

**Federal Consistency Appeal  
by Broadwater Energy LLP  
From an Objection by the  
New York Department of State**

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**Reply Brief of the New York Department of State to the Amicus Brief  
of the State of Connecticut**

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## Statement of the Case

The New York State Department of State (“NYSDOS”) files this brief in reply to the amicus brief submitted by the Attorney General of Connecticut (“Connecticut Amicus Brief”), supporting NYSDOS’s consistency determination and opposing the request of Broadwater Energy L.L.C. and Broadwater Pipeline L.L.P. (“Broadwater”) for an override of that determination by the Secretary of the Department of Commerce (“Secretary”).

Connecticut’s Amicus Brief enunciates a concern, shared by New York, that the national interest in coastal zone management would be seriously impaired by the unwelcome presence of the Broadwater project in the middle of Long Island Sound. Long Island Sound is a 110-mile-long, predominantly enclosed, tidal estuary at the interstate boundaries of New York and Connecticut. As an Estuary of National Significance, it is ranked among the most productive estuarine waters in the world. It provides valuable breeding, nesting and feeding habitats for myriad aquatic, avian and animal species, and provides commercial fishing, tourism and recreational benefits to the communities along its shoreline. Home to more than 8.4 million people along its shores, the Sound is used for recreational boating, commercial and recreational fishing and shellfishing, and recreational beach-going.

New York and Connecticut have contributed millions of dollars to improving the water quality in Long Island Sound. In three decades, New York alone has invested \$340 million towards cleanup effort. Likewise, Connecticut has invested vast sums to improve municipal waste treatment facilities and reduce pollution and runoff.<sup>1</sup> In 2002, the U.S. Environmental Protection Agency, New York and Connecticut agreed to restore Long Island Sound by 2014, with the goal of reducing bathing beach and shellfishing closures, restoring fish river runs for migratory fish and improving ecologically-important habitats that support marine life.<sup>2</sup> In fact, last week, the EPA announced its latest round of water quality improvement grants in Long Island Sound.<sup>3</sup> These financial investments demonstrate the commitments shared by both states and the federal government in improving this public resource

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<sup>1</sup>See Connecticut Amicus Brief at p. 7.

<sup>2</sup>The Long Island Sound Office of the U.S. Environmental Protection Agency  
<http://www.longislandsoundstudy.net/press/dec4pcpr.pdf>.

<sup>3</sup>Id. at [http://www.longislandsoundstudy.net/press/LongIslandSSFF\\_release\\_Sept2008.pdf](http://www.longislandsoundstudy.net/press/LongIslandSSFF_release_Sept2008.pdf)

for the benefit of generations of Americans. If the Broadwater Project goes forward, the public will be excluded from sizable portions of the Sound and the benefit of these great public financial investments will have been greatly diminished.

**BROADWATER’S REQUEST FOR AN OVERRIDE SHOULD BE REJECTED AND ITS APPEAL DISMISSED BY THE SECRETARY BECAUSE THE PROJECT IS INCONSISTENT WITH THE PURPOSES AND OBJECTIVES OF THE CZMA**

As Connecticut demonstrated in its Amicus Brief, Broadwater has failed to meet its burden of proof for the statutory requirements in 15 C.F.R. § 930.130 in seeking its override of NYSDOS’s consistency determination.<sup>4</sup> NYSDOS completely agrees with this conclusion.

**A. Broadwater’s Proposed Project Does Not Further The National Interest In A Significant Or Substantial Manner**

***1. The Siting of Major Energy Facilities***

Connecticut’s Amicus Brief correctly explains that a state is not required to “categorically accept [coastal-dependent energy] facilities in order to participate in the coastal management program process set up by NOAA.”<sup>5</sup> Section 1452 (2)(D) of the CZMA directs that states’ coastal programs provide for:

priority consideration being given to coastal-dependent uses and **orderly processes for siting major facilities** related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments **in or adjacent to areas where such development already exists.** (emphasis added.)

In recent decisions, the Secretary has emphasized that LNG facility development should occur, to the maximum extent practicable, in areas where industrial development already exists.<sup>6</sup> At nine miles from the closest shoreline, Broadwater’s project is nowhere near development. The open waters of Long Island Sound contain no floating or over-water industrial complexes.

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<sup>4</sup> See Connecticut Amicus Brief at pp. 7-8.

<sup>5</sup> Connecticut Amicus Brief at p. 11.

<sup>6</sup> Weaver’s Cove Appeal at 8-9, 27, 39; Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, L.L.C. from an Objection by the State of Maryland (June 26, 2008) (“AES Sparrows II Point Appeal”) at 2, 11-12.

Coastal states are not compelled to accommodate certain types of facilities but instead are to demonstrate the process through which “energy facilities likely to be located in or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities.”<sup>7</sup> NYSDOS’s federally approved Long Island Sound Coastal Management Plan (LISCMP) addresses the topic of coastal-dependent energy facilities. Connecticut noted that LISCMP Policy 1 provides for a development pattern that is of beneficial use and LISCMP Policy 10 requires siting “new water-dependent uses in suitable locations.”<sup>8</sup>

NYSDOS begs to differ with Connecticut on the application of LISCMP subpolicy 13.4 to the Broadwater Project.<sup>9</sup> Consistent with NYSDOS’s obligations to plan for major energy facilities, the LISCMP includes subpolicy 13.4, which deals with the safe siting of LNG facilities. Ideally, New York would have used this policy in the consistency review of the Broadwater Project.<sup>10</sup> However, (OCRM)<sup>11</sup> notified coastal states that “*exclusive* authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal” has been granted to Federal Energy Regulatory Commission (FERC) by the Energy Policy Act of 2005 amendments to the Natural Gas Act, NYSDOS considered its LISCMP subpolicy 13.4 to be unenforceable.

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<sup>7</sup> 15 C.F.R. 930.15. The NOAA regulations are void of a mandate requiring states to site energy facilities within their coastal zones while disregarding the inconsistency the facilities may have with the remaining coastal policies. Broadwater misinterprets 16 U.S.C. § 1452 (2)(D) as requiring that its project should be given priority consideration and, thus, an automatic positive consistency determination without any regard to the other policies.

<sup>8</sup> Connecticut’s Brief at pp11-12.

<sup>9</sup> Connecticut’s Brief at pp. 11-12.

<sup>10</sup> While the subpolicy addresses the safe siting of LNG facilities, the Broadwater Project may well have been determined not to be consistent with this subpolicy. As Connecticut astutely stated: “ The FSRU will be absolutely the first of its kind, constituting an entirely novel and untested concept. No 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>11</sup> OCRM circulated to the coastal states a letter from David Kennedy, Director, Office of Ocean and Coastal Resource Management (OCRM) to Ruth E. Ehinger, (dated Oct. 4, 2006). David Kennedy’s letter provided guidance in interpreting the effect of the amendments to the Natural Gas Act by section 311(c)(2) of the Energy Policy Act of 2005. See 15 U.S.C. § 717b(e)(1). Based on David Kennedy’s letter and subsequent confirmation with OCRM Senior Consistency Staff, NYSDOS treated this subpolicy, though listed in the LISCMP, as not legally enforceable because any state laws to the contrary would likely be preempted. In accordance with federal law, the subpolicy was not used in the consistency determination.

Connecticut accurately portrays Broadwater's attempt to use the improperly issued FERC Order as a backdoor approach to gutting the CZMA. The Attorney General stated:

Broadwater insists that an LNG terminal sited in the coastal zone, without more, is entitled to priority over other CZMA (and CMA) policy objectives. Neither the Act nor NOAA's regulations supports that contention. The thrust of Broadwater's argument is that the FERC's responsibilities under the National Gas Act are so important that they cancel out the applicability of the CZMA to the licensure process in which it is engaged. Thus, the company argues that the important national goals and objectives of the CZMA are subservient to the National Gas Act. This is not the case and the mere fact that the FERC has approved the project does not mean that all other licensure procedures are irrelevant.<sup>12</sup>

Broadwater equated FERC's statutory violation with rendering the CZMA consistency determination requirements as subservient to the authority granted to FERC pursuant to the Natural Gas Act § 717b. However, as Connecticut correctly pointed out in its brief, "FERC itself has conceded that the Secretary's authority under the CZMA is a coordinate, not subordinate review authority."<sup>13</sup>

FERC rendered its Order in advance of NYSDOS's consistency determination. FERC's Order does not render the CZMA coastal zone objectives subservient to the Natural Gas Act. The fact is FERC's Order violated § 1456 of the CZMA. As stated by one federal district:

"It would be anomalous to impute to the Congress which induced the states to formulate these plans an intention to permit the federal government to proceed with critical decision-making in total disregard of them. Congress can hardly have had such an intent. The CZMA was purposely designed to encourage cooperation between federal, state and local governments rather than conflict, and it should be construed in a manner which will effectuate that purpose."<sup>14</sup>

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<sup>12</sup> Connecticut Amicus Brief at pp. 12-13.

<sup>13</sup> Id. at p. 13.

<sup>14</sup> *California v. Watt*, 520 F. Supp. 1359, 1371-72 (C.D. Calif. 1981), *aff'd in part and rev'd in part on other grnds.*, 683 F.2d 1253 (9<sup>th</sup> Cir. 1982), *rev'd in part on other grnds., sub. nom., Sec'y of Interior v. California*, 464 U.S. 312 (1984).

## ***2. Enhancing the Goal of Energy Self-Sufficiency***

Connecticut's Amicus Brief correctly points out that the Broadwater Project moves the U.S. away from energy self-sufficiency. Energy self-sufficiency is achieved through development of domestic sources of natural gas so the Nation is not dependent on foreign supplies and suppliers. The Connecticut Attorney General stated: "Broadwater's claim that its proposed project will move the nation closer to energy self-sufficiency is patently false. The project has no relation to the development of any *domestic* sources of natural gas that will make the nation less dependent upon foreign sources of energy."<sup>15</sup>

## ***3. Promoting Economic Development***

Connecticut correctly points out that Broadwater's proposed project ignores 16 U.S.C. § 1452(2), which encourages states to "giv[e] full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development..." Broadwater attempts to argue that its project promotes compatible economic development. The opposite may well be true.

Connecticut is justifiably concerned that Broadwater's massive project would directly interfere with its economic base, which relies heavily on commercial transit. As noted in the US Coast Guard's Water Suitability Report,<sup>16</sup> a large majority of the commercial vessel traffic into Long Island Sound arrives in Connecticut ports, including New Haven, Groton, and Bridgeport.<sup>17</sup> Shipping routes to shore are concentrated in Connecticut coastal waters. The Broadwater project will unnecessarily divert commercial vessel traffic through the narrow passageway at the east end of Long Island Sound. Up to six times each week, LNG carriers accompanied by US Coast Guard escorts, would travel from the Atlantic Ocean to the center of the Sound by way of either Block Island Sound (northern route) or the Montauk Channel (southern route). If the LNG carriers pass through the

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<sup>15</sup> Connecticut's Amicus Brief at p. 14.

<sup>16</sup> US Coast Guard Water Suitability Report (WSR) at p. 21.

<sup>17</sup> Final Environmental Impact Statement (EIS) p. 3-190.

northern route, commercial marine vessel traffic will be stymied; large vessels will need to alter their travel paths to avoid the carrier exclusion zone, thereby increasing commercial traffic in the Montauk Channel. If the southern route by way of Montauk Channel is chosen, then commercial, recreational and charter boat fishing activity in The Race, a lucrative and popular commercial and recreational fishing area, would be frequently disturbed, adversely affecting the economies of both states.

**B. The National Interest Purportedly Advanced By The Proposed Project Fails To Outweigh Its Adverse Coastal Effects, When Those Effects Are Considered Separately or Cumulatively**

Connecticut stated that “[t]he adverse environmental consequences of this ill-conceived, poorly sited, and inadequately studied project to a very precious resource, the Long Island Sound, are obvious and severe. This estuary provides a rich assortment of natural resources—including, fish, shellfish and waterfowl among its treasures—that would be placed at grave risk by Broadwater’s proposal.”<sup>18</sup>

As delineated in Connecticut’s Amicus Brief, Broadwater has not demonstrated that the national interest benefits of its project “significantly” outweigh the negative impacts on the coastal zone resources.<sup>19</sup> Both New York and Connecticut will lose open space in combination with the blocking of routes used for recreational and commercial vessels, an economic lifeline for both states.<sup>20</sup> The states play a cooperative decision-making role with federal agencies in determining the siting of energy facilities because of the statutory authority granted to the states in 16 U.S.C. §§ 1452(2)(B)-(C) and the requirement in 16 U.S.C § 1456(c)(3)(A) mandates that FERC withhold issuing an Order until a state has concurred with an applicant’s certification, the state has failed to act, or the Secretary overrides the state’s consistency determination.<sup>21</sup>

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<sup>18</sup> Connecticut Amicus Brief at p. 2.

<sup>19</sup> See Connecticut Amicus Brief at p. 18, n. 5.

<sup>20</sup> See NYSDOS Consistency Determination at pp. 14-15.

<sup>21</sup> See Connecticut Amicus Brief at 20-21, n. 8; see also Islander East Pipeline Co. V. McCarthy, 525 F.3d 141, 143-144 (2d Cir. 2008).

## ***1. Broadwater's Project Will Result in an Unacceptable Loss of Public Trust Assets in Both New York and Connecticut***

As Connecticut emphasizes in its Amicus Brief, the Broadwater Project would usurp 950 acres of submerged land, water column, and surface waters held in the public trust. The public exclusion zone around the FSRU, which intrudes into New York and Connecticut waters, would preclude all vessels from using or transiting the water column and surface waters in the area. Broadwater's preferred location for the FSRU is the center of Long Island Sound. In this location, it creates an exclusion zone of 1.5 square miles around the FSRU and moving security zones around the LNG carriers that bars transit of commercial and recreational vessels from both states.<sup>22</sup> Commercial, recreational, and passenger transit vessels play a vital role in both Connecticut's and New York's economy. Broadwater's project will permanently alter and interfere with transiting vessels that are an economic lifeline for Connecticut's port cities.<sup>23</sup>

Connecticut notes that marine vessel transport is only one economic element affected by the Broadwater project. The Attorney General emphasizes : "The Sound is vastly important to the economies of New York and Connecticut for other reasons than marine transport. Commercial and recreational fishing has been valued at \$1 billion each year. Task Force Report [on Long Island Sound], Section 2.1, p. 17. The total of all direct and

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<sup>22</sup> See NYSDOS Consistency Determination at pp. 11-12, n. 41-45.

"In addition to the commercial sector, recreational fishing and boating are also significant, both economically and culturally. In 2006, nearly 10% of the 55 million marine recreational fishing trips that occurred in all of the U.S. Atlantic were taken in New York waters, accounting for more than 14 million pounds of landings. There is a large recreational boating community on Long Island Sound, derived in part from the approximately 126,000 boats registered in Suffolk, Nassau and Westchester Counties, and the 180,000 recreational vessels registered statewide in Connecticut. The Coast Guard's Ports and Waterways Safety Assessment (PAWSA) also notes that the major volumes of small craft occur around Stratford Shoal/Middle Ground, and seasonally in The Race. Stratford Shoal/Middle Ground is widely regarded by recreational fishermen as a top fishing spot in the western Sound, and one of the best places to find striped bass and bluefish. Data collected weekly by Connecticut reflects the importance of the Stratford Shoal/Middle Ground as fishing location."

<sup>23</sup> See Moving Forward: Connecticut's Transportation Strategy: Report and Recommendation of the Transportation Strategy Board, January 2007 at pp. 93-96, 100-101. Passenger service out of New London and Bridgeport carry over two million people and 82,00 vehicles per year.

indirect economic use of the Sound produced a ‘total use value’ of more than \$5,200,000,000 per year.”<sup>24</sup> The impact of the fixed exclusion zone on commercial and recreational fishing would also be great. Broadwater itself noted that “nearly all of the western two-thirds of the Sound, including the area being considered for the FSRU and pipeline, are classified as a high-use fishery area”.<sup>25</sup> In addition, the enormous LNG carriers would need to traverse “The Race,” a well-known deepwater area and thereby displace a significant number of commercial fishing, charter and party boat operations, as well as recreational boating and fishing. Between 4,000 and 7,000 commercial vessels transit The Race each year.<sup>26</sup> The conflicts between the Broadwater Project and existing water-dependent commercial navigation and commercial and recreational fishing and boating uses, especially in The Race, render the project unacceptable to both Connecticut and New York.

## ***2. Adverse Environmental Impacts on the Marine Ecosystem***

Connecticut assails Broadwater for continuing to ignore the adverse ecological impact of its project. The Connecticut Attorney General accurately and unequivocally describes the destruction of fisheries and habitats that Broadwater’s Project will engender and its adverse impact on both New York’s and Connecticut’s efforts to preserve the marine environment of LIS.

In analyzing anticipated environmental impacts of the Broadwater Project, Connecticut discusses many of coastal impacts of the project identified by NYSDOS throughout the Objection letter. "It is beyond dispute that Broadwater will have material impacts to the Sound. The most egregious of these are likely to be the permanent damage caused to the unique Stratford Shoals benthic community and the massive mortality inflicted to marine organisms caused by entrainment and impingement."<sup>27</sup>

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<sup>24</sup> Connecticut Amicus Brief at p. 6, citing to *Comprehensive Assessment and Report Part II*, Task Force on Long Island Sound, June 3, 2003.

<sup>25</sup> Broadwater EIR-19, Marine/Land Use Compatibility Assessment, April 2006, p. 7.

<sup>26</sup> See WSR at p. 18.

<sup>27</sup> See Connecticut’s Amicus Brief at p. 25.

With respect to the pipeline route, Connecticut expresses justifiable outrage that Stratford Shoals, a unique and irreplaceable benthic community, will be destroyed when Broadwater runs its pipeline route through the ecosystem.<sup>28</sup> NYSDOS has discussed the devastation which would occur to Stratford Shoals in its Objection letter.<sup>29</sup> Citing past subsea utility projects Broadwater choose to ignore fragile northern coral and sponge ecosystems that will be destroyed by the pipeline.<sup>30</sup>

Broadwater attempts to trivialize the scientific evidence demonstrating that the Broadwater project will result in the impingement and entrainment of 274 million ichthyoplankton.<sup>31</sup> By citing to other industrial facilities on the Sound, Broadwater fails to recognize the cumulative impacts to fisheries and other aquatic life from its own operations.

### **C. Alternatives Discussion**

Connecticut debunks Broadwater's claim that Long Island Sound is the only location for its massive project. As the Attorney General correctly points out, Broadwater has failed to demonstrate that there is no "reasonable alternative" by rigidly framing its business plan and project design such that it is the "only means to supply natural gas to the region."<sup>32</sup>

The Attorney General's Amicus Brief states:

"Under federal law, the Department of Commerce may override the New York Department of State only if there are no reasonable alternatives to the project. This is

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<sup>28</sup> See Connecticut's Amicus Brief at p. 27 (stating that the Iroquois Pipeline installation resulted in damage to the ecosystem and prevented the use of the area for shellfishing that originated with the pipeline installation in 1991 and continues today.)

<sup>29</sup> NYSDOS Consistency Determination (NYSDOS Supplemental Document 1) at pp. 30 - 34.

<sup>30</sup> See id.; see also Broadwater's Reply Brief at p. 13. See Broadwater FEIS [Doc. # 1911\_0007] at pp. 3-90 - 3-91 [BW28937-28938]; NYSDOS Supplemental Document 5, June 11, 2008 letter from NYSDEC to Broadwater.

<sup>31</sup> Broadwater attempts to point out that the NYSDEC, in a 2006 SPEDES permit, allowed for impingement and entrainment at the Northport Power, a facility which pre-existed New York's Coastal Management Program. (See Broadwater Supplemental Document VII.) However, cumulative effects are an integral part of the Secretary's review of coastal impacts. See Decisions and Findings in the Consistency Appeal of Carlos Cruz, September 27, 1993 at p. 11, n. 29. Cumulative effects has been construed "to mean the effects of an objected-to activity when added to the baseline of other past, present and reasonably foreseeable future activities." Id.

<sup>32</sup> Connecticut Amicus Brief at p. 8.

patently not the case here because there are several LNG projects in various stages of development besides Broadwater, including some under the consideration of the State of New York, which would also supply natural gas to many of the same market areas. The natural gas supply infrastructure has not neglected Long Island. Because ecological harm is lasting, and sometimes permanent, strong preference must always be given to the least harmful alternative. Even so, the states of New York and Connecticut have, in fact, previously permitted use of the Sound by other utilities, thereby manifesting an understanding of the balance of use and conservation that is inherent in the field of coastal resource management.”<sup>33</sup>

Listing numerous existing and proposed LNG regasification facilities outside of Long Island Sound which serve or would serve New York and New England, Connecticut’s Attorney General emphatically stated:

Broadwater cannot creditably claim that its project is the only means to supply natural gas to the region. Further, it cannot credibly claim that its project is the only reasonable new or proposed LNG terminal in the region. The Federal Energy Regulatory Commission’s docket is replete with other LNG projects, most if not all less damaging to the environment, proposed throughout the region. For this reason alone, the denial under the CZMA must be upheld.<sup>34</sup>

### **Conclusion**

NYSDOS supports the positions and arguments in the Connecticut Amicus Brief, which substantiate the conclusions of NYSDOS’s consistency determination. The coastal impacts resulting from the presence of the FSRU, LNG carriers and their associated exclusion zones will negatively impact on the economies of both states and will compromise millions of dollars in taxpayer investment in improving the health of LIS. Both states have federally approved coastal management plans. Both coastal states are firmly opposed to the Broadwater Project as proposed. Most importantly, Broadwater has not met the required burden of proof and Broadwater’s request for an override must be denied.

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<sup>33</sup> Id. at p. 3.

<sup>34</sup> Id.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served this 3rd day of October, 2008, on the following:

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