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August 4, 2008

Corrected Copy

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

Re: Broadwater Energy LLC & Broadwater Pipeline LLC
Reply of New York State Department of State (NYSDOS) To Broadwater's
Response to NYSDOS's Motion to Supplement the Decision Record

Dear Mr. Gutierrez:

This letter replies to the August 1, 2008 letter of Broadwater's attorney, Robert J. Alessi, responding to NYSDOS's Motion to Submit Supplemental Documents to clarify matters relating to their introduction into the decision record.

1. In its letter, Broadwater consents to the inclusion of all 12 of NYSDOS's Supplemental Documents into the decision record "with the partial exception of Document 10 (discussed below)." Broadwater also provided 9 additional pages of single-spaced commentary.
2. Broadwater expressed concerns with the submission of Document 10, which is a letter from David Kennedy, Director, Office of Ocean and Coastal Resource Management (OCRM) to Ruth E. Ehinger, N.J. Coastal Program Manager (dated Oct. 4, 2006).

This official OCRM document was distributed to the state Coastal Management Programs as a guide in interpreting the effect of the amendments to the Natural Gas Act by section 311(c)(2) of the Energy Policy Act of 2005. Many coastal states, like New York, had applications pending for LNG facilities and had policies, like LISCMP 13.4, which specifically dealt with LNG siting. OCRM's timely advice established the parameters of NYSDOS's consistency review of the Broadwater Project.

NYSDOS complied with the EPLA of 2005 and the guidance provided by OCRM. Had NYSDOS used LISCMP subpolicies 13.3 and 13.4, we would have been in violation of the law. Broadwater's claim of a post-hoc rationalization is completely unfounded.

3. NYSDOS's legally correct decision not to use the unenforceable policies relating to LNG facility siting in the consistency determination does not mean that the Broadwater project can be safely sited or operated in Long Island Sound. Many government agencies and commentators have expressed grave doubts and fears about the safe siting of FSRU and the LNG tankers in that estuary. Their comments permeate the Consolidated Record.

Additionally, the inclusion of subpolicy 13.4 in the LISCMP does not mean Broadwater's permanently moored floating storage regasification unit (FRSU) in Long Island Sound is, in any way, consistent. In fact, Broadwater's proposed FSRU would be the first of its kind in the world. The placement of the FSRU in the open waters of the LIS was not contemplated by NYSDOS in its drafting of the LISCMP in 1999, as no such facility existed at the time and still does not today.

4. Broadwater contends that judicial notice cannot be taken of the Legislative History of the Coastal Zone Management Act of 1972, As amended in 1974 and 1976 (US Government Printing Office, December 1976), without providing the entire document (1000 plus pages) to it.

NYSDOS's sole reference to legislative history is as follows:

The Secretary of Commerce (through NOAA) should provide guidance and assistance to the States under this section 305(b)(8), and under section 306, to enable them to know what constitutes "adequate consideration of the national interest" in the siting of energy facilities necessary to meet the requirements other than local in nature. The Committee wishes to emphasize, consistent with the overall intent of the Act, that this new [§ 305(b)](8) requires a State to develop, and maintain a planning process, but does not imply intercession in specific siting decisions. The Secretary of Commerce (through NOAA) in determining whether a coastal State has met the requirements, is restricted to evaluating the adequacy of the process.

Senate Comm. On Commerce, Coastal Zone Management Act Amendments of 1975, S. Rep. No. 277, 94th Cong., 1st Sess. 24 (1975), Reprinted in Legislative History of the Coastal Zone Management Act of 1972, at 725, 760 (1976).

5. NYSDOS has no objection to the introduction of Broadwater's Supplemental Document V into the decision record. However, the document was prepared for internal use by NYSDOS consistency review staff early in 2005 (before the Energy Policy Act of 2005 was enacted) and was shared with Broadwater during subsequent discussions.

6. Broadwater mischaracterizes NYSDOS's request for relief. NYSDOS neither requested an increase in the size of our brief, nor an extension of time to submit its principal brief. NYSDOS will be ready to file its principal brief on August 6, 2008. For that reason, there is no justification for Broadwater to obtain a longer reply brief. It should be bound to the page limits established by NOAA General Counsel Jane Luxton in her June 20, 2008 Order.

Only if the Secretary allows Broadwater's Supplemental Documents I, II or III into the decision record does NYSDOS request a 45 day extension to allow Battelle Memorial Institute to prepare a full analysis of the new wave data and other supplementary information, together with a 25 page double-spaced supplemental brief by which arguments may be advanced as to the veracity and relevancy of the supplemental documents. NYSDOS's proposed Supplemental Document 12 indicates that Battelle did not have access to the 2005 Moffatt and Nichol study from which wave comparisons were made. Battelle indicated that, without Broadwater's information, the reliability of Moffatt and Nichol's comparison could not be verified. Broadwater's submission raises more questions than it answers. Based on the current data, Battelle questioned the reliability of the Moffatt and Nichol report: "As far as we can see, Broadwater has chosen the worst-case scenario in each instance." Moreover, Battelle did not have an opportunity to review Broadwater's proposed Supplemental Document III due to the short time frame following receipt of Broadwater's submissions. Broadwater's opposition to an independent Battelle report would withhold from the Secretary complete and accurate information endorsing the reasonableness and availability of Atlantic Ocean alternatives.

Kindly advise us if you need further information.

Sincerely,



Susan L. Watson
General Counsel

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