

CP06-54-000, et.

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FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

OFFICE OF THE CHAIRMAN

April 17, 2007

The Honorable Richard Blumenthal
Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Dear Attorney General Blumenthal:

I am writing to you in response to your March 26, 2007 letter regarding the Broadwater LNG Project (Federal Energy Regulatory Commission Docket Nos. CP06-54-000, et al.).

Your letter mentions several submittals to FERC by the Connecticut Department of Environmental Protection (CTDEP) and the Connecticut Attorney General regarding Coastal Zone Management Act (CZMA) compliance of the Broadwater LNG Project. We have previously responded to this issue in the FERC staff's Draft Environmental Impact Statement (DEIS) and in correspondence with CTDEP and the Connecticut Governor's office.

The Coast Guard Waterway Suitability Report indicated that Connecticut State waters would be included in the U.S. Coast Guard's proposed safety and security zones. As you should be aware, FERC does not establish or authorize safety and security zones around vessels or offshore facilities. That is the responsibility of the Coast Guard. Consequently, while the scope of our National Environmental Policy Act review includes the proposed safety and security zones, the CZMA review of FERC's authorization does not. The Coast Guard will ensure compliance with the CZMA for its action.

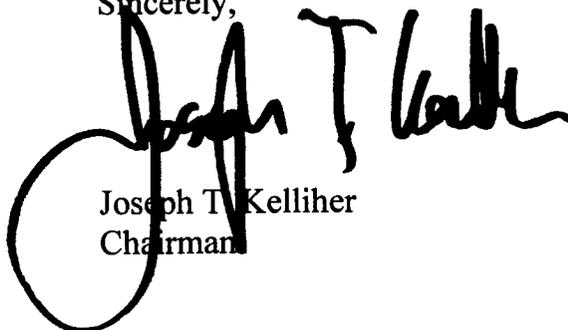
This position is consistent with the interpretation of the Coast Guard counsel (see enclosed Coast Guard memorandum dated December 1, 2005, and discussion on page 3-103 of the DEIS) and with our discussions with the National Oceanic and Atmospheric Administration's Office of Ocean and Coastal Resource Management. This is also the position that we have reiterated in every correspondence with CTDEP and other state agencies. Your letter makes no new argument and offers no legal rationale that would alter our interpretation of FERC's statutory obligations under the CZMA.

2007-00065

Please know the Commission staff is presently analyzing the many comments we received on the draft EIS. We are continuing our review work with the Coast Guard, and after careful consideration, the staff will incorporate its finding in the final EIS. After the final EIS is completed, it will be made part of the complete record, presented to the Commission, and then be considered by the Commission in its decision for this project.

If I can be of further assistance in this or any other Commission matter, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph T. Kelliher". The signature is written in a cursive style with a large, prominent loop at the beginning.

Joseph T. Kelliher
Chairman

Enclosure



Commandant
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: G-LEL
Phone: 202-267-6006
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5090
1 Dec 2005

MEMORANDUM

From: T. Hayes 
COMDT (G-LEL)

Reply to: LT Seely
Attn of: 202-267-0078

To: CAPT Kenney
CGD One(dl)

Subj: Broadwater LNG Terminal

- Ref:
- (a) Coastal Zone Management Act of 1972, 16 U.S.C. § 1451, et seq.
 - (b) Coastal Zone Management Act Federal Consistency Regulations, 15 C.F.R. Part 930
 - (c) COMDTPUB P16700.4 Navigation and Vessel Circular No. 05-05, Guidance on Assessing the Suitability of a Waterway for Liquefied Natural Gas (LNG) Marine Traffic 14 Jun 05.
 - (d) Interagency Agreement among the Federal Energy Regulatory Commission, U.S. Coast Guard, and Research & Special Program Administration for the Safety and Security Review of Waterfront Import/Export Liquefied Natural Gas Facilities, signed Feb 2004.

1. Question: You have asked whether requirements of the Coastal Zone Management Act (CZMA) Reference (a) apply to a letter of recommendation (LOR) issued by the Coast Guard for the proposed Broadwater Liquefied Natural Gas facility to be constructed in New York state waters in Long Island Sound.¹ For the reasons outlined below, I conclude that Connecticut has waived its right to review the LOR for consistency with the CZMA, and the Coast Guard has no obligation to take any action for compliance with the CZMA.

2. Background/Analysis: Broadwater Energy has applied to the Federal Energy Regulatory Commission (FERC) to construct a facility in state waters that would receive shipments of LNG via tanker vessels.

3. Pursuant to authority under the Natural Gas Act², the FERC is responsible for authorizing the siting and construction of LNG facilities located in state waters.³ The National Environmental Policy Act (NEPA) requires FERC to prepare an environmental impact statement (EIS) as part of the licensing process. FERC and the Coast Guard entered into an agreement (Reference (d))

¹ For guidance and background on LOR see Reference (c): COMDTPUB P16700.4 Navigation and Vessel Circular No. 05-05, Guidance on Assessing the Suitability of a Waterway for Liquefied Natural Gas (LNG) Marine Traffic, 14 June 2005.

² 15 U.S.C. § 717, et seq.

³ Pursuant to the Deepwater Port Act, the U.S. Maritime Administration has been delegated authority to issue licenses to construct and operate proposed LNG facilities located beyond state territorial waters. The Coast Guard works jointly with the Maritime Administration to process deepwater port applications.

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whereby the Coast Guard is a cooperating agency for the preparation of the EIS—serving as a subject matter expert for marine safety and security.

4. In addition to its cooperating agency responsibilities, the Coast Guard has an independent obligation to issue an LOR. *See 33 C.F.R. Part 127*. An LOR is a determination made by the Captain of the Port (COTP) as to the suitability of waterways for LNG marine traffic as it relates to the proposed project.

5. In accordance with 33 C.F.R. § 127.007, Broadwater Energy submitted to the Coast Guard a letter of intent (LOI) to construct its proposed facility. On August 16, 2005, the Coast Guard published a Federal Register notice and request for comments on preparation of an LOR for the proposed Broadwater facility.

6. On October 6, 2005, the State of Connecticut Department of Environmental Protection (Connecticut) submitted comments on both FERC's public notice for preparation of an EIS and the Coast Guard's August 16th notice to prepare an LOR. (Enclosure 1) The Connecticut letter raised concerns that any federal licensing or permitting action must be done in a manner consistent with the Coast Zone Management Act of 1972⁴ (CZMA). The letter also specifically requests consideration of the impacts on commercial vessels, recreational and commercial fishing, and pleasure crafts due to anticipated safety and security zones to be established in and around the proposed facility and LNG vessel transit routes.

7. The CZMA requires federal activities that have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone to be consistent to the maximum extent practicable with a state's federally approved Coastal Zone Management Plan (CZMP). 16 U.S.C. § 1456(c)(1)(A). Regulations guiding compliance with the CZMA are promulgated at 15 C.F.R. Part 930.

8. 15 C.F.R. Part 930 Subpart D gives the requirements for determining consistency with a CZMP for activities requiring a federal license or permit. Although an LOR is not on its face a federal license or permit, 15 C.F.R. § 930.51 defines a federal license or permit as including "any required authorization, certification, approval, lease or other form of permission which any Federal agency is empowered to issue." Because an applicant is not able to construct or operate an LNG facility without an LOR from the Coast Guard, an LOR should be considered a federal permit for the purposes of the CZMA regulations.⁵

9. CZMA regulations require a state to list federal license or permit activities that affect any coastal use or resource and which the state would like to review for consistency with its approved plan.⁶ Preparation of an LOR is not listed in Connecticut's approved management plan. For non-listed activities, a state must notify the National Oceanic and Atmospheric Administration (NOAA) Office of Coastal Resource Management (OCRM), the permitting federal agency, and the applicant of the unlisted activities affecting any coastal use or resource that the state would

⁴ 16 U.S.C. § 1451, et seq.

⁵ In *State of New Jersey, Department of Environmental Protection and Energy v. Long Island Power Authority*, 30 F.3d 403, (3rd Cir. 1994), the Third Circuit Court of Appeals held that an energy company's voluntary submission of an operation plan to the Coast Guard for review for compliance with applicable law was not a license or permitting activity triggering the requirements of the CZMA. The company's submission was not required by law thus, the Coast Guard did not take a licensing or permitting action. The Broadwater LOR provides the exact type of distinction that the Court in *Long Island Power* was trying to make. The LOR is a federal action for purposes of CZMA because the applicant is required to obtain one from the Coast Guard.

⁶ 15 C.F.R. § 930.53

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like to review.⁷ See 15 C.F.R. § 930.54(a). The state must bring its request to review the non-listed permitting activity within 30 days of receiving notice of the license or permit application, otherwise the state waives its right to review the unlisted activity. See 15 C.F.R. § 930.54(a). If the proposed licensing activity will have reasonably foreseeable coastal effects OCRM must grant permission to the state and allow it to review the activity. See 15 C.F.R. § 930.54(c). The state is considered to have constructive notice if the agency published notice in the Federal Register. See 15 C.F.R. § 930.54(a)(2).

10. FERC and the Coast Guard published their notifications in the Federal Register on August 11, 2005 and August 16, 2005 respectively. The October 5, 2005 letter from CDEP to the FERC docketing system did not specifically request to review the project for consistency nor was it submitted to FERC and the Coast Guard within the 30 days required by the regulations. There is no other indication that Connecticut made a request to OCRM to review the LOR as a non-listed permitting activity. As such, Connecticut has effectively waived its right to seek a consistency certification review for the LOR.

11. Issuance of an LOR under the present circumstances triggers no CZMA requirements for the Coast Guard. This memo does not address whether future safety and security zones discussed in the LOR may require CZMA compliance in the form of a consistency determination.⁸ It would likely be helpful if the applicant would provide as much data as possible on the impacts from establishing future security zones for inclusion in the FERC EIS.

12. Conclusion: Based on the above analysis, I conclude that an LOR issued by the Coast Guard is a non-listed federal licensing or permitting activity. Pursuant to the CZMA, as a non-listed permitting activity, the LOR requires no review by the State of Connecticut for consistency with its management plan because OCRM has not given permission to Connecticut to review the LOR and Connecticut did not deliver proper notice within 30 days thereby waiving its right to review the project.

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Enclosure: (1) Letter from Connecticut DEP to FERC Docket No. PF05-4-000 dated 6 Oct 05.

Copy: MLCLANT(lg)

⁷ 15 C.F.R. § 930.54—This section requires the State to request permission from the OCRM to review an unlisted permitting activity. OCRM decides whether to allow the State the opportunity to review the permitting activity for consistency. The regulations allow an applicant to expedite the CZMA review process by submitting a consistency certification to the State whether or not the OCRM has acted on the State's request to review the activity.

⁸ See 15 C.F.R. Part 930 Subpart C-- Consistency for Federal Agency Activities