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July 23, 2008

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

Re: New York State's Response to Broadwater's Motion to Supplement the Decision Record

Dear Secretary Gutierrez:

The two ocean alternatives identified in NYSDOS's April 10, 2008 Objection letter are within the general vicinity that Broadwater and NYSDOS have been mapping and discussing for more than one year. In rendering its consistency determination, NYSDOS attempted to add greater specificity by adding approximate coordinates to the ocean sites. The nautical coordinates for Alternative 1 (Long Beach) closely approximate the location S1, which has been discussed extensively by NYSDOS and Broadwater.<sup>1</sup> The nautical coordinates for Alternative 2 were chosen in response to Broadwater's desire for greater water depth to accommodate the mooring of the FSRU and berthing of LNG carriers. Those waters are approximately 20 feet deeper than at S2 and are intended to be in the separation zone, just outside the Ambrose to Nantucket Traffic Lane.

While NOAA regulations impose no obligation on states to actively assist applicants to design alternatives during the consistency review,<sup>2</sup> NYSDOS early on provided Broadwater with a study of ocean conditions, prepared by its consultant Battelle Memorial Institute, demonstrating the feasibility of various alternative ocean locations. Based on Battelle's original

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<sup>1</sup> In NYSDOS's decision, coordinates for these two general locations were provided, in addition to general descriptions, as 13 miles south of Long Beach NY and 22 miles south of Fire Island Inlet. The slight change in distance in each case reflects a slight adjustment to improve water depth for the FSRU.

<sup>2</sup> In accordance with 15 CFR § 930.56, since Broadwater made its initial presentation to NYSDOS early in the decade, NYSDOS has offered its views on the project, impacts on enforceable policies and the means for ensuring that the proposed activity would be conducted in a manner consistent with the management program.

studies, Broadwater and NYSDOS generated numerous maps depicting the two Atlantic Ocean sites.

From the initial meeting between NYSDOS and Broadwater in April 2007, siting an FSRU or a Shuttle Regasification Vessel (SRV) in the Atlantic Oceans was foremost in the discussions. The meetings included assessments of the wave conditions in the general vicinity of the two proposed Atlantic sites so they could be compared to the operating criteria that Broadwater was using for a Long Island Sound location.

Broadwater could have, and indeed should have, introduced the 20 years wave analysis of Moffat and Nichol, in the series of meetings during the consistency review. Broadwater's consultants used NYSDOS's meteocean data in the production of its study for Alternative 1.<sup>3</sup> Importantly, Moffat and Nichol chose NDBC Buoy 44025 for Alternative Site-2, noting that it is closer to Site-2 than WIS-A119. The close proximity of the NDBC buoy to Alternative Site 2 and S2 indicates that Broadwater could have submitted this documentation at any time. Instead, it chose to submit it for the first time in this consistency appeal. In Supplemental Document I, Broadwater proposes introducing a wave study for ocean area it has examined for more than a year. This study was prepared after the NYSDOS consistency determination was rendered.

The US Secretary of Commerce may supplement the consolidated record as described in 15 CRF § 930.130(a)(2) in two ways. The Secretary may require any supplemental information specifically requested by the Secretary to complete a consistency review under the CZMA, or any clarifying information submitted by a party to the proceeding related to information in the consolidated record compiled by the lead Federal permitting agency. See Final Rule, Coastal Zone Management Act Federal Consistency Regulations 71 FR 788, 799-800. If the Secretary chooses to request that Broadwater prepare new studies which require independent verification, he would do so. He has not done so.

The material Broadwater proposes to submit differs significantly from other clarifying information accepted by the US Secretary of Commerce during consistency appeals. Based on a review of the NOAA correspondence, most clarifying information accepted into the decision record are official reports such as the Coast Guard's LOR, the official filings by the parties, official changes in project designs, comment letters from federal agencies and earlier studies relied upon by federal or state agencies in making their decisions.

Broadwater's material does not fit within the category of materials determined by the US Secretary of Commerce to clarify the Consolidated Record. It is not an official document or filing with an official agency. Supplemental Documents I, II and III were produced after the consistency determination. The new wave data and self-analysis is not independently verifiable without further study. Most of the documents were generated to address an argument of Ground 1 on this consistency appeal, rather than to clarify materials in the Consolidated Record. For that reason, they should be omitted from the decision record.

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<sup>3</sup> "The hindcast wave data at WIS-A124 was used for Alternative Site-1 in this study since it was used by Battelle in the New York Department of State's document." Moffat & Nichols, "Alternative Site Operability Study" Executive Summary p. SD-8.

If Broadwater's studies are accepted into the decision record, NYSDOS requests that it be given additional time to address those documents in its principal brief or be given the opportunity to submit a supplemental brief and additional studies after service of its principal brief and Broadwater's reply brief.

**WHEREFORE**, Broadwater's motion to include Supplemental Documents I, II, and III in the decision record should be denied. In the event the Secretary grants the motion to enter any of the supplemental documents (except Supplemental Document IV) into the decision record, NYSDOS requests an extension of 45 days beyond its August 7, 2008 principal brief submission deadline, to prepare a counter study and, additionally, that NYSDOS be provided with the opportunity to submit a 25 page double-spaced supplemental brief by which arguments may be advanced as to the veracity and relevancy of the supplemental documents.

Respectfully Submitted,



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