



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
NORTHEAST REGION  
55 Great Republic Drive  
Gloucester, MA 01930-2276

JAN 30 2009

Mr. Jamon L. Bollock, Attorney-Advisor  
Office of General Counsel for Ocean Services  
National Oceanic and Atmospheric Administration  
U.S. Department of Commerce  
1305 East-West Highway  
SSMC IV, Suite 6111  
Silver Spring, Maryland 20910

**Re: Coastal Zone Consistency Appeal in the Matter of Broadwater Energy LLC  
and Broadwater Pipeline LLC vs. State of New York Department of State**

Dear Mr. Bollock:

This letter constitutes the National Marine Fisheries Service (NMFS), Northeast Regional Office's response to a December 2, 2008 letter from the Office of General Counsel for Ocean Services that it was accepting public comments regarding the subject administrative appeal, pursuant to the Coastal Zone Management Act (CZMA). This matter concerns a petition brought by two appellants, Broadwater Energy LLC and its affiliate Broadwater Pipeline LLC (jointly termed hereinafter as Broadwater). These parties respectively wish to obtain various state and federal authorizations necessary to construct and operate a floating liquefied natural gas (LNG) terminal and an associated pipeline lateral to receive, store, process, and convey LNG imported into the U.S. from overseas.

The CZMA appeal relates to the State of New York's April 10, 2008 objection to Broadwater's request for consistency certification. New York Department of State reviewed the available information and concluded that Broadwater's proposal failed to meet the evaluation criteria for several coastal policy standards established for New York's Long Island Sound Coastal Management Program (LISCMP). Broadwater chose to contest New York's objection and subsequently appeal the consistency decision to the Secretary of Commerce (Secretary).

This correspondence restates and reaffirms NMFS' present position on the issues as of this date, and as represented in our Federal Energy Regulatory Commission filings of January 10, 2007 (DEIS comments) and February 19, 2008 (FEIS comments). The correspondence also indicates new or pending developments in NMFS of possible relevance and perspective to the appeal in relation to our statutory authorities: Magnuson-Stevens Fishery Conservation and Management Act (MSA); the Endangered Species Act of 1973 (ESA), as amended; the Fish and Wildlife Coordination Act (FWCA); the Marine Mammal Protection Act (MMPA); and the National Environmental Policy Act (NEPA). Some of the coastal zone policy standards being evaluated in this appeal process pertain



to NMFS' resources of concern. As public trustees responsible for protecting living aquatic resources, protected resources, estuarine and marine habitats, endangered and protected species, and associated coastal resources, NMFS has a statutory responsibility over resources potentially impacted in cases of this nature. We appreciate this opportunity to publicly comment on the Secretary's review.

NMFS has previously been involved in the review of the Broadwater project through FERC's issuance of the EIS. In a contemporaneous, coordinated process of NMFS consultation with FERC, NMFS issued a series of conservation recommendations to manage construction and operation impacts of the Broadwater LNG project to afford protection to the aforementioned marine resources. FERC has not yet responded to all of our conservation recommendations under existing regulations, although we understand that this further expected coordination on these matters may have been interrupted and put on hold by the present CZMA appeal. Nevertheless, this correspondence collapses the issues of our conservation recommendations within several thematic focus areas that should help evaluators integrate our perspectives into the body of public commentary to carry out the appeal. The comments identified below are an incorporation of comments previously made by NMFS on this project. Please refer to our prior filings for the full discussion of our conservation recommendations.

Select the least environmentally damaging project alternative that assures protection of living marine resources and habitats.

As NMFS has previously stated, it is vital that every reasonable precaution is taken to ensure that the key biological and physical components of the aquatic environment are protected. Any project impacts that would degrade water quality, impair benthic sediment integrity, or otherwise disturb essential habitat necessary to support estuarine fish, invertebrates, etc. need to be avoided or greatly reduced through enforceable conservation measures that ensure important values and functions remain available to support living aquatic resources. The floating storage and degasification unit (FSRU) water intakes and associated entrainment and impingement require minimization, and are issues that remain to be addressed. Benthic disturbance and integrity of habitat function must be addressed and managed considering the extensive areas projected to be disturbed during pipeline and potential mooring system installation. Restoration of the bottom habitat is necessary and would, otherwise, accrue impacts to the detriment of a wide variety of living aquatic resources; plans and monitoring are necessary.

Placement of the FSRU and associated structures.

NMFS maintains its position, as stated in its earlier comment letters, that the structures should not be placed in shallow areas or in highly productive or sensitive ecological areas. The foundation of the floating mooring should not be placed so as to degrade benthic habitat quality. Placement needs to maintain broad ocean use of this public resource, notably traditional commercial and recreational fishing operations, many of which are under fishery management. Interactions with protected species need to be

avoided, managed, and monitored. Safe navigation to, from, and on station adds to this intricacy.

#### Other construction and operation considerations

NMFS maintains, as it has in the past, that the applicant should properly configure and maintain buoys and anchor cables for dredging operations; approve a suitable disposal site for dredge material; develop backfilling and post construction monitoring criteria and success standards; manage acoustic disturbance to living marine resources; develop mitigation for unavoidable habitat impacts; develop fuel spill plans.

#### Protected Resources

In previous comments on the Draft and Final EIS for the Broadwater LNG project, NMFS indicated that construction and operation of the Broadwater LNG facility may affect species listed as endangered or threatened under the Endangered Species Act of 1973 (ESA), as amended, and indicated that consultation pursuant to section 7 of the ESA would be required for the project. NMFS requested that FERC evaluate the following types of potential impacts on ESA-listed sea turtles and whales:

- Vessel collisions
- Habitat impacts (water quality, water temperature)
- Acoustic disturbance and harassment
- Destruction of benthic resources (impacts on prey resources)
- Fuel spills
- Impingement and entrainment during water intake

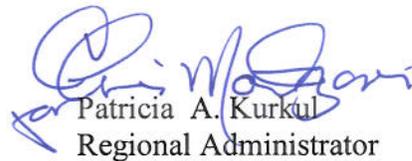
FERC required Broadwater to work with NMFS to develop mitigation measures that would reduce these potential impacts to an insignificant or discountable level. Once these plans were finalized to NMFS' satisfaction, NMFS concurred with FERC's determination that the activities related to the construction and operation of the Broadwater LNG terminal were not likely to adversely affect any listed species under NMFS' jurisdiction (letter dated November 14, 2008). NMFS indicated that section 7 consultation was complete, and that no further consultation pursuant to the ESA was required for the project unless project plans changed, new information became available that changed the basis for the determination, or a new species or critical habitat was listed.

In comments on the FEIS and in the section 7 concurrence letter dated November 14, 2008, NMFS also indicated that, while not protected under the ESA, several marine mammal species protected under the Marine Mammal Protection Act may be present in Long Island Sound. NMFS recommended that, if project activities were expected to result in take of marine mammals by injury, harassment, or mortality, then the applicants were responsible for obtaining an incidental take permit from the NMFS Office of Protected Resources.

The commentary above indicates the status of NMFS' activity and progress on the project with respect to the CZM appeal in process. NMFS will resume consultation with FERC recognizing this reinitiation is dependent upon NOAA's disposition of the appeal. In addition, coordination and consultation would involve the Army Corps of Engineers (ACOE), a co-permitting agency for this project. The ACOE, too, will address NMFS' conservation recommendations. Our primary objective for this coordination will be to work to address the various significant issues that remain in order that our resources of concern are protected.

Thank you for the opportunity to provide these comments. We hope they are of assistance to the Secretary's review of this appeal.

Sincerely,



Patricia A. Kurkul  
Regional Administrator

cc: NOAA General Counsel, NER  
C. Mantzaris, F/NER  
M. Colligan, F/NER3  
T. Bigford, HQ  
S. Rauch, NMFS/OAA