

DEWEY & LeBOEUF

Dewey & LeBoeuf LLP
 125 West 55th Street
 New York, NY 10019-5389

tel +1 212 424 8515
 fax +1 212 424 8500
 ralessi@dl.com

June 6, 2008

BY HAND

The Honorable Carlos Gutierrez
 Secretary of Commerce
 Hebert C. Hoover Building
 14th Street and Constitution Avenue, N.W.
 Washington, DC 20230

2008 JUN -6 PM 3:50
 THE SECRETARY OF COMMERCE

Re: Broadwater Energy LLC & Broadwater Pipeline LLC
Notice of Appeal of CZMA Objection Pursuant to 15 C.F.R. § 930.125

Dear Mr. Gutierrez:

On April 10, 2008, Broadwater Energy LLC and Broadwater Pipeline LLC (collectively, "Broadwater") received an objection from the New York State Department of State ("NYSDOS") to the coastal zone consistency certification filed in conjunction with the Broadwater applications to the Federal Energy Regulatory Commission ("FERC") (Docket Nos. CP06-54-000, CP06-55-000, CP06-56-000), the U.S. Army Corps of Engineers, and the U.S. Coast Guard to construct and operate a floating LNG storage and regasification facility and natural gas sendout pipeline in the New York waters of Long Island Sound. On May 7, 2008, Broadwater sought an extension of time to file a Notice of Appeal in order to complete the compilation of the consolidated record. On May 9, 2008, the Assistant General Counsel for Ocean Resources granted Broadwater's request and extended the time in which to file a Notice of Appeal to June 11, 2008.

Pursuant to 15 C.F.R. § 930.125, Broadwater submits herewith a Notice of Appeal of the April 10, 2008 consistency objection of the NYSDOS. Broadwater also submits with its Notice of Appeal a Motion for Extension of Length of Principal and Reply Briefs pursuant to 15 CFR § 930.127(g).

Subject to the reservation of rights asserted below, Broadwater also submits one electronic copy of the consolidated record on three DVD volumes. DVD Volume 1 contains that portion of the consolidated record that has been filed publicly. DVD Volume 2 contains those portions of the consolidated record that were filed as privileged and confidential documents

under sections 388.107 and 388.112 of the FERC's regulations, 18 C.F.R. §§ 388.107 & 388.112. DVD Volume 3 contains those portions of the consolidated record that were filed as "critical energy infrastructure information," or "CEII," under sections 388.113 and 388.112 of FERC's regulations, *id.* §§ 388.113 & 388.112. Both categories of documents are exempt from the mandatory disclosure requirements of the Freedom of Information Act ("FOIA"). *Id.* §§ 388.107, 388.112(a), 388.113(c)(1)(iii). Consequently, Broadwater states that the materials on DVD Volumes 2 and 3 are exempt from mandatory disclosure under one or more of the exemptions under FOIA, requests confidential treatment of all such materials, and has marked DVD Volumes 2 and 3 with the label "CONFIDENTIAL—DO NOT RELEASE."

Along with a copy of this letter and the Notice of Appeal, Broadwater is simultaneously delivering by hand one paper copy and one electronic copy of the consolidated record to the Office of the Assistant General Counsel for Ocean Resources. The paper copy consists of 50 volumes containing public material, 1 volume containing privileged and confidential material, and 4 volumes containing CEII material. For the reasons set forth above, Broadwater requests confidential treatment of all of the materials located in the Privileged and Confidential volume and CEII volumes.

Included with the consolidated record is a sortable index. Consolidated record items may be located in both the paper copy and electronic copy by tab number. Bates numbers and volume numbers are also provided for each record item.

It is clear that an administrative agency must submit all documents it has considered – *i.e.*, all documents submitted to the agency – in the creation of the record. Thus, Broadwater has requested that the NYSDOS provide to Broadwater all documents considered by the NYSDOS in its objection. The NYSDOS apparently takes the position that it need only identify and provide documents that it "relied upon" in rendering its objection. Broadwater requested all records at the NYSDOS pertaining to the Broadwater Project except those submitted by or on behalf of Broadwater to determine what further documents would be appropriate for the consolidated record. In response, the NYSDOS suggested that Broadwater file a New York Freedom of Information Law ("FOIL") request for such records, which Broadwater did. However, in response to the FOIL request, the NYSDOS advised Broadwater that such records would not be available for inspection until December 1, 2008. As a result, Broadwater respectfully reserves its rights, including the right to supplement the consolidated record, to address the position of the NYSDOS regarding documents pertaining to the Broadwater Coastal Zone Consistency Certification that are to be included in the consolidated record.

Broadwater is serving a copy of this transmittal letter, the Notice of Appeal, the Motion for Extension of Length of Principal and Reply Briefs, and DVD Volume 1 to the NYSDOS. Broadwater has also previously delivered to NYSDOS a Protective Agreement substantially

The Honorable Carlos Gutierrez

June 6, 2008

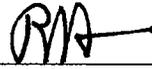
Page 3

similar to the protective agreement executed by various parties in the underlying FERC proceeding, which, if executed by NYSDOS and Broadwater, would permit NYSDOS to have access to the confidential materials on DVD Volumes 2 and 3 pursuant to the terms of the Protective Agreement.

Pursuant to 15 C.F.R. § 930.125(c), also enclosed is a check in the amount of \$500 in remittance of the application fee.

Please do not hesitate to contact me with any questions regarding this submission.

Respectfully submitted,



Robert J. Alessi
Dewey & LeBoeuf LLP
125 West 55th Street
New York, New York 10019
(212) 424-8515
ralessi@dl.com

James A. Thompson, Jr.
1101 New York Avenue, NW
Suite 1100
Washington, DC 20005-4213
(202) 346-8000
jthomps@dl.com

*Counsel to Broadwater Energy LLC and
Broadwater Pipeline LLC*

Enclosures

The Honorable Carlos Gutierrez
June 6, 2008
Page 4

cc: Assistant General Counsel for Ocean Services
1305 East West Highway
Room 6111 SSMC4
Silver Spring, Maryland 20910 (w/encls.)

Lorraine Cortes-Vazquez
Secretary of State
State of New York
Department of State
One Commerce Plaza
99 Washington Avenue
Albany, New York 12231-0001

99676

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

Broadwater Energy LLC)
Broadwater Pipeline LLC)
 Appellants,)
))
 vs.)
))
New York State)
Department of State)
 Respondent.)

Case No. _____

**APPEAL OF BROADWATER ENERGY LLC
AND BROADWATER PIPELINE LLC
UNDER THE COASTAL ZONE MANAGEMENT ACT**

1. On April 10, 2008, the New York State Department of State (“NYSDOS”) issued an objection (“Objection”) to the Broadwater Energy LLC and Broadwater Pipeline LLC (collectively, “Broadwater”) certification of their project’s consistency with the Long Island Sound Coastal Management Program (“LISCMP”). Pursuant to Section 307(c)(3)(A) of the federal Coastal Zone Management Act (“CZMA”), 16 U.S.C. § 1456(c)(3)(A), and 15 C.F.R. §§ 930.120-131, Broadwater hereby appeals NYSDOS’s Objection to the Secretary of Commerce (“Secretary”). Broadwater requests that the Secretary override NYSDOS’s Objection, as set forth below and as more fully discussed in Broadwater’s forthcoming principal brief. In summary, the bases for Broadwater’s appeal are as follows:

- (A) NYSDOS’s Objection is defective to the extent that it relies on federal agency activities that are not subject to review under 15 C.F.R. Part 930, Subpart D. 15 C.F.R. § 930.129(b).

- (B) NYSDOS’s Objection is defective to the extent that it relies on local land use plans and preservation initiatives that are inconsistent with the goals and policies of the CZMA and the LISCMP and have not been reviewed and approved by the National Oceanic and Atmospheric Administration (“NOAA”) in accordance with the CZMA and 15 C.F.R. Part 123. 16 U.S.C. §§ 1452, 1455; 15 C.F.R. Part 123, Subpart H.
- (C) NYSDOS’s Objection should be overridden because the Broadwater project—as a coastal dependent energy facility that is entitled to priority consideration under the CZMA—is consistent with the objectives of the CZMA. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.121.
- (D) NYSDOS’s Objection should be overridden because the Broadwater project is necessary in the interest of national security. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.122.

I. BACKGROUND

2. Broadwater proposes to construct and operate a liquefied natural gas (“LNG”) import terminal, which will consist of a floating storage and regasification unit (“FSRU”), in Long Island Sound, approximately 10 miles from the coast of Connecticut and 9 miles from the coast of Long Island in New York State waters. The FSRU has a design capacity of 1 billion cubic feet per day (1 “Bcf/d”) and would provide natural gas to Long Island, New York City, the greater New York City metropolitan area, upstate New York, and southern Connecticut through a 21.7-mile-long pipeline (“Sendout Pipeline”) that will connect to the existing subsea Iroquois Gas Transmission System. The FSRU, Sendout Pipeline, and appurtenant structures comprise the Broadwater Project (hereinafter “Project” or “Broadwater Project”).

3. In November 2004, Broadwater submitted a request to the Federal Energy Regulatory Commission (“FERC”) to voluntarily participate in the FERC’s National Environmental Policy Act (“NEPA”) Pre-File Process and the FERC accepted Broadwater’s request.

4. In February 2005, the FERC issued a pre-filing notice to 2,200 interested parties, including agencies of the State of New York, inviting participation in the early review of the Project’s environmental information.

5. On January 30, 2006, in Docket No. CP06-54-000, Broadwater Energy LLC filed with the FERC an application under Section 3 of the federal Natural Gas Act (“NGA”) and Part 153 of the FERC’s regulations to construct and operate the FSRU. Concurrently, in Docket No. CP06-55-000, Broadwater Pipeline LLC filed an application under section 7(c) of the NGA and Part 157 of the FERC’s regulations for a certificate of public convenience and necessity to construct, own, and operate the Sendout Pipeline.

6. On April 13, 2006, Broadwater filed with NYSDOS its coastal zone consistency certification (“CZCC”) for the Project, which concluded that the Project is consistent with the enforceable and applicable policies of the LISCMP and the applicable Local Waterfront Revitalization Programs, as approved by NOAA.

7. In October 2006, the FERC provided its Preliminary Draft Environmental Impact Statement to cooperating federal and state agencies, which included NYSDOS.

8. On October 31, 2006, Broadwater filed a supplement to its April 13, 2006 CZCC with NYSDOS.

9. On November 17, 2006, after receipt of Broadwater’s October 31, 2006 supplement to its CZCC, NYSDOS commenced its review of the Project.

10. On April 12, 2007, May 2, 2007, May 23, 2007, June 13, 2007, and July 24, 2007, Broadwater's representatives and technical advisors attended meetings with NYSDOS to discuss, among other things, the Project's alternatives, reliability, size and scope, impacts, and ability to provide additional energy supplies to the region. Broadwater responded to all questions and issues raised by NYSDOS at these meetings.

11. On August 23, 2007, Broadwater attended a meeting with NYSDOS regarding alternatives to the Project. During this meeting, Broadwater provided NYSDOS with extensive documentation on the alternatives to the Project, including responses to alternatives suggested by NYSDOS.

12. As noted in the consolidated record (which is being submitted with this Notice of Appeal), on June 22, 2007, September 14, 2007, October 8, 2007, and November 21, 2007, Broadwater provided NYSDOS with additional documentation on, among other topics, alternatives to the Project, compensation to fishermen, and marine use conflicts.

13. On January 11, 2008, the FERC issued its Final EIS ("FEIS") for the Project.

14. On March 20, 2008, based on its findings in the FEIS, the FERC approved the Project concluding that "construction and operation of the Broadwater Project, with the adoption of the proposed mitigation measures, would result in only limited adverse environmental impacts [and] the [P]roject is needed to meet the projected energy needs for the New York City, Long Island and Connecticut markets." Order Granting Authority Under Section 3 of the Natural Gas and Issuing Certifications, March 20, 2008, at 2.

15. On April 2, 2008, Broadwater submitted additional information regarding proposed mitigation measures in response to NYSDOS's requests for additional information dated March 19, 2008, March 25, 2008, and March 27, 2008.

16. On April 10, 2008, NYSDOS objected to Broadwater's CZCC, contending that the Project is not consistent with Policies 1, 3, 6, 9, 10, and 11 of the LISCMP.

II. THE NYSDOS OBJECTION IS DEFECTIVE TO THE EXTENT THAT IT RELIES UPON ISSUES RELATED TO A FUTURE "FEDERAL ACTIVITY" TO OBJECT TO A FEDERAL PERMIT

17. The CZCC filed with NYSDOS by Broadwater is required because federal permits are being sought from the FERC and the United States Army Corps of Engineers for the proposed Project. Thus, the process and review requirements of 15 C.F.R. Part 930, Subpart D—Consistency of Activities Requiring a Federal License or Permit—govern NYSDOS's consideration of the Broadwater CZCC and provide the substantive standard upon which an objection can be made.

18. As is evident from even a cursory review, NYSDOS's Objection to the Broadwater CZCC is based in large part upon NYSDOS's evaluation of the potential use conflicts associated with yet-to-be-established federal safety and security zones ("SSZs") for the FSRU and LNG carriers that will supply the Project.

19. The promulgation of SSZs is a federal activity as defined in the controlling Part 930 regulations, and it will be the responsibility of the United States Coast Guard ("USCG") to make any necessary determination regarding the consistency of the published SSZs with the LISCMP pursuant to the provisions of 15 C.F.R. Part 930, Subpart C. That future consistency determination must be considered separately from the CZCC submitted pursuant to 15 C.F.R. Part 930, Subpart D.

20. Accordingly, to the extent that NYSDOS has relied upon the potential consequences of *recommended* SSZs from a federal agency which have yet to be subject to formal rulemaking or evaluated for consistency with the policies of the federally-approved coastal management plans and the applicable Subpart C regulations, those bases for the

Objection are improper and must be struck when considering the Broadwater Project's "consistency with the objectives or purposes of the [CZMA]". 15 C.F.R. § 930.121.

III. THE NYSDOS OBJECTION IS DEFECTIVE TO THE EXTENT THAT IT RELIES UPON LOCAL LAND USE PLANS, PRESERVATION INITIATIVES AND OTHER DOCUMENTS THAT DO NOT REPRESENT ENFORCEABLE POLICIES OF THE LISCMP UNDER 16 U.S.C. § 1456

21. NYSDOS bases its Objection to the Broadwater Project in part on the Project's alleged inconsistency with local land use plans, preservation initiatives and other documents. See, e.g., NYSDOS Objection at 6-8, 16-20.

22. The local land use plans, preservation initiatives and other documents relied upon by NYSDOS are not valid bases for an Objection to Broadwater's CZCC because those materials are not enforceable policies of a coastal management program and have not been approved by NOAA. See 16 U.S.C. §§ 1455(e)(3), 1456(c)(3)(A); 15 C.F.R. Part 923, Subpart H. As a result, to the extent NYSDOS has relied on such materials, those bases for the Objection must be struck when considering the consistency of the Broadwater Project with the CZMA. See AES Sparrows Point LNG, LLC v. Smith, No. 07-1615, 2008 WL 2082148 (4th Cir. May 19, 2008).

23. The local land use plans, preservation initiatives and other documents relied upon by NYSDOS cannot constitute grounds for objection to Broadwater's CZCC because they are not consistent with the goals and policies of either the CZMA or the LISCMP. Among other things, NYSDOS impermissibly relies on these local land use plans, preservations initiatives and other documents as *de facto* amendments to the LISCMP that effectively prohibit all offshore development in Long Island Sound.

24. The CZMA was enacted to "preserve, protect, develop and where possible, to restore and enhance, the resources of the Nation's coastal zone for this and succeeding

generations....” 16 U.S.C. § 1452. The CZMA requires that state coastal management programs provide for:

priority consideration being given to coastal-dependent uses and orderly process for siting major facilities related to ... energy ... and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists.

Id. § 1452(2)(D). A coastal management program must also contain, *inter alia*, proof of “adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of energy facilities which are of greater than local significance.” Id. § 1455(d)(8); 15 C.F.R. 923.52. Indeed, in the case of energy facilities, the CZMA requires states to give “consideration to any applicable national or interstate energy plan or program.” Id.

25. Local land use plans and preservation initiatives, by definition, are enacted with zero consideration of the “national interest involved in planning for, and managing the coastal zone, including the siting of energy facilities which are of greater than local significance.” Id. The CZMA was enacted, in part, to remove parochial considerations from the management of the coastal zone, including siting of major energy facilities such as the Broadwater Project.

26. NYSDOS has violated the CZMA by relying on local land use plans, preservation activities and other documents that do not represent enforceable policies of an approved coastal management program.

IV. THE BROADWATER PROJECT IS CONSISTENT WITH THE OBJECTIVES OF THE COASTAL ZONE MANAGEMENT ACT

27. The Secretary may override the Objection based on the fact that the Project is consistent with the objectives of the CZMA. 16 U.S.C. § 1456(c)(3)(A). The NOAA implementing regulations at 15 C.F.R. § 930.121 state that a project will be considered consistent with the objectives of the CZMA if it satisfies each of the following:

- (A) The activity furthers the national interest as articulated in § 302 or § 303 of the [CZMA], in a significant or substantial manner;
- (B) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively;
- (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.

The Broadwater Project satisfies each of these elements.

A. The Broadwater Project Furthers the National Interest in a Significant and Substantial Manner

28. The consolidated record demonstrates that the Project promotes and furthers a number of national interests in a significant and substantial manner, each of which is independently sufficient for the Secretary to find that the Project satisfies the first element of 15 C.F.R. § 930.121. Congress has broadly defined the national interest in coastal zone management to include both protection and development of coastal resources. 16 U.S.C. §§ 1451(a), 1452(1). This finding has been made in several prior CZMA appeal decisions. Decision and Findings in the Drilling Discharge Consistency Appeal of Mobil Oil Exploration & Prod. Southeast, Inc., Sept. 2, 1994, at 13; Decision and Findings by the Secretary of Commerce in the Consistency Appeal of Islander East Pipeline Company, L.L.C. from an Objection by the State of Connecticut, May 5, 2004, at 3–4 (hereinafter “Islander East”).

29. For example, the Project furthers in a significant and substantial manner the national interest in developing coastal resources by enabling regional growth and enhancing reliable energy supplies by providing significant volumes of new molecules of natural gas at the

doorstep of the target markets to meet demand in Long Island, New York City, the greater New York City metropolitan area, upstate New York, and southern Connecticut. See 16 U.S.C. § 1452(1) (declaring that it is national policy to “develop... the resources of the Nation’s coastal zone”); see also 16 U.S.C. § 1451(a) (declaring a national interest in the “effective management, beneficial use... and development of the Coastal Zone”) and 65 Fed. Reg. 77,150 (“[a]n example of activity that significantly and substantially furthers the national interest is the siting of energy facilities.” As described below, the Project both develops and protects New York State’s coastal resources.

30. Further, the CZMA acknowledges that it is in the national interest to accord priority consideration to projects like Broadwater: “priority consideration [is] given to coastal-dependent uses and orderly processes for siting major facilities related to... energy.” 16 U.S.C. § 1452(2)(D). With a design capacity of 1 Bcf/d of natural gas received from ocean-going LNG carriers, the Project is a coastal-dependent, major energy facility that furthers the national interest. See Islander East at 5. Considering the relatively small size of the Project in the 1,320 square mile expanse of Long Island Sound and the large population centers that it will serve, the Project furthers the national interest in a significant and substantial manner. Id. at 5–6, n. 26.

31. The Project also furthers the national interest by “preserve[ing], protect[ing]... restor[ing] [and] enhanc[ing]... the resources of the Nation’s coastal zone.” 16 U.S.C. § 1452(1). The Secretary has previously concluded that providing an increase in the supply of clean burning fuel that would result in cleaner air, as the Broadwater Project would, protects and preserves coastal resources. See Islander East at 10. Additionally, the FERC concluded in the FEIS that the “Project would reduce the region’s future need for additional transportation

infrastructure (new or expanded interstate natural gas pipelines),” thus further protecting the coastal resources. FEIS at 1-4.

32. Furthermore, the CZMA states that there is a national interest in minimizing improper development in “areas likely to be affected by or vulnerable to sea level rise, land subsidence, and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands.” 16 U.S.C. § 1452(2)(B). The Project’s location and design avoid all such consequences.

B. The National Interest Furthered by the Broadwater Project Outweighs Any Putative Adverse Coastal Effects

33. The significant and substantial benefits of the Project far outweigh any limited effects to the coastal zone, whether assessed individually or cumulatively. The Project was conceived and developed with the goal of avoiding, minimizing, and mitigating environmental impacts, including coastal effects. To the extent the Project has the potential to give rise to adverse coastal effects, Broadwater has committed in applications and supplemental information provided in response to government agency requests, to implement measures to eliminate or mitigate such effects.

34. The FERC, in consultation with NEPA cooperating agencies including NYSDOS, thoroughly reviewed and assessed the environmental impacts, including coastal effects, of the Project and found that “construction and operation of the Broadwater project, with the adoption of the proposed mitigation measures, would result in only limited adverse environmental impacts [and] the project is needed to meet the projected energy needs for the New York City, Long Island and Connecticut markets.” Order Granting Authority Under Section 3 of the Natural Gas and Issuing Certifications, at 2 (March 20, 2008).

35. The very limited adverse coastal effects of the Broadwater Project are outweighed by both the national interest described in Section A above and by benefits to coastal resources as recognized in the LISCMP. In addition to the CZMA, LISCMP Policy 13 specifically promotes the development of energy facilities, including LNG terminals such as the Project, in the Long Island Sound coastal zone. LISCMP Policy 13 also recognizes the need to reduce dependence on oil and states that natural gas is presently not obtainable in much of the region. NYSDOS appears to have failed to consider this critical part of the LISCMP in its weighing of the Project, thereby largely ignoring the benefits recognized in the LISCMP that the Project confers on New York State's coastal resources.

36. The significant and substantial benefits of the Project being in the national and state interests far outweigh the alleged adverse coastal effects resulting from the Project identified in NYSDOS's Objection, including alleged impacts to, among others, visual aesthetics, recreational boating, commercial fishing, industrial development trends, aquatic species and ecosystems, and water quality. Many of the adverse coastal effects described in NYSDOS's Objection are either grossly exaggerated and/or lack evidentiary support in the record.

C. **There Are No Reasonable Alternatives to the Broadwater Project Consistent With the Enforceable Policies of the Applicable Coastal Management Program**

- i. The Objection Violates 15 CFR §§ 930.63(b) and 930.121(c) Because NYSDOS Has Not, and Cannot, State That The Alternatives Proposed Therein Are Consistent With the Enforceable Policies of the LISCMP.

37. There is no alternative to the Broadwater Project that would permit the Project to be conducted in a manner consistent with the enforceable policies of the LISCMP. In fact, NYSDOS's Objection does not assert that there are any alternatives to the Broadwater Project

that would allow the Project to be conducted in a manner consistent with the enforceable policies of the LISCMP.

38. 15 CFR § 930.63(b) states:

State agency objections [] shall describe how the proposed activity is inconsistent with *specific enforceable policies of the management program*. The objection may describe alternative measures (if they exist) which, if adopted by the applicant, may permit the proposed activity to be conducted in a manner consistent with the *enforceable policies of the management program*.

(Emphasis supplied.)

39. NYSDOS has objected to the Broadwater Project on the basis that the Project is not consistent with Policies 1, 3, 6, 9, 10 and 11 of the LISCMP. In its Objection, however, NYSDOS has not proposed any alternatives allegedly consistent with the LISCMP. Instead, NYSDOS's Objections describes two alternatives – the so-called Fire Island Inlet and Long Beach alternatives – “that, if adopted by Broadwater, would permit the proposed project to be conducted in a manner consistent with the enforceable policies of the [New York State Coastal Management Program (“NYSCMP”)].” Objection at 62. Under the unambiguous language of 15 CFR § 930.63(b), however, inasmuch as NYSDOS has objected to the Project “as inconsistent with specific enforceable policies of the management program” – *i.e.*, the LISCMP – NYSDOS must at least allege that its proposed alternatives are “consistent with the enforceable policies of the management program” – *i.e.*, the LISCMP. Because NYSDOS objects that the Project is inconsistent with the LISCMP, but then proposes alternatives purportedly consistent with an entirely different management program (the NYSCMP), the alternatives described in NYSDOS's Objection are invalid under 15 CFR § 930.63(b).

40. At the time the LISCMP was first enacted in January 1999, NYSDOS published an introductory document, which stated that the LISCMP “replaces” the NYSCMP “for the

Sound shorelines of Westchester County, New York City to the Throgs Neck Bridge, Nassau County, and Suffolk County.” LISCMP Introduction at 1. Accordingly, the policies of the LISCMP, and not the NYSCMP, are enforceable or applicable to the Broadwater Project.

41. The invalidity of the alternatives proposed in NYSDOS’s Objection is also confirmed by the language of 15 CFR § 930.121(c). As noted above, under section 930.121(c), a federal license or permit activity is “consistent with the objectives or purposes” of the federal CZMA if, *inter alia*:

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*. [] 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*.

(Emphasis supplied.) The Secretary cannot consider the two alternatives proposed in NYSDOS’s Objection because NYSDOS failed to submit a statement that those alternatives could be conducted in a manner consistent with the enforceable policies of the LISCMP, the coastal “management program” that formed the basis of NYSDOS’s Objection.

ii. The Alternatives Proposed By NYSDOS Are Not Consistent With The NYSCMP, Described With Sufficient Specificity, Reasonable or Available

42. In the alternative, even if NYSDOS could rely on the Fire Island Inlet and Long Beach alternatives and the NYSCMP, NYSDOS cannot meet its burden to demonstrate that either of those alternatives can be “conducted in a manner consistent with the enforceable policies of the management program.” 15 CFR § 930.121(c). As noted in the previous decisions by the Secretary, “alternatives must be described with specificity; vague descriptions do not suffice. The objecting state must describe the proposed alternative with enough detail for the project’s proponent and the Secretary to know how the proposed alternative could be

implemented consistently with the objecting state's coastal management program and evaluate when the alternatives are reasonable and available." Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company From an Objection by the North Carolina Department of Environment, Health, and Natural Resources, May 19, 1994, at 39. According to NOAA's regulations, "[m]ore complicated activities or alternatives generally need more information than less-complicated activities or alternatives." 15 C.F.R. § 930.63(d).

43. In the section of the Objection that purports to present proposed alternatives to the Broadwater Project, NYSDOS characterizes Broadwater's objective as delivering "a large supply of natural gas into a regional market." NYSDOS Objection at 61. NYSDOS's description of the Broadwater Project's objective is vague to the point of inaccuracy. The purpose of the Broadwater Project is to receive imported LNG shipments from LNG carriers, store and regasify the LNG at an average sendout rate of 1.0 Bcf/d, and to serve as a new source of reliable, long-term and competitively-priced natural gas to the Long Island, New York City, the greater New York City metropolitan area, upstate New York, and southern Connecticut energy markets by connecting with the existing natural gas pipeline system. NYSDOS's Objection fails to recognize the objective of a throughput of 1 Bcf/d that was cited in Broadwater's application to all federal and New York State agencies, including the CZCC filed with NYSDOS, and which precisely defines the Project's objectives and establishes the benchmark against which alternatives must be judged.

44. The NYSDOS Objection goes on to make a general statement that there are many other projects proposed "to serve the Northeastern market." NYSDOS Objection at 61. In the footnote to this statement, NYSDOS lists ten (10) projects in an attempt to support its premise, but provides no specific information to compare these alternatives to the Broadwater Project. In

fact, NYSDOS has presented only a few sentences on each of these purported alternatives. Clearly, NYSDOS has failed to meet its legal burden to describe these alternatives with sufficient specificity such that it cannot be determined if these alternatives can satisfy the primary purpose and objectives of the Broadwater Project.

45. In addition, although NYSDOS has provided insufficient information regarding their proposed alternatives, there is enough information in the record to demonstrate that, *inter alia*, NYSDOS's alternatives are inconsistent with the enforceable policies of the applicable coastal management program (NYSDOS identifies its proposed alternatives as subject to the NYSCMP, not the LISCMP, presumably because the proposed locations for the alternatives are outside of Long Island Sound), do not satisfy the objectives of the Project, and are otherwise unavailable. Moreover, the alternatives proposed by NYSDOS are unreasonable because the increased costs of those alternatives relative to the Project are not justified by any reduced coastal effects.

46. Neither of the two alternatives discussed by the NYSDOS Objection – the Long Beach and Fire Island Inlet alternatives – would achieve the primary purpose and objectives of the Broadwater Project. Nor are NYSDOS's Long Beach and Fire Island Inlet alternatives sufficiently described, "reasonable," "available," or consistent with the policies of the NYSCMP. Reasonableness is determined by weighing the difference in the environmental effects and cost between the alternatives and the proposed project. Islander East at 45. The Long Beach and Fire Island Inlet alternatives would require fundamental design changes to the Broadwater Project – design changes that were previously evaluated both by Broadwater in its various applications/filings and by the FERC in the FEIS. Project designs substantively identical to the Long Beach and Fire Island Inlet alternatives were rejected by the FERC as not reasonable

alternatives to the Project for reasons related to the purpose and need of the Project, operability/functionality, and the potential to create more significant adverse coastal effects than those associated with the Broadwater Project. For instance, the Long Beach and Fire Island Inlet alternatives proposed by NYSDOS are inconsistent with, *inter alia*, policies 7, 11, 12, 15, 18, 19, 20, 22, 23, 24, 25, 27, 29 and 44 of the NYSCMP.

47. Rather than detailing how the Long Beach and Fire Island Inlet alternatives are consistent with all the policies of the NYSCMP, NYSDOS analyzes those alternatives only through the narrow prism of the alleged coastal effects of the Broadwater Project that formed the basis of NYSDOS's Objection. As a result, NYSDOS has not produced nearly enough information to intelligently conclude that the Long Beach and Fire Island Inlet alternatives are consistent with *all* of the 44 policies of the NYSCMP. Based on the inchoate descriptions of the Long Beach and Fire Island Inlet alternatives provided in NYSDOS's Objection, it is impossible to conclude that those alternatives are consistent with the NYSCMP.

48. Even with the incomplete information supplied by NYSDOS regarding the Long Beach and Fire Island Inlet alternatives, it is clear that those alternatives could never be realized in a manner consistent with all the policies of the NYSCMP. For an alternative to be "available" the proponent of the project must be able to implement the alternative, and the alternative must achieve the primary purpose of the project. Islander East at 40. NYSDOS ignores a myriad of coastal effects associated with the Long Beach and Fire Island Inlet alternatives, including, *inter alia*, onshore effects related to massive pipeline construction on the environmentally-sensitive south shore of Long Island required by both alternatives. These coastal effects are inconsistent with the policies of the NYSCMP.

49. Additionally, because the Long Beach and Fire Island Inlet alternatives are so clearly inconsistent with the policies of the NYSCMP, neither alternative could ever be implemented by Broadwater. Moreover, neither the Long Beach nor Fire Island Inlet alternatives provide any advantages to the resources of New York State's coastal zone that would justify the increased costs of implementing those alternatives relative to the Broadwater Project.

50. The narrow window of NYSDOS's analysis of the Long Beach and Fire Island Inlet alternatives also fails to demonstrate that those alternatives will satisfy the primary purpose and objectives of the Broadwater Project. Again, even with the incomplete information supplied by NYSDOS, it is clear that the Long Beach and Fire Island Inlet alternatives could never receive imported LNG shipments from LNG carriers, store and regasify the LNG at an average sendout rate of 1.0 Bcf/d, or serve as a new source of reliable, long-term and competitively-priced natural gas to the markets targeted by the Broadwater Project. Both Broadwater and the FERC concluded that project designs very similar to the Long Beach and Fire Island Inlet alternatives would be unable to provide constant and reliable services as a result of, *inter alia*, metocean conditions in the Atlantic Ocean south of Long Island. Finally, given the proposed locations for the Long Beach and Fire Island Inlet alternatives, the FERC would not have the legal authority to authorize the construction and operation of either alternative suggested by the NYSDOS as the fundamental changes to the Broadwater Project being sought by the NYSDOS would essentially result in the transfer of primary licensing authority from the FERC under Sections 3 and 7 of the NGA to the U.S. Coast Guard and the U.S. Maritime Administration under the Deepwater Port Act, 33 U.S.C. §§ 1501, *et seq.* Based upon past Secretary of Commerce precedent, such a fundamental change renders the alternatives being proposed by the NYSDOS unavailable. See *Islander East* at 44 – 45 (“For an alternative to be available, there

must be a realistic path to achieve the same project purpose, not simple conjecture that the project proponent can easily adopt the offered alternative.”).

51. Accordingly, there are no available or reasonable alternatives to the Broadwater Project that are consistent with the policies of the NYSCMP.

V. THE BROADWATER PROJECT IS IN THE INTEREST OF NATIONAL SECURITY

52. Separate from finding the Project consistent with the objectives of the CZMA, the Secretary can override NYSDOS’s Objection on the ground that the Project is necessary to the interest of national security. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.122. The CZMA regulations provide that a federal license or permit activity is “necessary in the interest of national security” if a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed. *Id.* The Project is necessary in the interest of national security because it will add to both the supply and geographic diversity of the nation’s energy infrastructure.

53. One of the primary markets served by the Project, New York City, is both the nation’s largest city and its economic center (in addition to being the preeminent financial center in the world). By increasing needed energy supply and diversity to New York City, the Project will help to insure against regional energy supply disruptions that could have serious economic ramifications for the country as a whole.

54. In testimony before the Senate Armed Services Committee on February 27, 2008, J. Michael McConnell, the Director of the National Intelligence Committee on Senate Armed Services, indicated that “[a]ccess to stable and affordably priced energy supplies has long been a critical element of national security.” Similarly, on March 11, 2008, C.H. Albright, Jr., the

Under Secretary of the Department of Energy, testified before the House of Representatives that “[e]nergy is central to our economic and national security.”

55. A number of the nation’s energy policymakers have underscored the importance of diversification of the nation’s energy infrastructure as a key component of national security. In testimony before the Senate Energy and Natural Resources Committee on February 26, 2008, Kathy Fredriksen, the Principal Deputy Assistant Secretary of the U.S. Department of Energy’s Office of Policy and International Affairs, indicated that “[o]ur nation’s energy security is directly intertwined with our national security...We must expand and diversify our energy supply and our suppliers...[and] expand our infrastructure.” Further, on May 7, 2007, Steven E. Flynn, former adviser on homeland security for the U.S. Commission on National Security (Hart-Rudman Commission) and a retired Coast Guard officer, testified to the congressional subcommittee on Coast Guard and Maritime Transportation that diversification of the country’s energy supply through increased terminals away from the Gulf of Mexico was in the national interest.

56. Projects like the Broadwater Project are particularly important for national security in light of the devastating impacts to energy supply that can occur when infrastructure is concentrated in one region of the country. Geographic diversification of energy infrastructure helps to mitigate the effects of natural disasters like Hurricanes Katrina and Rita on the nation’s energy supply. Former Secretary of the Interior Gale Norton noted, in the aftermath of Hurricanes Katrina and Rita, the importance of diversified energy supply for our national security:

Hurricanes Katrina and Rita clearly demonstrated we have no margin to mitigate the impacts of natural disasters on our energy supply. The wake-up call being sounded for the past decade has reached the point where it must be heard. The President recognized, in his National Energy Policy, that we need to increase our

energy supply and invest in our energy infrastructure . . . Therefore, we must not lose sight of this fact: Diversification of our Nation's energy supply is a key goal for this Administration and must remain a top priority for our Nation's economic and national security. Achieving the goal to secure, affordable and environmentally sound energy will require diligent, concerted efforts on many fronts on both the supply and demand sides of the energy equation.

57. Currently, the critically important natural gas markets in the greater New York City metropolitan area, upstate New York and southern Connecticut, are primarily served by declining and geographically distant natural gas production areas in the Gulf of Mexico and in Western Canada. The introduction of new, incremental natural gas supply by the Broadwater Project (which is geographically close to an area of very high and growing energy demand, yet sited way from population centers) provides the type of diversification necessary to the national security of the United States of America.

V. CONSOLIDATED RECORD

58. Pursuant to 15 C.F.R. § 930.127(i)(2), this Notice of Appeal is accompanied by two copies of the consolidated record maintained by the FERC, as the lead permitting agency, for the Project. One copy of the consolidated record is being provided in electronic format compatible (to the extent practicable) with the website maintained by the Secretary.

VI. REQUEST FOR LIMITING DEVELOPMENT OF DECISION RECORD

59. Broadwater respectfully requests that the development of the decision record be limited to 90 days. The NOAA regulations provide that the Secretary is to close the decision record not later than 160 days after the date that the Secretary's Notice of Appeal is published in the Federal Register. 15 C.F.R. § 930.130(a)(1). The Secretary, therefore, has discretion to limit the time for development of the decision record to less than 160 days. As noted above, Broadwater filed its first submission with the FERC regarding the Project in November 2004, and since that time the Project has been subject to ongoing regulatory review at both the state

and federal levels. Accordingly, Broadwater respectfully submits that good cause exists to shorten this time period for development of the decision record as the parties to this appeal, as well as all involved state and federal agencies and the public, both before and after the initiation of the FERC pre-filing process, already have expended considerable resources in the creation of a record. Moreover, the length of the regulatory approval process already has resulted in the originally planned in-service date for the Project being pushed back at least one year. Further delay in the regulatory review process will hamper Broadwater's ability to further both the national interest and national security.

VII. RESERVATION OF RIGHTS

60. Broadwater reserves all rights to raise and address such other procedural or substantive issues that may be necessary or appropriate in support of its appeal.

Dated: June 6, 2008

Respectfully submitted,



Robert J. Alessi
Dewey & LeBoeuf LLP
125 West 55th Street
New York, New York 10019
(212) 424-8515
ralessi@dl.com
James A. Thompson, Jr.
1101 New York Avenue, NW
Suite 1100
Washington, DC 20005-4213
(202) 346-8000
jthomps@dl.com

*Counsel to Broadwater Energy LLC and
Broadwater Pipeline LLC*

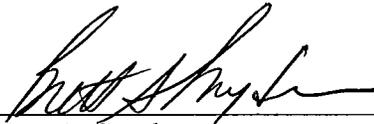
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal and Consolidated Record was served this 6th day of June 2008, by first-class mail unless otherwise indicated, to the following persons at the addresses listed below.

Assistant General Counsel for Ocean Services
1305 East West Highway
Room 6111 SSMC4
Silver Spring, MD 20910
(By Hand)

Honorable Lorraine Cortes-Vazquez
Secretary of State
State of New York Department of State
99 Washington Avenue
Albany, NY 12231-0001
(Consolidated Record DVD Vol. 1 only)

Susan Watson
General Counsel
State of New York Department of State
99 Washington Avenue
Albany, NY 12231-0001
(Consolidated Record DVD Vol. 1 only)


Brett A. Snyder
Dewey & LeBoeuf LLP
1101 New York Avenue NW, Suite 1100
Washington, DC 20005-4213