UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Broadwater Energy, L.L.C. and Broadwater Pipeline, L.L.C.	)	
Appellant,	)	
-vs-	)	
State of New York Department of State,	)	August 15, 2008
Appellee	)	

BRIEF OF THE ATTORNEY GENERAL OF CONNECTICUT IN THE APPEAL OF BROADWATER ENERGY L.L.P AND BROADWATER PIPELINE, L.L.C FROM AN OBJECTION BY THE STATE OF NEW YORK DEPARTMENT OF STATE, TO A CONSISTENCY CERTIFICATION FOR THE BROADWATER LNG PROJECT

The Attorney General of Connecticut ("Attorney General") hereby files this brief in support of the New York Department of State ("DOS") and in opposition to the request of Broadwater Energy L.L.C. and Broadwater Pipeline L.L.P. ("Broadwater") for an override by the Secretary of the Department of Commerce ("Secretary") of the DOS's objection ("Objection") to the request of Broadwater for a certification of consistency for its proposed pipeline under Section 387(c)(3)(A) of the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.* ("CZMA" or the "Act").

The Secretary should dismiss the instant request for an override of the DOS's objection. There is no substantive ground under the CZMA and applicable federal regulations upon which Broadwater's request could be granted. Under Ground I, Broadwater must demonstrate that its

project significantly and substantially advances the national interest. It fails to do so. The company also must demonstrate that any national interest shown is not outweighed by the adverse environmental impacts associated with it. Broadwater clearly fails to make that showing. Finally, as Connecticut and New York have identified numerous alternatives to the proposal, Broadwater must show that every alternative specified is neither available nor reasonable. The company cannot sustain its burden under this element. Alternatively, under Ground II, whether the project is "necessary in the interests of national security," Broadwater has failed utterly to prove that the national security interests of the United States would be impaired if Broadwater is not constructed

SUMMARY

The State of New York Department of State's objection to Broadwater's request for a Coastal Zone Management Act ("CZMA") coastal consistency certification for a floating natural gas facility and pipeline in the ecologically sensitive and economically vital Long Island Sound is clearly justified. The 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

The DOS's objection is an environmental assessment by the regulator charged under federal law with reviewing and evaluating the adverse consequences of siting and constructing Broadwater's proposed project. The agency's action is *not* a determination that new supplies of natural gas are undesirable for New York, Connecticut or any other state in the region, and the DOS has *never* taken the position that there is *no* place for proposals for new pipelines and entry

ports for LNG. The State of New York has, however, on the basis of objective review of the applicable standards and criteria, objected to the certification of this project because it will degrade and endanger key environmental and economic resources of the state even though less damaging alternative methods and routes to increase energy supplies are available. New York is under an obligation placed upon it by the federal government through the CZMA to apply the enforceable coastal management policies of the state. Unfortunately, Broadwater has ignored them. These review requirements are every bit as important to the future of the people of Connecticut and New York as the determinations that the Federal Energy Regulatory Commission has made. The State of New York and the State of Connecticut cannot abdicate their public trust responsibility to preserve natural resources—especially those that have not yet been significantly impacted by development. They must strive to minimize adverse impacts upon those resources, as required by both federal and state law.

Broadwater's proposal does not offer any unique opportunity to improve the overall scheme of natural gas delivery to this region. 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 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.

I. Background

1. The Project.

The Broadwater Project is immense in its size and scope – and its potential impacts. Not only are the sheer physical bulk and impact enormous, but it is proposed for a uniquely valuable and sensitive environment.

The facility will be made up of four interrelated elements. The largest will be the floating storage and regassification unit (FSRU). The FSRU is planned to be about the length of four football fields -- over 1,200 feet long, 200 feet wide and over 100 feet high, with a draft of 40 feet. Decision, p.3. The FSRU is designed to hold up to 8 billion cubic feet of liquefied natural gas along with the necessary machinery to transform it into its gaseous form at a rate of up to a billion cubic feet per day. Decision, p.4. The FSRU will be anchored to the seafloor by a mooring system that will cover 13,180 square feet. *Id.* 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.

The second element of the project is a planned 21.7 mile long undersea thirty inch pipeline from the FSRU to the Iroquois Gas Transmission System (IGTS) pipeline. Decision, p.4. Broadwater plans to employ an underwater plow to install the pipeline. However, if the plow encounters bedrock or other seafloor conditions are unfavorable, the company has indicated that it could pursue blasting or other methods.

The third element of the Broadwater project comprises land based systems, including buildings for maintenance and other logistical support. Decision, p.4. The fourth and last

element of the project, the LNG tankers that will reload the FSRU, will have a major negative impact on the Sound. These tankers, ranging from the existing 125,000 cubic meters capacity to an as yet unbuilt 250-300,000 cubic meters size, will cross the narrow entrance to the Sound, known as the Race, every few days and will anchor next to the FSRU for unloading of LNG. Id.

2. Procedural Background

On January 30, 2006, Broadwater filed an application with FERC under Sections 3(a) and 7(c) of the Natural Gas Act (NGA) to construct and operate a floating LNG terminal and pipeline in Long Island Sound. On March 20, 2008, FERC, without a final determination of consistency under the CZMA, approved the Broadwater project.

On November 17, 2006, DOS commenced review of this project under the CZMA. On April 10, 2008, after completion of its review, DOS issued its decision (Decision) denying a determination of consistency under the CZMA. This appeal followed.

3. Interests of the State of Connecticut.

The Attorney General submits these comments because Connecticut's interests are directly affected by this project. The Project's security zones and the LNG carrier routes include and so will directly impact Connecticut's coastal waters and numerous important environmental nearshore and onshore resources on the Connecticut side of the Sound. WSR, pp. 76, 81, 90, 95, and 101.

From a broader perspective, the State of Connecticut has long had an interest in protecting its coastal resources. The importance of Long Island Sound to Connecticut, New York, and the entire country - environmentally, esthetically, and economically – cannot be overstated. The Sound is one of the largest estuaries in the United States,

> where the tidal, sheltered waters support unique communities of plants and animals. Birds, mammals, fish, shellfish, and other wildlife depend on estuarine

> habitats as places to live, feed and reproduce. Numerous marine organisms, including many of the commercially valuable fish and shellfish species, depend on the Long Island Sound estuary at some point in their development. Long Island Sound is also economically important to the Connecticut-New York region for a variety of commercial and recreational purposes.

Comprehensive Assessment and Report Part II, Task Force on Long Island Sound, June 3, 2003, (hereinafter "Task Force Report")

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, Section 2.1, p. 17. The total of all direct and indirect economic use of the Sound produced a "total use value" of more than $5,200,000,000 per year. Task Force Report, Section 2.1,0. 24.

The Connecticut legislature has been very clear -- the health of the overall ecosystem of the Long Island Sound is critical to the State and unchecked development and poorly-sited infrastructure are unacceptable.

> The General Assembly finds that the growing population and expanding economy of the state have had a profound impact on the life-sustaining environment. The air, water, land and other natural resources, taken for granted since the settlement of the state, are now recognized as finite and precious . . . Therefore the General Assembly hereby declares that the policy of the state of Connecticut is to conserve, improve and protect its natural resources and environment and to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state.

Conn. Gen. Stat. § 22a-1.

The legislature has done more, expressly defining the policy of the state and making numerous legislative findings, including the following from Connecticut's Coastal Management Act:

> (1) The waters of Long Island Sound and its coastal resources . . . form an integrated natural estuarine ecosystem which is both

> unique and fragile;
> (2) Development of Connecticut's coastal area has been extensive and has had a significant impact on the Long Island Sound and its coastal resources;
> (5) The coastal area is rich in a variety of natural, economic, recreational, cultural and aesthetic resources, but the full realization of their value can be achieved only by encouraging further development only in suitable areas and by protection of those areas unsuited to development;
>
> (7) Unplanned population growth and economic development in the coastal area have caused the loss of living marine resources, wildlife and nutrient-rich areas, and have endangered other vital ecological systems and scarce resources.

Conn. Gen. Stat. § 22a-91. The state has supported its policies with action. Vast sums of public money have been spent to improve municipal waste treatment facilities and reduce pollution and runoff. Significant amounts of taxpayer dollars have been invested in the state's shellfish industry. The State of Connecticut therefore has a direct and immediate interest in the marine environment that is impacted by this project. As noted in the *Comprehensive Assessment and Report Part II*: "[a]s custodian for half of Long Island Sound, Connecticut has an obligation to continue to protect and preserve this irreplaceable resource." Task Force Report, p. 8.

ARGUMENT

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

The override provisions of the Coastal Zone Management Act authorize the Secretary to allow a project to go forward notwithstanding a state objection pursuant to its coastal management program if he finds that the project is either "consistent with the objectives or purposes of this title or is otherwise necessary in the interest of national security." 16 U.S.C. § 1456(c)(3). The burden of proof remains with the party seeking override that the activity

proposed satisfies these statutory requirements. 15 C.F.R. § 930.130. The appellant bears both the burden of production and the burden of persuasion, and in the specific instance where insufficient information exists in the Secretary's record for him to make the required findings pursuant to these regulations, the appeal will be dismissed. *Appeal of Shickery Anton* (May 21, 1991) at 4; *Appeal of Chevron U.S.A., Inc.* (October 29, 1990) at 4-5. The language "consistent with the objectives or purposes" is explicated in the applicable regulations as follows:

> (a) The activity furthers the national interest as articulated in § 302 or § 303 of the Act, 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. When determining whether a reasonable alternative is available, the Secretary may consider but is not limited to considering, previous appeal decisions, alternatives described in objection letters and alternatives and other new information described during the appeal.

15 C.F.R. § 930.121.

The last point quoted above is critical. The Secretary of Commerce may only override the Department of State if there is "no reasonable alternative." 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.

Further, the appellant can only prevail if it can prove that its proposed project satisfies each of the three grounds listed above; otherwise, the state's consistency objection stands and the appeal must be dismissed. The validity of the state's consistency determination is not the

primary focus of the request for override; for the purposes of the Secretary's review, the state coastal consistency determination must be *presumed correct*. The review of the Secretary is in the nature of the application of a judicial review standard to an existing administrative agency record of decision. Moreover, the Secretary's review addresses the issue of alternatives in light of materials received in the Secretary's record of decision in addition to the record before the state agency at the time that it conducted its coastal consistency determination and lodged its objection to the proposed project. *Id.*; see *Appeal of Southern Pacific Transportation Co.*, (September 24, 1985) at 4-5.

Finally, it must be emphasized that New York's CMP is a federally approved plan under the provisions of the CZMA. As such, an approved plan is the federally authorized state implementation of a federal law and, thus, the New York CMP is accorded the force and effect of a federal standard.

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

The crucial balance between "use" and "development" inherent in the CZMA is apparent in the detailed congressional findings and declaration of policy with which the Act commences. *See* 16 U.S.C. § 1451(a) – (g) and (k) – (m), inclusive; 16 U.S.C. § 1452(1), (2)(A) – (F) and (K). Section 1452(2) declares that it is the "national policy" to "encourage and assist the states to exercise effectively their responsibilities in the coastal zone . . . ." The Congress has in turn found that "[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone . . . ." 16 U.S.C. § 1452(2); § 1451(i).[1]

[1] NOAA's regulations commentary states that Congress "specifically chose the States as the best vehicle to further this national interest" [that being the "effective management, beneficial use, and development of the coastal zone"]. 65 F.R. 77,149 (December 8, 2000).

The Secretary has explained that the determination of whether a project significantly or substantially furthers the national interest implicates three factors for consideration: (1) the "degree to which the activity furthers the national interest"; (2) the "nature or importance of the national interest furthered as articulated in the CZMA"; and (3) the "extent to which the proposed activity is coastal dependent." 65 F.R. 77,150 (December 8, 2000).

Broadwater asserts that its proposed project will further the following national interest objectives: (1) the national interest in siting major energy facilities; (2) contribution toward the goal of national energy self-sufficiency; (3) fostering of the need for compatible economic development; and (4) protection and development of resources in the coastal zone. These claims are inaccurate.

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

Broadwater asserts that, since the CZMA provides that "priority consideration should be given to siting major facilities related to energy," its project is in the national interest.

States that seek to have federally approved coastal management programs ("CMPs") must address the siting of major energy facilities. New York's federally approved Long Island Sound Coastal Policies ("Policies") do that, and in a manner that properly considers the coastal-dependency criterion. *See* 16 U.S.C. § 1455(d)(2)(H). New York, like other participants in coastal management, was required to provide "adequate consideration of the national interest involved in . . . managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate

energy plan or program." 16 U.S.C. § 1455(d)(8).[2] (Emphasis added.) New York complied with this requirement in its CMP.[3]

The import of this statutory language, recognized in NOAA's regulations, is that any coastal management planning process of a state must address the national interest in planning for and siting coastal-dependent energy facilities, but it need not categorically accept such facilities in order to participate in the coastal management program process set up by the CZMA. Thus, Section 923.15(b) of NOAA's regulations states that this requirement of including energy facilities in the planning and management process

> should not be construed as compelling the States to propose a program which accommodates certain types of facilities, but to assure that such national concerns are included at an early stage in the State's planning activities and that such facilities are not arbitrarily excluded or unreasonably restricted in the management program without good and sufficient reasons . . . No separate national interest "test" need be applied and submitted other than evidence that the listed national interest facilities have been considered in a manner similar to all other uses, and that appropriate consultation with the Federal agencies listed has been conducted.

The following policies underscore the state's due consideration of these requirements.

2. *New York's Long Island Sound Coastal Policies*

New York's Long Island Sound Coastal Policies ("Policies") is a comprehensive policy document outlining, in detail, the enforceable policies of the State. Many of its provisions are of particular relevance to a review of the Broadwater project. For example, policy 1 mandates "foster[ing] a pattern of development in the Long Island Sound coastal area that enhances

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[2] *Cf.* 40 Fed. Reg. 1683 (January 9, 1975) ("A management program which integrates . . . the siting of facilities meeting requirements which are of greater than local concern into the determination of uses and areas of statewide concern will meet the requirements of [the Act].")

[3] Congress restricted the Secretary to evaluating the adequacy of a coastal state's planning process, and forbade him from "intercession" in "specific siting decisions." S. Rep. No. 277, 94th Cong., 1st Sess. 24 (1975) [re 1976 energy amendments to CZMA]. The meaning of this directive, and of the CZMA itself, is that there exists *no* substantive requirement that would force a state to site an energy facility simply because it is an energy facility.

community character, preserves open space, makes efficient use of infrastructure . . . and minimizes adverse effects of development." As the commentary adds: "The policy is intended to foster a development pattern that provides for beneficial use of the Sound's coastal resources."

Additionally, policy 10 is designed to "promote siting of new water-dependent uses in suitable locations." Policy 10.3 requires DOS to "[a]llow for development of new water-dependent uses outside of maritime centers" and policy 10.4 clearly states that the agency should "[i]mprove the economic viability of water-dependent uses by allowing for non-water-dependent accessory and multiple uses, particularly water-enhanced and maritime support services."

Most importantly, policy 13 is designed to "[p]romote appropriate use and development of energy . . . resources." Policy 13.1 adds that decisions should "[p]romote and maintain energy efficient modes of transportation, including . . . waterborne cargo. . . ." Policies 13.3 and 13.4 add the following comments: "Site and construct new energy . . . transmission facilities so they do not adversely affect natural and economic coastal resources" and "Liquified Natural Gas facilities must be safely sited and operated."

Thus, New York's CZMA Policies clearly and unequivocally identify the need and importance of siting major energy facilities and dictate precisely how to do that. It is not possible, therefore, for Broadwater to claim that New York has not properly and comprehensively undertaken its statutory obligations in its CZMA Policies.

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.

As an initial matter, the FERC itself has conceded that the Secretary's authority under the CZMA is a *coordinate, not subordinate* review authority. As explained by the Secretary in *Appeal of Mobil Exploration, supra,* the national interests to be balanced in the second element of the consistency appeal process "are limited to those recognized in or defined by the objectives and purposes of the CZMA. *Id* at 39, citing *Appeal of the Korea Drilling Co , Ltd.* (January 19, 1989) at 16. Further, a FERC approval based on the National Environmental Policy Act, 42 U S.C. § 4321, *et seq.* ("NEPA") cannot somehow take precedence over the entirely separate environmental CZMA regulations. NOAA's December 8, 2000 Rules and Regulations commentary affirmed that NEPA review does not necessarily satisfy all the consistency requirements of the CZMA review process: "NEPA and the CZMA have different 'effects tests.' Thus, it may be that a NEPA document *may not contain the needed CZMA information or that a conclusion regarding effects for NEPA purposes will not satisfy the CZMA effects test.*" 65 F R. (December 8, 2000) at 77,139 (emphasis added). *See Mtn. Rhythm Resources v F E R.C* , 302 F 3d 958, 960, 964 (9th Cir. 2002).

New York has reviewed Broadwater's project in the context of these mandated programmatic coastal policies, and did so in the proper discharge of its federally-approved CMP. The DOS concluded that the company's project would not be compatible with the ecological conditions in the Sound. Broadwater is advancing a national interest that is neither superior to other competing schemes to route gas nor proposing a project that is entitled to any priority, particularly in light of the long-term adverse impact of its proposed project on the environment

3. ***Enhancing the Goal of National Energy Self-Sufficiency***

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 The project does not realize the CZMA legislative finding respecting the promotion of energy-self sufficiency. 16 U S C. § 1451(j). All of the gas that Broadwater would move to New York is nothing less than additional foreign gas and thus the project will increase reliance on non-domestic gas and negatively affect energy self-sufficiency.

Certain amendments to the CZMA in the 1970s put into higher relief the "national objective" of "increasing *domestic* energy production." *Am. Petroleum Inst.*, 456 F. Supp. at 923 (emphasis added), quoting H. Rep. 94-1298 at 25, U.S. Code Cong. & Admn. News, pg. 1822; *see also Appeal of Mobil Exploration & Producing* (June 20, 1995) at 39-40. Broadwater's argument does not address the point of domestic energy self-sufficiency.

4. ***Promoting Economic Development***

Broadwater asserts that, because there is a need for compatible economic development in the coastal zone, and because the Secretary has determined that compatible economic development is a CZMA objective, its proposal will facilitate those objectives by serving two areas within the coastal zone. The proposed project, however, is not in accord with the CZMA policy to "encourage . . . states to achieve wise use of the land and water resources of the coastal zone, *giving full consideration* to ecological, cultural, historic and esthetic values as well as the needs for compatible economic development . . ." 16 U.S.C. § 1452(2). Broadwater's simplistic reasoning ignores all of the factors outlined by Congress in this declaration of policy, and, in particular, factors (C) and (D), which require the state to "protect natural resources and existing

uses of those waters" and to give "priority consideration" to "coastal-dependent uses." 16 U S C. § 1452(2)(C), (D).

Without close attention to coastal management goals and policies in reviewing siting approvals, there can be no truly "compatible" economic development: it will not suffice to reiterate mantra-like the slogans of "increased reliability," "security," "market competition" and "added infrastructure." The CZMA standard that applies is one of appropriate weighing by the state in light of these applicable goals and policies. It is for this reason that state CMPs were developed and federally approved under the enabling legislation

Furthermore, Broadwater ignores the significant growth in new LNG terminals and pipelines in the region. In the Northeast, a proposed facility in Everett, Massachusetts, providing 1 035 billion cubic feet per day (Bcfd) has already been constructed, and FERC has approved the Weaver's Cove Energy project in Fall River to bring in another .8 Bcfd. *See*, FEIS, §§ 4.3-4 4 In addition, the Crown Landing project, FERC Docket No. CP-04-411, is a new LNG terminal planned for New Jersey that could store up to 9.2 Bcf of natural gas and transmit it at up to 1.2 Bcfd, 20 % more than Broadwater, into the northeast market. This on-shore project would store more LNG than Broadwater and would be safer and less impacted by storms than a floating terminal. Furthermore, the project only involves 11 miles of new pipe, rather than the 21 7 miles of underwater pipeline Broadwater will require. This project was approved by FERC on June 15, 2006.

Other regional projects are also in various stages of regulatory approval. For example, the Coast Guard has approved both the Boston-based Neptune LNG project (4 Bcfd) and Northeast Gateway projects (8 Bcfd) that together total more LNG than Broadwater and are directly connected to the northeast pipeline system. The immense Quoddy Bay project in

Pleasant Point, Maine proposes to add 2.0 Bcfd -- twice what Broadwater could provide – to northeastern supplies. In addition, the Downeast LNG project in Robbinston, Maine, would bring in another .5 Bcfd. Not all of the planned projects are in New England. The Safe Harbor project, for another 2.0 Bcfd, is planned for off-shore New York and ExxonMobil's recently announced BlueOcean project would provide 1.2 Bcfd, 20 % more than Broadwater, into the New Jersey/New York market with less underwater pipeline and in a significantly less sensitive marine environment.

These constructed, approved, or planned projects would total 10.15 Bcfd of new supplies of LNG without Broadwater. As noted above, several of these projects would add LNG into the Boston and Maine areas, which are connected to Connecticut and New York through the existing pipeline system. Currently, natural gas moves through Connecticut along the Iroquois pipeline into Long Island. Adding more than 5.5 Bcfd through the new LNG terminals constructed or planned in New England described above would more than satisfy Connecticut's needs and provide huge amounts of LNG for New York. Broadwater is not needed for the energy future of New York or Connecticut.

While there are clearly enough potential LNG terminal projects under regulatory consideration, this does not end the discussion of alternatives. New pipelines can bring in other sources of natural gas. The MarketAccess Project, a part of the larger Northeast (NE)-07 Project, includes upgrades to existing and certain new pipeline construction that would provide major new transmission capacity for the region and would tap into significant supplies of Canadian gas. In addition, the Northeast (NE) 08/09 project, another upgrade to the Algonquin and Iroquois pipeline systems, would add 100,000 dekatherms of natural gas from Canada directly to the Long Island market. Finally, the Eastern Long Island project, previously proposed by Iroquois

Gas Transmission Company, allowed for the construction of a new pipeline across the Sound to shift even more gas to Long Island. This project, like NE 08/09 and NE 07, has been broadly supported by Connecticut in order to assist Long Island to meet its energy needs. Unlike Broadwater, which would devastate pristine and untouched areas of the seafloor, these pipeline projects would have far fewer new impacts to the environment because they would either entail no new underwater construction of any type or, in the case of the Eastern Long Island pipeline route, would involve construction in previously impacted areas of the seafloor.

Ultimately, Broadwater cannot credibly claim that Broadwater and Broadwater alone is a "necessary source" of LNG, while ignoring other, safer, alternatives. This failure to consider alternatives, by itself, mandates denial of approval to this project.

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

The second required element that Broadwater must demonstrate is that "[t]he national interest furthered by the activity outweighs the activity's coastal effects, when those effects are considered separately or cumulatively." 15 C.F.R. § 930.121(b). The Secretary has stated in commentary to the NOAA regulations that this inquiry is designed to ensure that he "overrides a State's objection only where the activity *significantly or substantially* furthers the national interest and that interest outweighs the adverse coastal effects of the activity." 65 F.R. 77,149 (December 8, 2000) (emphasis added).[4] The "coastal effects" to be considered by the Secretary are broad-ranging in scope, embracing not only the effects occasioned by the proposed activity in

[4] In relation to state CMPs, what this means is described by the Secretary in this way: "The Secretary's review is an independent assessment of the proposed activity and whether the proposed activity meets the objectives of the CZMA or is necessary in the interest of national security. . . . Although one of the central goals of the CZMA is to encourage State management of coastal resources, the Secretary's review is available to ensure that proposals that further the national objectives articulated in the Act may be allowed to proceed notwithstanding their inconsistency with the enforceable policies of a management program." 65 F.R. 77,149 (December 8, 2000).

isolation, but also those effects that arise from the proposed activity being undertaken in combination with other activities that have an impact upon coastal zone resources. Adverse impacts associated with the proposed activity may be either direct or indirect, and may also arise from accidental or unsanctioned activities. *Mobil Exploration & Producing, U S, Inc.* (June 20, 1995) at 13; *Appeal of Korea Drilling Co., Ltd.* (January 19, 1989) at 10; *Appeal of Texaco, Inc.* (May 19, 1989) at 6-7.

The national interests to be factored into the analysis under this aspect of the appeal process "are limited to those recognized in or defined by the objectives and purposes of the Act." *Id.* at 16. Broadwater asserts that its proposed project contributes to the national interest.[5] There is, however, nothing about the Broadwater project that cannot be replicated by any of the other planned or projected LNG terminals in the Northeast with substantially fewer adverse impacts. Even if the proposed project met the parameters that it claims describe the furtherance of the national interest, the company has nevertheless presented a proposal that does not outweigh the adverse environmental impacts associated with it.

1. Broadwater's Project Will Have A Major Adverse Impact Upon New York's Coastal Zone

The New York Department of State has carefully reviewed the administrative record and concluded that the major adverse environmental impacts from the proposed Broadwater Project are fundamentally incompatible with numerous New York CZMA polices and regulations because of the major adverse environmental impacts that clearly and substantially outweigh any potential benefits. The record evidence is compelling that this project will also cause an

[5] The preamble to the earlier (1979) iteration of the Secretary's regulations stated that an objection to coastal consistency would not be set aside unless the national interest benefits of a proposal "significantly" outweighed the negative impacts upon coastal zone management resources. 42 Fed Reg 43594. It is noteworthy that NOAA's 2000 revisions to its regulations expressly stated that it was *not* the

unacceptable loss of open space and permanently block recreational use of major areas of the Sound. There will be major negative impacts to water quality and the environment. Finally, there will be substantial negative impacts to traditional uses of the Sound and to important visual and scenic resources. These various adverse impacts are discussed in the context of each of the Long Island Sound Coastal Policies below.

As an initial matter, Broadwater claims that the FERC's canvass of environmental issues pursuant to its obligations as agency lead under NEPA satisfies its obligation to consider environmental matters in this proceeding. This claim is incorrect. No agency of the executive branch (the FERC included) of government, federal or state, and no court has ever confused the differences between a procedural decision-making statute such as NEPA and a substantive statutory regime such as that contained in the CZMA and its associated state-level CMPs. The claim lacks a legal basis and support in the caselaw.

The enactment of the CZMA in 1972 was an expression of the need for both the federal government and the coastal states, with the states' important public trust proprietary interest in the regulation of water bodies and their adjacent and connected lands,[6] to work cooperatively toward a goal of a structured assessment of resources and uses.

> The management program created under the CZMA is intended to be comprehensive. Congress intended that federal-state consultation procedures extend to all phases of the management of coastal resources. To be considered during consultation are such issues as the orderly siting of energy facilities, including pipelines, oil and gas platforms, and crew and supply bases, and the minimization of geological hazards. 16 U.S.C. §§1452(2)(B)-(C), 1453(6). Directing the coastal states to identify potential problems with respect to marine and coastal areas and to prevent unavoidable losses of any valuable environmental or recreational resource as a result of "ocean energy activities,"

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intention of the agency to "fundamentally change or 'weaken' the consistency requirement." 65 Fed. Reg. 77124.

[6] Because Long Island Sound is an estuary bounded by the states of Connecticut and New York, the submerged lands, the waters and resources of this water body are owned as well as managed by the two states

> Congress intended that the states be involved at the initial stages of decision-making related to the coastal zone. 16 U.S.C. §§ 1456a(c)(3); 1456b(a) The Act requires that the coastal state's management program include a "planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing impacts from such facilities " § 1454(b)(8) (emphasis added). In order to anticipate impacts and prevent unnecessary losses in the coastal zone, it is manifest that the consultation process was intended to begin at the earliest possible time.

California v Watt, 520 F. Supp. 1359, 1370 (C.D. Calif. 1981), *aff'd in part and rev'd in part on other grnds.*, 683 F.2d 1253 (9th Cir. 1982), *rev'd in part on other grnds., sub nom., Sec'y of Interior v California*, 464 U.S. 312 (1984).

It was the decision of Congress to invite states into this federal level of environmental review, which is separate, coordinate and programmatically distinct from the NEPA review conducted by the FERC [7] *See Mtn Rhythm Resources v F.E.R.C.*, 302 F.3d 958, 960, 964 (9th Cir. 2002) (Congress has required the FERC to coordinate its licensure decisions with "certain specified federal and state interests" like CWA Section 401 and CZMA certification; CZMA issues "not generally within the mission and expertise of FERC.") To view the CZMA review functions of the State of New York and the Secretary of Commerce on an appeal of a coastal consistency determination without this understanding would throw out of balance the different functions of the agencies pursuant to their distinct statutory obligations.

The United States Court of Appeals for the Second Circuit has recently, and definitively, addressed this issue in *Islander East Pipeline Co v. McCarthy*, 525 F.3d 141 (2d Cir. 2008), and concluded that

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[7] The CZMA "reflects a strong congressional intent to give states and their delegates a more significant management role than the national government" *Watt*, 520 F. Supp. at 1375, quoting Finnell, *Federal Regulatory Role in Coastal Land Management*, 1978 American Bar Foundation Research Journal 173, 249-250

> While the NGA generally preempts local permit and licensing requirements . . the Clean Water Act and Coastal Zone Managements Acts are notable in effecting a federal-state partnership to ensure water quality and coastal management around the country, so that state standards approved by the federal government become the federal standard for that state. . . Consistent with this scheme, the two Acts require applicants for federal permits to provide federal licensing agencies such as the FERC with certifications from affected states confirming compliance with local standards.

Id. at 143-144, Citations omitted.

The CZMA thus guarantees that in states having approved CMPs, such as New York, there will exist effective—not pro forma—regulation of activities within the coastal zone notwithstanding the fact that a given activity is subject to federal licensure proceedings or that the activity is proposed to be conducted by an agency of the federal government itself.[8]

Unacceptable Loss of Public Trust Open Space - Policies 1, 3, 9

Policy 1 of New York's Long Island Sound Coastal Polices states that its goal is to "[f]oster a pattern of development . . that enhances community character, **preserves open space,**

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[8] "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." *Watt*, 520 F. Supp. at 1371-72. Congress articulated the point in the 1976 CZMA amendment process in the following manner:

"Section 307 is the portion of the Act which has come to be known as the 'Federal consistency' section. It assures that once State coastal zone management programs are approved and a rational management system for protecting, preserving, and developing the State's coastal zone is in place (approved), the Federal departments, agencies, and instrumentalities will not violate such system but will, instead, conduct themselves in a manner consistent with the States' approved management program. . . As energy facilities have been focused upon more closely recently, the provisions of section 307 for the consistency of Federal actions with the State coastal zone management programs has *[sic]* provided assurance to those concerned with the coastal zone that the law already provides an effective mechanism for guaranteeing that Federal activities, including those supported by, and those carried on pursuant to, Federal authority (license, lease, or permit) will accord with a rational management plan for protection, preservation and development of the coastal zone. One of the specific federally related energy problem areas for the coastal zone is, of course, the potential effects of Federal activities on the Outer Continental Shelf beyond the State's coastal zones, including Federal authorizations for non-Federal activity, but under the act as it presently exists, as well as the S. 586 amendments, if the activity may affect the State coastal zone and it has an approved management program, the consistency requirements do apply." S. Rep. No. 94-277 (1975) at 36-37.

makes efficient use of infrastructure . . and **minimizes adverse effects of development**." (Emphasis added.) Policy1.4 requires that the Department of State evaluate proposals in the context of maintaining "natural, recreational, and open space values" and mandates avoiding "loss of economic, environmental, and aesthetic values . . ." Broadwater's plan violates both aspects of Section 1.4.

Broadwater clearly violates these policies. For example, policy 1.2 requires "reserv[ing] coastal waters for water-dependent uses." The Broadwater project, however, will automatically impact existing water dependent uses because the FSRU and the LNG tankers will be surrounded by exclusion zones barring *all* recreational and commercial shipping access to several square miles of the Sound. The FSRU will be surrounded by an exclusion zone 1210 yards in every direction from the anchoring system. WSR, p. 3. The individual LNG carriers will have an oval shaped exclusion zone 2 miles ahead of the bow of the vessel, 1 mile behind from the stern and 750 yards on either side. WSR, p. 3-4. Sea-borne commerce and recreational boating are defined water dependent uses under the Policies and will be completely excluded from the security zones -- thus banning, not preserving, water dependent uses in these areas of the Sound. Section 1.4 of the polices requires that the Department of State evaluate proposals in the context of maintaining "natural, recreational, and open space values." Furthermore, this same section also mandates avoiding "loss of economic, environmental, and aesthetic values. . ." Broadwater's plan violates both aspects of Section 1.4.

In sum, policy 1 requires DOS to foster development that "enhances community character," maintains "traditional waterfront communities" and "natural areas [and] open space" and minimizes potential cumulative impacts. Broadwater's project is fundamentally incompatible with these policies in that it is a comprehensive assault on traditional community

character and will result in the complete loss of access to important areas of the Sound for any recreational or commercial use. Finally, it, along with the numerous other utility projects in the Sound, will together permanently alter significant areas of natural habitat and pose the threat of even greater damage going forward.

Impacts to Visual and Aesthetic Quality

Coastal Zone Policy 3 expressly states that "[v]isual quality is a major contributor to the character of the Long Island Sound region and its communities, and the primary basis for public appreciation of the Sound's landscape" and that the "intent of this policy is to protect and enhance visual quality." In order to protect the visual quality of the Sound, Section 3.1 mandates "minimizing introduction of discordant features" in order to "[p]rotect scenic values associated with . . . public trust lands. . . ."

The importance of maintaining the scenic quality of a coastal zone area is great. Tourism and overall quality of life are directly related to visual and scenic quality and, as noted earlier, tourism is a major part of the $5.5 billion a year in economic value generated by Long Island Sound. Furthermore, the environmental regulators of New York and Connecticut have each identified the preservation of the scenic quality of the Sound as a matter of public importance, particularly with respect to public trust lands.

It would be difficult to imagine a more direct and adverse impact to the scenic and visual quality of the public trust lands and waters of the Sound than the Broadwater Project. The sheer scale of the FSRU will blight the visual quality of miles of coastline of the Sound. At 1200 feet long, 200 feet wide and rising more than 100 feet in the air, it will be visible simultaneously from both shores as the largest man-made object in the Sound, permanently scarring the horizon. From the thousands of large and small ships passing within one or two miles, the visual impact

will be overwhelming. Unlike the existing open seascapes that have captivated artists, residents and tourists, the FSRU will be, first and foremost, an industrial site, an utterly discordant feature that cannot be harmonized in scale or shape to anything currently in or around the Sound.

Broadwater claims that its project will simply look, from shore, like a conventional large ship on a typical passage through the Sound. But the project is not a ship and is not going anywhere. It will be a permanent eyesore, not only from the shore but also from the tens of thousands of recreational boats and numerous cruise line ships that use the Sound. The proposal is simply incompatible with the carefully preserved character of Long Island Sound, as the DOS has correctly concluded.

Direct Impacts to the Marine Ecosystem and Water Quality, Policies 1, 6

Further, policy 1.5 emphasizes the need to "[m]inimize the potential for adverse impacts of types of development which individually may not result in a significant adverse environmental impact, but when taken together could lead to or induce subsequent significant adverse impacts."

The Broadwater FSRU, together with its 20+ miles of underwater pipeline, will itself have a massive impact on the seafloor and water quality in the Sound. However, Broadwater is not the only project that has the potential to impact coastal resources in the region. Starting in 1967 with the construction of seven power lines from Northport, Long Island to Norwalk, Connecticut, there have been an ever increasing number of energy projects in the Sound that threaten to turn the estuary into a giant utility corridor. *See*, Task Force Report, p. 12; State of Connecticut Department of Environmental Protection, denial of Water Quality Certification under Section 401 of the Clean Water Act for Islander East Pipeline Project, dated December 19, 2006 (DEP Islander East Decision), pp. 47-48. The Iroquois pipeline was installed from Connecticut to Long Island in 1991. The damage from the anchor marks and other damage

associated with that pipeline can still be seen and the affected area cannot be used for shellfishing purposes. DEP Islander East Decision, p. 43, Task Force Report, pp 80, 82. The Cross-Sound Cable Company electric transmission line cuts through from New Haven, Connecticut to Shoreham, Long Island and a depression along the cable installation line up to 3 feet deep and 8 feet wide can still be seen. Task Force Report, p. 78. The Islander East project is intended to build another 20+ mile long natural gas pipeline from Branford, Connecticut to Shoreham, Long Island. *Id.* at 85. The Eastchester Project includes a natural gas pipeline along the north shore of Long Island. *Id.* at 86. The Sound has been repeatedly and heavily impacted by a never-ending succession of utility projects each of which has scarred the seafloor and added cumulatively to the damages inflicted on the marine ecosystem.

Policy 6 is a key element in New York's efforts to protect the marine environment of Long Island Sound. This policy mandates that DOS "[p]rotect and restore the quality of the Long Island Sound ecosystem" and specifically lists biological and physical components of the overall ecosystem. Policy 6.1 particularly notes the need to "[a]void permanent adverse changes to ecological processes" and to "[a]void significant adverse changes to the quality of the Long Island Sound ecosystem as indicated by physical loss . . . of ecological components." As the DOS's Decision makes clear: "The natural resources of Long Island Sound are recognized as important to the region and the nation by several federal, state and regional programs" and must be protected from precisely the threat posed by Broadwater. Decision, p. 29.

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.

Stratford Shoals

As noted in the Decision, the Stratford Shoals is an important geomorphological feature that contains important benthic communities. The DOS found specifically that the Stratford Shoals Middle Ground area is unique and influences the distribution of habitats and the marine life that lives in them. (Decision, p. 30). The Decision specifically refers to the "fragile balance of ecosystem characteristics present at this unique site" and its sensitivity to disturbances. Id.

While Broadwater commissioned a minor and superficial scan of the proposed pipeline route over the Stratford Shoals, it completely missed the northern coral and sponge communities unique to the region and located in the vicinity of its planned pipeline. Numerous commentators, however, corrected this oversight and provided important technical information that demonstrated not only that these communities existed, but that they are clearly threatened by any disturbance to their habitat. Specifically, the planned pipeline would cut through 4,000 feet of the Shoals, dispersing vast amounts of sediment and irreparably damaging the seafloor. Worse, there is no assurance that this plan would even succeed in installing the pipeline. So little work has been done to characterize this area that Broadwater has been forced to admit that it does not know if its planned installation technology will work. As a result, it has said that it may have to blast a corridor thorough the Shoals, with no end of potential consequences.

Consequently, the Decision concluded that the planned 4,000 feet of underwater pipeline would have "significant adverse effects" on these communities. (Decision, p. 30). The NY DOS also noted that the "FEIS . . . incorrectly characterizes" important facts about the northern coral community. (Decision, p. 31). The Decision refers to "the FEIS' cursory analysis on the importance of the Stratford Shoals/Middle habitat and the inadequate discussion of potentially

significant effects on fish, wildlife and other living resources that would be caused by pipeline construction." (Decision, p. 32).

While Broadwater claims that damage to the seafloor will simply fix itself in short order,[9] scientific analysis of the impact of pipeline installation on the benthic habitat of Long Island Sound uniformly demonstrates that the damage to the marine environment is permanent and irreversible. The State of Connecticut has long and uniformly negative experience with pipeline construction and past experience in the Sound has demonstrated that the effects of underwater construction operations *persist for decades* and effectively eliminate any possibility of commercial shellfishing operations into the foreseeable future (Testimony of Dr. L. Stewart before the Connecticut Siting Council, April 12, 2002, p. 192 (Ex. 3); Islander East FEIS, p. 3-70.) The FEIS produced by FERC for the Islander East Pipeline Project fully acknowledges that natural gas pipeline installation causes permanent "long-term conversion of shellfish habitat." Islander East FEIS, Dckt. No. CP01-384-000, p. 3-71. The Connecticut Department of Environmental Protection has noted that damage caused by installation of the Iroquois pipeline in 1991 is persistent and long-lasting. *See*, DEP Islander East Decision, p. 39, Islander East FEIS, Dckt. No. CP01-384-000, p. 3-70. Further, there is uncontroverted evidence that anchor scars up to six feet deep and other holes left by dredging and lay barges from the Iroquois project still exist and prevent use of the area for shellfishing, years after construction was completed (DEP Islander East Decision, pp. 43-48; Transcript of testimony of L. Williams, Connecticut Siting Council, Islander East application, Dckt. No. 221, 4/17/02 at 91-96 Ex. 4.) Dr. Lance Stewart, a benthic ecologist, testified that the "continuum of trenching and anchor scars" could

[9] Broadwater's Brief, pp. 27-28.

create entrapment and anoxic depressions, stating that this sort of "pitting" of the substrate was most harmful. *Id*, 4/12/02 at 185-187 (Ex 5)

As the Connecticut DEP has determined: "Time does not necessarily heal the scars left by underwater utility installation." DEP Islander East Decision, p. 47. The DEP continues:

> Based on agency experience, it is difficult, if not impossible to restore the seafloor to pre-construction conditions because depressions in the sediment become areas of either erosion or deposition. . . . [D]redging and general excavation of the substrate breaks up the compact fine grain sediment and allows water to "fluidize" the consistency. Once these sediments are disturbed by dredging, they will no longer exhibit the consolidation, high density and cohesiveness of the undisturbed, in-situ sediments and they would be easily eroded in areas of high current. Alternatively, depressions left on the seafloor in areas of lower current velocity may become traps for fluidized sediments. This phenomenon is mentioned in the [Islander East] FEIS at 3-65 regarding impacts associated with anchors and cable sweep: "These long lasting depressions can act as sediment traps that develop considerably different communities from the original deposits (Hall, 1994). The persistence of these depressions would represent a long-term conversion of benthic habitat.

DEP Islander East Decision, p. 47. There is more than abundant evidence for the "persistence" of impacts associated with utility projects. The DEP noted that an aerial photo taken on November 1, 2001 clearly shows visible impact scars from the 1967-1969 installation of the Northeast Utilities cables between Connecticut and Long Island. *Id.* pp. 47-48. *See also* Task Force Report, pp. 74-77 (evidence of continued visibility of habitat damage 35 years after installation.)

Pipeline projects in New York have also had unequivocally negative long-term impacts associated with pipeline construction. As noted in a document prepared by the National Marine Fisheries Service ("NMFS"), adverse impacts from underwater pipeline construction are substantial and long-lasting.

> Evidence of this from the Hudson River collected from benthic profiling performed by LaMont-Doherty Geological Observatory for the State of New York (New York State Department of Environmental Conservation 2003) indicates that other utility crossings, undertaken in the Hudson even decades ago, continue to

> have discernible adverse impacts on the aquatic resources in the project alignments. As a specific example, benthic profiling of a water line installation between Newburgh and Wappinger in 1974 indicates that the site has not fully recovered to preconstruction conditions.

Letter, Dr. Hogarth to NOAA General Counsel for Ocean Services, June 3, 2003, p. 2 (Ex. 1). Therefore, all evidence continues to show that once the seafloor of the Sound is damaged by anchor scars and pipeline trenches, it never returns to its natural state and the marine resources in the trench area suffer for decades.

Entrainment and Impingement

The planned project will include an average withdrawal of more than 28 million gallons of water each day. The FEIS calculates that impingement or entrainment will kill between 49.8 and 101.9 million fish eggs and another 67.4 to 173.1 million fish larvae, all from a designated estuary of national significance used by important aquatic resources. Decision, pp. 33-34. Even Broadwater has admitted that use "of Sound water will result in impingement and entrainment of Long Island Sound planktonic organisms" and that "[m]arine species that may be impacted by the construction of the Project are those associated with benthic habitats, including demersal finfish, shellfish, early benthic-phase lobsters, and benthic communities." Supplement, p. 28. Broadwater is similarly compelled to acknowledge that there will be "[i]mpacts on Essential Fish Habitat (EFH) during construction. . . ." Supplement p. . Finally, the New York Department of Environmental Conservation (NY DEC), in a letter to the Commission dated March 27, 2008, highlighted numerous other areas where the FEIS has minimized or ignored important information. For example, NY DEC points out that the "FEIS inadequately considers the project's displacement of traditional commercial and recreational water-dependent uses in Long Island Sound," as well as discounting commercial fishing and lobstering interests. Id. p. 1.

Similarly, the NY DEC notes that the FEIS "incorrectly concludes that [fish egg and larvae impingement] impacts are of minimal importance to the Sound." Id. p. 2.

It is simply incomprehensible that Broadwater continues to assert that its project complies with Policy 6. The continuous process of daily destruction of eggs and juvenile aquatic organisms in a designated EFH region is enough to require denial of this project.

Loss of Public Access and Public Trust Lands

The security zones for the FSRU alone result in the loss of 1.4 square miles of the Sound. Additionally, the large security zones around the LNG carriers will result in the repeated temporary loss of even greater areas. Because these moving security zones will cross much of the Sound every few days, they may even have a greater impact on existing water dependent uses through the repeated disruption and delay of recreational and commercial boating and fishing.

Policy 9 directs DOS to "maintain and improve existing public access," "increase public access throughout the Sound," and "capitalize on all available opportunities to provide additional visual and physical public access . . ." Policy 9.3 is even more specific and refers to the need to "[p]reserve the public interest in and use of lands and waters held in public trust by the state, . . and the towns in Nassau and Suffolk counties" and the need to "[l]imit grants, including conversion grants, in fee of underwater lands to exceptional circumstances." Policy 9 is particularly important because it is rooted in a fundamental aspect of New York's sovereign interests, specifically, the interest in protecting public trust land for the benefit of its citizens. The law is clear in this regard--the land underlying the Long Island Sound is owned by the respective states, New York and Connecticut, and not by the federal government. Thus, from the high tide mark on the New York side of the Sound to the border with Connecticut, the

submerged lands under the Sound belong to, and are held in trust by, the State of New York for the benefit of its citizens. See, *State v. Sargent & Company*, 45 Conn. 358, 372 (1877).

No project could more violate policy 9 than Broadwater. As extensively discussed above, this project will directly ban all public access to approximately 1000 acres of public trust lands held by the states of New York and Connecticut and Suffolk County. This project will further degrade visual access for more than 40 miles of New York coastline and it will destroy access to important portions of the Sound for recreational and commercial use of any kind by anyone except Broadwater. Broadwater continually asserts that the Sound is already subject to industrialization. This argument is specious because the fact that the Sound has been damaged and threatened by industrialization does not mean that it can stand even more damage of a uniquely harmful kind. The FSRU is unique and immense. Further, unlike conventional commercial tankers, it is not a fleeting or transitory visual impact, but permanent and stationary. It is fundamentally different from any existing impact and utterly discordant with existing visual seascapes.

Policy 11

Policy 11 notes that "[c]ontinued use of the Sound's living resources depends on maintaining long-term health and abundance of marine fisheries resources and their habitats . . . " Policy 11.3 in particular encourages maintenance of a "stable commercial fishing fleet" and policy 11.4 urges promotion of recreational use of marine resources.

Of course, the flat ban on commercial and recreational fishing in the area around the FSRU is incompatible with policy 11. Beyond this, as noted above, the withdrawal of 28+ million gallons of water per day will result in the destruction of massive numbers of important marine organisms. As a result, the NY DEC found "that the loss of 275 million eggs, larvae and

juveniles from impingement and entrainment . . . [to] be a significant adverse impact to the aquatic ecology of Long Island Sound." (DEC Letter, dated March 17, 2008, p. 2). This extermination of huge numbers of fish eggs and immature marine wildlife will occur in a NMFS designated EFH area which is used by 19 important species. Decision, p. 51

It is impossible to accept the wholesale destruction of marine young as consistent with "maintaining long-term health and abundance of marine fisheries." Furthermore, even if the indiscriminant slaughter of larvae and young organisms was consistent with maintaining fish populations, the physical disruption of fishing areas by the permanent establishment of the FSRU and the periodic shutdown of the Race and elsewhere render Broadwater completely inconsistent with the Policy 11 goal of protecting and preserving commercial and recreational fishing.

It is clear, the FRSU and tankers will destroy millions of important marine organisms and seriously compromise commercial and recreational use of the Sound for decades. All of this is in direction opposition to the goals of Policy 11.

Conclusion

New York's Long Island Sound Coastal Policies are the detailed and considered result of careful regulatory planning and are closely matched to important public goals. They are also part of applicable federal law. The Broadwater project will result in serious damage to vital coastal resources and permanently convert important areas of public trust natural resources to private use in contravention of these policies. Even assuming the need for the project as described by Broadwater, other alternatives can meet that need with much less damage to the Long Island Sound. Accordingly, Broadwater's request for determination of consistency with the CZMA must be denied

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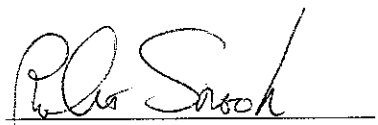

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