



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

JUN 20 2008

VIA FAX AND U.S. MAIL

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

Susan Watson
General Counsel
New York Department of State
99 Washington Avenue
Albany, NY 12231-0001

Re: Broadwater Energy, LLC & Broadwater Pipeline LLC
Federal Consistency Appeal

Counsel:

On June 6, 2008, Broadwater Energy, LLC and Broadwater Pipeline LLC (collectively, Broadwater) filed an appeal with the Secretary of Commerce (Secretary), pursuant to the Coastal Zone Management Act (CZMA). Broadwater appeals an objection raised by the State of New York, relative to the proposed construction of a floating liquefied natural gas (LNG) terminal and associated natural gas pipeline, located in the New York waters of Long Island Sound.

The Secretary is responsible for deciding appeals filed under the CZMA. NOAA's Office of the General Counsel assists the Secretary in carrying out this responsibility and has been delegated certain responsibilities associated with processing consistency appeals, including ruling on procedural motions and establishing briefing schedules.

PROCEDURAL MOTIONS

As a threshold matter, the parties have filed several procedural motions associated with the appeal that are addressed below.

Extension of Briefing Page Limits

In a motion accompanying its appeal, Broadwater has asked that the length of the parties principal and reply briefs be extended. Specifically, Broadwater requests that the page limit for principal briefs be extended from 30 to 100 pages, and that the length of any



reply brief be extended from 15 to 50 pages. Broadwater argues that this extension is necessary given the complexity of the record that must be discussed and the need to address two Project alternatives New York has proposed. New York opposes the motion, asserting that an extension is unnecessary. Should Broadwater's motion be granted, however, New York requests an additional 30 days in which to file its principal brief, arguing it will need additional time to respond to Broadwater's principal brief.

Department regulations governing the processing of federal consistency appeals establish page limits for briefs filed by the parties. Under these regulations, principal briefs shall not exceed 30 pages (double spaced) and any reply brief shall not exceed 15 pages (double spaced). 15 C.F.R. § 930.127(b). These page limits are to help ensure that the Secretary meets strict appeal processing deadlines established by the Energy Policy Act of 2005. The Secretary does have discretion to extend the length of any briefs for good cause. 15 C.F.R. § 930.127(g).

Based upon the record before me, good cause does not exist to extend the governing page limits, to the extent proposed by Broadwater. While the record and issues associated with Broadwater's appeal are likely complex, Broadwater has failed to provide a sufficient showing why it requires page limits that more than triple existing requirements. Indeed, with two recent appeals involving LNG projects, the parties did not require such an extension. Accordingly, Broadwater's motion to extend the page limits on principal briefs to 100 pages, and any reply brief to 50 pages is denied.

Having said this, Broadwater's need to potentially address two alternatives proposed by New York justifies some level of extension. Accordingly, this Order hereby authorizes parties to submit principal briefs not to exceed 50 pages (double spaced), and a reply brief not to exceed 25 pages (double spaced).

Given the page limit extension afforded to the parties, there is no need to provide New York with an extension of time in which to file its principal brief. The page limit extensions established within this Order are not so great as to necessitate granting New York additional time to prepare and file its principal brief. Moreover, granting New York an extension of time could potentially jeopardize the Secretary's ability to issue a decision within the deadlines established by statute. Accordingly, New York's motion for an additional thirty days in which to file its principal brief is denied.

Acceleration of Decision Record Deadline

In its notice of appeal, Broadwater requests that development of the decision record be reduced from 160 days to 90 days. Broadwater maintains that the parties have already spent a substantial amount of time examining the Project during the licensing process conducted by the Federal Energy Regulatory Commission (FERC), obviating the need for an extended period of time to further develop the decision record on this appeal. New York opposes this motion, arguing that careful consideration of the complex issues associated with this Project will require the full 160 days allotted by statute.

Broadwater's motion is denied. As Broadwater notes in its motion to extend the page limit for its principal and reply brief, the record developed by FERC is over 41,000 pages long and involves many complex issues, including two Project alternatives offered by New York. Moreover, the issues considered by the Secretary differ from those examined by FERC during its licensing process. Premature closure of the decision record risks inadequate consideration of the many issues on appeal.

Premature Filing of Broadwater Appeal

Finally, New York moves that the Secretary consider Broadwater's notice of appeal premature, because the FERC licensing process has yet to run its course. On March 20, 2008, FERC issued Broadwater an order under section 3 of the Natural Gas Act to proceed with the Project subject to multiple conditions. New York has filed motions with FERC requesting reconsideration, which FERC has yet to act upon.

New York's motion is denied. The State's motion erroneously presumes that an appeal to the Secretary may only commence after FERC's licensing proceeding has run its course. Under the Coastal Zone Management Act (CZMA), however, no such precondition is envisioned. Under the CZMA, a Project applicant must provide the state with a consistency certification within its application for a Federal license or permit. 16 U.S.C. § 1456(c)(3)(A). At the same time the applicant includes the consistency certification in its application, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. *Id.* Once the consistency certification and necessary data and information are received by a state, a state then has six months in which to review the Project for consistency with its coastal management program. *Id.* This process plainly anticipates that an appeal to the Secretary may be filed before the conclusion of the FERC licensing process.

BRIEFING SCHEDULE

The following briefing schedule will govern this appeal:

- * July 27, 2008 New York shall file any objection to the consolidated record submitted by Broadwater. Any objection shall identify specific documents either missing from the record or inappropriately included within the record, together with all arguments supporting its objection. New York shall provide both Broadwater and this office with copies of any additional documents it believes should be included within the consolidated record.

- * July 7, 2008 Broadwater shall file its principal brief and appendix.

- * August 6, 2008 New York shall file its principal brief, accompanied by any supplemental appendix, if required.
- * August 26, 2008 Broadwater may file a reply brief, accompanied by any supplemental appendix, if required.

The deadlines listed above will not be continued absent compelling reasons. At the conclusion of this schedule, we will, to the extent necessary: a) resolve any disputes concerning the consolidated record; and b) identify any additional information necessary to rule on this appeal.

Parties are directed to briefing and filing requirements contained in regulations published at 15 C.F.R. § 930.127. Questions should be directed in writing to Ted Beuttler, NOAA Office of General Counsel for Ocean Services, at ted.beuttler@noaa.gov, with a copy to the opposing party.

Sincerely,



Jane Luxton
General Counsel