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STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES

In the Matter of the Petition of Broadwater Energy, LLC
for a grant of easement in lands under the waters of
Long Island Sound in the Town of Riverhead, County of Suffolk

OBJECTION OF CFE/SAVE THE SOUND

OC6-1

Save the Sound, a permanent program of Connecticut Fund for the Environment ("CFE/Save the Sound") hereby objects to the March 15, 2007 application of Broadwater Energy LLC ("Broadwater") to the Commissioner of the Office of General Services ("OGS") for an easement in underwater land to construct and operate a floating liquid natural gas ("LNG") terminal or a floating storage and regasification unit ("FSRU") in Long Island Sound[1] and its safety and security zone presently recommended at 1210 yards around the FSRU.

CFE/Save the Sound is dedicated to the restoration, protection, and celebration of Long Island Sound through advocacy, education and research. CFE/Save the Sound is a bi-state organization and has approximately 6,500 members located primarily in Long Island, Westchester County and Connecticut. Many of CFE/Save the Sound's members live on or near Long Island Sound, including the Town of Riverhead, and work or recreate in Long Island Sound and will be directly, and adversely, affected by the requested easement that would, among other things, close off a significant part of the Sound to use by the public.

[1] CFE/Save the Sound, again, respectfully requests that copies of the application and all documents filed with OGS in this matter by parties or objectors be provided by the filing party to the undersigned counsel for CFE/Save the Sound.

OC6-1 Save the Sound has provided comments on Broadwater's application to NYSOGS for an easement for the proposed Project. We do not consider it appropriate for us to respond to comments directed to Broadwater. In this letter, Save the Sound has reiterated the comments on the draft EIS that were in its previous letter (Letter OC-1), cited other comment letters to the draft EIS, and cited the comments of speakers at the public comment meetings. With the letter, Save the Sound also submitted two reports by Synapse Energy Economics, Inc. (March 2, 2006 and January 22, 2007; the latter provided comments on the draft EIS and updated the March 2, 2006 report) and two reports by Coastal Vision (January 22, 2007, which provided comments on the draft EIS; and February 28, 2007). We addressed Save the Sound's previous comments in our responses to Letter OC-1, including responses to the January 22, 2007 Synapse report and the January 22, 2007 report by Coastal Vision). We addressed the March 2, 2006 Synapse report in the EIS. Our response to the February 28, 2007 Coastal Vision letter is presented below (see response to comment OC6-2).

Our responses to comments on the EIS referred to in the Save the Sound letter are presented in the following letters:

- New York State Office of Parks, Recreation, and Historic Preservation: Letter SA-3
- John Whittaker: Letter IN-4
- New York State Department of Environmental Conservation (January 31, 2007): Letter SA-2
- Cross Sound Ferry Services, Inc: Letter OC-4
- National Marine Fisheries Service: Letter FA-4
- U.S. Department of the Interior: Letter FA-1
- Maritime Aquarium of Norwalk: Letter OC-9

Save the Sound also referred to other letters submitted to FERC and statements made at the public comment meetings; however, those were not specific to the EIS, and we did not provide specific responses in this appendix. Tables 3.3-1 to 3.3-4 of this appendix provide information on where the issues raised by those general comments have been addressed in the final EIS.

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I. Summary of Argument

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III. Broadwater's application under Pub L § 75, should be denied because Broadwater is not an adjacent landowner and the facility would not be reasonably related to any riparian rights held by Broadwater.

IV. OGS must take an independent look at Broadwater's impact under the Long Island Sound Coastal Management Program.

A. Public Interest

i. Regional Consensus of Long Island Sound's Future

ii. Economic Investment in Long Island Sound

iii. Denial of visual and physical access to Long Island Sound (Long Island Sound Coastal Policy ("LIS CP") 9).

iv. Restriction of public access for boating, fishing or swimming in large portions of Long Island Sound (LIS CP 9).

v. Negative visual impacts (LIS CP 9.2 and 3.1).

vi. Non-water dependant use (LIS CP 9.4 and 1.4).

vii. Degradation of Long Island Sound's community character and development of open space (LIS CP 1).

B. Use Conflicts

i. Inefficiency and adverse impacts to natural and economic coastal resources (LIS CP 13).

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iv. Adverse impacts on air quality (LIS CP 7).

V. Broadwater has failed to meet the threshold review requirements and minimization of impacts pursuant to SEQRA.

A. There are reasonable siting alternatives and environmental minimization options available to Broadwater.

B. There are reasonable supply alternatives to Broadwater.

VI. Because the DEIS fails to meet SEQRA standards, OGS must take a separate hard look.

VII. Conclusion

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I. SUMMARY OF ARGUMENT

Broadwater's application should be dismissed or rejected because it is deficient in the following respects: 1) it is an application for a structure, platform and/or yoke mooring system that fails to comply with the requirements of NY Pub L § 75 and § 270 of the OGS regulations 2) the applicant is not an adjacent upland property owner; 3) the FSRU is of a different scope and size than the reasonable riparian uses contemplated by Pub L § 75; 4) Broadwater violates the Long Island Sound Coastal Management Program, which OGS must review independently of the Department of State; 5) the existing Draft Environmental Impact Statement is insufficient to satisfy SEQRA because there are alternatives which negate or mitigate environmental impacts to Long Island Sound which have not been implemented.

II. BACKGROUND

The Proposal: The Broadwater project is of a magnitude and scope that has not previously been seen in the Long Island Sound or considered by this agency. As proposed to the Federal Energy Regulatory Commission ("FERC"), the Broadwater FSRU would be a platform 1,215 feet in length, 200 feet in width and would rise approximately 277 feet from the waterline to the flare tower.[2] The FSRU would receive an average throughput of 1 billion cubic feet of LNG per day and would store

[2] Broadwater Energy, Application to the U.S. Army Corps of Engineers for Construction and Operation of the Broadwater LNG Terminal and Associated Pipeline In Long Island Sound, 2.1, 2.9-2.16, figure 2-5: Detailed Depiction of FSRU Equipment on Deck (Mar. 2006); *see also*, U.S. Coast Guard Waterways Suitability Report for the Proposed Broadwater Liquid Natural Gas Facility at p. 48. Available at http://www.uscg.mil/d1/units/seelis/broadwater/wsrrpt/WSR%20Master%20Final.pdf

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approximately 8 billion cubic feet of LNG.[3] LNG would be delivered in carriers with cargo capacities of up to 250,000 cubic meters.[4] The FSRU would be secured to a yoke mooring system in Long Island Sound, approximately 9 miles from Long Island and just over 10 miles from Connecticut, at a depth of approximately 90 feet.[5] International tankers would offload liquefied natural gas at the Broadwater terminal, which would convert it back to a gas and pump it through a pipeline on the floor of the Sound to the existing Iroquois pipeline that runs from Milford to Long Island.[6] The proposed safety security zone for the FSRU is a circle centered around the mooring tower with a 1210 yard radius that would span a 1.48 square mile range[7] or 950 acres.[8] Each delivery carrier will have a 2.4 square mile, or 1,536 acre, traveling safety and security exclusion zone[9] as it traverses nearly 100 miles in and out of Long Island Sound.[10] Commercial and private boaters and fishers and other members of the public would be permanently excluded from this area.

Public Opposition: Towns, citizens and environmental organizations vigorously oppose the Broadwater facility. In addition to the County of Suffolk, the New York towns of Riverhead, Brookhaven, Southold and Huntington have intervened in the FERC licensing proceedings to oppose the facility. Moreover, a law passed by the County of Suffolk specifically prohibits construction of floating Liquid Natural Gas facilities in

[3] Id.
[4] Id.
[5] Id. at 49.
[6] Id. at 48.
[7] Id. at 130.
[8] 3.14 x 1,210 yards x 1,210 yards yards 4,579,274 square yards. One acre equals 4,840 square yards, therefore 4,579,274 square yards equals 949.85 acres.
[9] U.S. Coast Guard, Waterways Suitability Report for the Proposed Broadwater Liquefied Natural Gas Facility at 130 .("Based on the above, the proposed size of the moving safety zone is 2 NM (4000 yards) ahead, 1 NM (2000 yards) astern, and 750 yards on each side of the LNG carriers.").
[10] *Id.* at 14, figure 1-1.

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Long Island Waters in Suffolk County.[11] In Connecticut, 47 Towns, including nearly every shoreline town, have gone on record opposing the Broadwater facility.[12] FERC has also been flooded with letters from the public objecting to the facility.[13]

The basis of the opposition by the towns, citizens and environmental groups is fourfold -- the Broadwater facility: 1) would be an unprecedented and inappropriate industrialization of a large portion of Long Island Sound and would make a large area of the Sound off limits to the public, 2) would be environmentally destructive, 3) would be unsafe and 4) is unnecessary. Due to the safety hazard posed by the facility, a large portion of the Sound surrounding the platform will need to be designated "no boating" and "no fishing," completely excluding public access to these waters. Water quality in the immediate area would be threatened by water intakes and discharges, sewage wastewater treatment, storm water runoff and potential liquefied natural gas spills. The visual and noise impacts of the massive lighted industrial facility would also be significant. Finally, a report by Synapse Energy Economics illustrates that Broadwater has failed to identify any compelling need for the new natural gas supply and that several alternatives that would better serve the region exist, including two regional natural gas

[11] Suffolk County Resolution 821-2006, "A Local Law to Prohibit the Construction and Operation of Liquefied Natural Gas (LNG) Floating Storage Regassification Units in The Long Island Sound," adopted August 28, 2006.
[12] Towns that have passed anti-Broadwater resolutions include: City of Milford, City of Norwalk, City of West Haven, Town of Ashford, Town of Bethany, Town of Branford, Town of Chester, Town of Clinton, Town of Darien, Town of Deep River, Town of Easton, Town of Guilford, Town of Lebanon, Town of Lisbon, Town of Newtown, Town of Old Saybrook, Town of Orange, Town of Plainville, Town of Prospect, Town of Redding, Town of Waterford, Town of Westbrook, Town of Weston, Town of Westport, Town of Wethersfield, Town of Woodbridge. Many other towns have expressed opposition but have not passed formal resolutions.
[13] The individual objections and the entire Broadwater FERC Docket may be accessed at the FERC e-library by searching on Docket # CP06-54 at: http://www.ferc.gov/docs-filing/elibrary.asp

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projects that have already received regulatory approval[14] and one that is under construction.[15]

Long Island Sound Investment: Long Island Sound is one of the most beautiful and significant bodies of water in the United States. Over the past ten years, the federal government, and the states of Connecticut and New York, have spent hundreds of millions of dollars to restore and protect the water quality of this national treasure. Recently Congress passed the *Long Island Stewardship Act of 2006,* appropriating $25 million annually until 2011 for Long Island Sound. The Act's findings include, among other things, that: "(a) Long Island is a national treasure of great cultural, environmental and ecological importance, (b) . . . 28 million people (approximately 10 percent of the population of the United States) live within 50 miles of Long Island Sound [and] (c) activities that depend upon the environmental health of Long Island Sound contribute more than $5,000,000,000 each year to the regional economy." Public Law No. 109-359 § 2(a).

Given that the region and the federal government have invested so much over the past 20 years to improve the Sound's environmental health and increase public access and also given the breadth and depth of the public concern, it makes little sense to rush this application through an administrative process that was not designed or intended to handle proposals of this scope and magnitude.

III. Broadwater's application under Pub L § 75, should be denied because Broadwater is not an adjacent landowner and the facility would not be reasonably related to any riparian rights held by Broadwater.

[14] Synapse Energy Economics, Inc, "The Proposed Broadwater Energy Import Terminal. An analysis and Assessment of Alternatives." Available at http://www.savethesound.org/LNG/BW_files/alternatives-analysis.pdf
[15] *Id.*

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The long-established "general rule" is that the title of the State to the seacoast and the shores of tidal rivers cannot be alienated except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit. People ex rel. Underhill v. Saxton, 15 A.D. 263, 271 (N.Y. App. Div. 1897). This "public trust doctrine" provides that the State holds lands in its sovereign capacity as trustee for the beneficial use and enjoyment of the public." Matter of Lupo v. Board of Assessors of Town of Huron, 2005 NY Slip Op 25295, 6 (N.Y. Misc. 2005).

The public trust doctrine has been incorporated into § 75 which permits OGS to grant rights to State-owned lands under navigable water to private parties subject to statutory limitations and restrictions OGS may impose in particular cases. Id. "Any grant must be consistent with the public interest in protecting and preserving the availability of navigable waters for public use and due regard for the legitimate interests of neighboring private property owners." Id. Such grants may only be made to the upland riparian owner ("proprietor of the adjacent land"), a limitation designed to recognize and protect the riparian right of access to navigable water. Id.; Pub L § 75 (7)(a).

Under § 75(7)(a) the Commissioner may "grant . . . to the owners of the land adjacent to the land underwater specified in this section . . . so much of said land underwater as the commissioner deems necessary for that purpose. No such grant shall be made to any person other than the proprietor of the adjacent land." (emphasis added).

This demonstrates the fundamental flaw of Broadwater's application. It seeks to construct a facility in the middle of the Long Island Sound to which there is no immediately apparent adjacent land and to which they have no interest that could be

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analogized, in any way, to a traditional riparian right. To the extent that there may specific adjacent land owned by Broadwater, the nature and scope of the proposed use cannot be said to relate to or grow out of the ownership of that land in any meaningful way.

The strict exclusionary language of § 75(7)(b) was added in 1992. The legislative findings to that Act explain that the purpose of the Act is to "ensure that waterfront owners' reasonable exercise of riparian rights and access to navigable waters shall be consistent with the public interest in reasonable use and responsible management of waterways and such public lands for the purposes of navigation, commerce, fishing, bathing, recreation, environmental and aesthetic protection and access to the navigable waters and lands underwater of the state." 1992 NY Laws ch. 791, § 1 (emphasis added).

Thus, there are two purposes to Pub. Lands § 75(7)(b): 1) to ensure that the use is reasonably related to the nature of the riparian rights of the adjacent upland property holder and 2) to ensure that such use is consistent with the rights of others to reasonably use such waters for traditional public trust purposes. The executive memorandum on the law identifies these same interests. The purpose, according to the memorandum, is to "Protect the public use of State lands for navigation, commerce, fishing and bathing and to serve the public interest in environmental protection, with due regard for the need for affected owners of private property to safeguard their property." Executive Memorandum for 1992 NY Laws ch. 791.

The Broadwater project bears no resemblance to what the legislature contemplated when it acted to protect the "reasonable exercise of riparian rights" or the need for "affected owners of private property to safeguard their property." The proposed

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facility would industrialize and completely exclude the boating, fishing and commercial public from a huge portion of the Long Island Sound. This is different both in scope and scale from traditional uses such as the cultivation of clam beds, the construction of a dock or the construction of a mooring structure for traditional ships.

The easement Broadwater seeks from OGS is prohibited by the letter and spirit of §§ 75(7)(a) and (b). If Broadwater wants such an easement, it must seek it in the form of a grant from the legislature under its traditional public trust powers.

IV. OGS MUST TAKE AN INDEPENDENT LOOK AT BROADWATER'S IMPACT UNDER THE LONG ISLAND SOUND COASTAL MANAGEMENT PROGRAM.

Pursuant to OGS' own regulations at § 270-3.2(a), it must "ascertain the probable effect of the use, structure or facility on the public interest in State-owned lands underwater" and must do so examining the following factors:

> (1) environmental impact of the project;
> (2) values for natural resource management, public recreation and commerce;
> (3) size, character and effects of the project in relation to neighboring uses;
> (4) potential for interference with navigation, public uses of waterway and riparian/littoral rights;
> (5) water dependent nature of use;
> (6) adverse economic impact on existing commercial enterprises;
> (7) effect of the project on the natural resource interests of the State in the lands; and
> (8) consistency with the public interest for purposes of fishing, bathing and access to navigable waters and the need of the owners of private property to safeguard their property."[16]

OGS, in making any grant under that statute, must "upon administrative findings" attach "conditions to preserve the public interest in use of State-owned lands underwater and waterways for navigation, commerce, fishing, bathing, recreation, environmental

[16] 9 NYCRR § 270-3.2(a)(1)-(8).

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protection and access to the navigable waters of the state."[17] Thus, not only is the Department of State responsible for such a review, OGS must also determine whether the unprecedented floating liquefied natural gas facility proposed by Broadwater is consistent with the public trust and environmental considerations set forth in its own regulations.

Additionally, OGS it is required under numerous New York statutes and regulations, to take into account the effects of the proposed action on various policies and factors, including the Long Island Coastal Zone Management Program ("LISCMP").[18]

Any New York State agency involved in the carrying out, funding, or approval of an action in a designated coastal area "shall be consistent with the applicable coastal policies set forth in section 600.5 or 600.6 of this Part for actions within the Long Island Sound coastal area."[19] Thus, OGS must consider the easement application of the proposed Broadwater project with regards to the project's consistency with the Long Island Sound Coastal Policies as articulated in § 600.6, and OGS "shall follow the review procedures" set forth in 19 NYCRR § 600.4.

The LISCMP provides thirteen primary policies for OGS to consider[20] when evaluating state action consistency.[21] Broadwater is inconsistent with at least ten of those enforceable policies. These inconsistencies are grouped into three categories below: public interest, use conflicts, and environment.

A. Public Interest

[17] Pub L § 75(7)(a) and 9 NYCRR § 270-3.2(b).
[18] The Long Island Sound Coastal Policies, 9 N.Y.C.R.R. § 600.6. The full LISCMP is available online at the N.Y.S. Dep't of State, at http://www.nyswaterfronts.com/downloads/pdfs/lis_cmp/index.htm.
[19] *Id.* at § 600.3(b).
[20] Long Island Sound Coastal Policies, N.Y. COMP. CODES R. & REGS. tit. 19, § 600.6 (2006).
[21] 16 U.S.C. §1456 (c) (2000).

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The proposed Broadwater project is not in the public interest as it is inconsistent with the regional consensus of needs and desires for Long Island Sound's future, is inconsistent with the economic investment in Long Island Sound by federal, state, and local governmental agencies, and violates the public trust doctrine.

i. Regional Consensus of Long Island Sound's Future

Long Island Sound is a unique estuary[22] that former U.S. Environmental Protection Agency ("EPA") Administrator Carol Browner has called a "national treasure and one of the nation's most important waterways."[23] However, it is now recognized that efforts beyond the requirements of the Clean Water Act will be required to restore its badly damaged health and the region has created a management conference and plan for its future. In 1985, the U.S. Environmental Protection Agency ("EPA"), New York and Connecticut began the Long Island Sound Study ("LISS")[24] to coordinate with the states' agendas to restore and protect the Sound. Shortly thereafter, funding to move the LISS agenda forward became available when the Sound became one of the first "Estuaries of

[22] Long Island Sound is the most densely populated estuary in the country, with nearly 10 percent of the US population within 50 miles of its shores, (Long Island Sound Stewardship Act of 2006, Pub. L. No. 109-359, 120 Stat. 2049, § 2(a)(2). and unlike other estuaries, rather than having a major source of fresh water at its head, flowing into a bay that empties into the ocean, Long Island Sound flows into an out of the ocean at both ends (Long Island Sound Study: Introduction, http://www.longislandsoundstudy.net/cemp/intro.html.). Estuarine environments, like the Sound, are among the most diverse and productive on earth, creating more organic matter each year than comparably-sized areas of forest, grassland, or agricultural land. U.S. E.P.A. National Estuary Project, About Estuaries, http://www.epa.gov/owow/estuaries/about1.htm (last visited Mar. 23, 2007).

[23] Long Island Sound Taskforce, *Signing on Long Island Sound Makes History*, Save the Sound (Stamford: Long Island Sound Taskforce, 1994).

[24] The Long Island Sound Study is a bi-state partnership consisting of federal and state agencies, user groups, concerned organizations, and individuals (*see* http://www.longislandsoundstudy.net/about_liss.htm (last visited Mar. 23, 2007)); a number of other Long Island Sound related academic, governmental, conservation and advocacy groups and programs can be found in Appendix I of the CT Long Island Sound Taskforce report, http://www.easternct.edu/depts/sustainenergy/taskForceWorkingGroup/appendices%20for%20LISreportII/App%20I%20%20Long%20Island%20Sound%20Advocacy%20Organizations.pdf.

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National Significance".[25] To focus efforts and funding for the Sound, the LISS created the Comprehensive Conservation and Management Plan ("CCMP") and identified a handful of issues[26] that merited special attention, including three areas directly impacted by the Broadwater proposal: living resources and habitat management, land use and development, and public involvement and education. However, the CCMP goes beyond these few issues by stating "the fate of the Sound depends on more than just the commitments of government agencies and regulated entities; it depends on the will and desire of the people of the region."[27] The will and desire of the people has been made clear in the priorities and agendas they have established under the CCMP, the money they expend to improve the health of the Sound, and in this particular case, by the thousands of letters submitted by New York State residents outlining Broadwater's impact on their use of the Sound's public waters.

Other programs that highlight regional priorities to improve and protect Long Island Sound have developed since instituting the LISS,[28] including the recent passage of the Long Island Sound Stewardship Act of 2006 where Congress found that

> (1) Long Island Sound is a national treasure of great cultural, environmental, and ecological importance;

[25] Created under the Clean Water Act's National Estuary Program, 33 U.S.C. § 1330 (2000).
[26] Long Island Sound Study, Comprehensive Conservation and Management Plan (2006, as amended). http://www.longislandsoundstudy.net/mgmtplan.htm (last visited Mar. 23, 2007).
[27] *Id.* at ES-1.
[28] Since the early 1980s federal and state government, regional and municipal partners, and academic institutions have made great strides in understanding, preserving and restoring the Sound. The Long Island Sound Restoration Act was passed by Congress in 2000 and reauthorized in 2005 to provide an allocated $40 million each year to improve the Sound's water quality and habitats (while actual appropriations have been $6-7 million/year the region cooperatively works to increase this figure to the authorized $40 million each year). In 2001, The Long Island Sound Nitrogen Total Maximum Daily Load set a goal of reducing nitrogen by more than half in 2014 (Ira W. Leighton & William J. Muszynski, U.S. EPA-New England and U.S. EPA Region 2, TMDL Approval Letter (Apr. 3, 2001), *available at* http://www.epa.gov/region01/eco/lis/assets/pdfs/Tmdl.approval.pdf). By 2002, Connecticut instituted the Nitrogen Trading Program and was contributing Clean Water Funds toward municipal sewage treatment plant upgrades in order to help meet that goal.

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> (6) large parcels of open space already in public ownership are strained by the effort to balance the demand for recreation with the needs of sensitive natural resources; and
>
> (8) much of the remaining exemplary natural landscape is vulnerable to further development.

LISSA §2(a)(1, 6, & 8).

Authorized at $25 million per year in federal funding for 4 years, the LISSA will provide a structure and funding source for the restoration and conservation of some of the region's last great coastal spaces.[29] Broadwater's proposal to construct an environmentally harmful facility that will impact water quality and fisheries while shutting down vast sections of Long Island Sound to public use is in direct conflict with congressional finding (1). The relationship of public access to public waters and protecting the Sound's natural resources is already strained, the Broadwater's proposal would only add an additional layer of stress to the community and exacerbate existing problems by creating additional negative recreational and environmental impacts. Lastly Broadwater's construction and operation of this industrial complex in the undeveloped mid-waters of the Sound, would be one of the very situations the Stewardship Act seeks to avoid.[30]

ii. Economic Investment in Long Island Sound

Long Island Sound is an economic staple for both New York and Connecticut. It contributes between $5.5 and $8.25 billion dollars[31] to the regional economy every year

[29] A complementary fund is currently proposed this session in Connecticut. Face of Connecticut Campaign, http://www.nature.org/wherewework/northamerica/states/connecticut/files/faceofconn_final_4_ind.pdf (last visited Mar. 23, 2007).
[30] Long Island Sound Stewardship Act of 2006 §2(a)(8).
[31] The original figure of $5.5 was established by the EPA in 1991, that number has been revised by the LISS after consultation with EPA. Their new figure of $8.25 was calculated by applying the Consumer Price Indexes on the Department of Labor website for 1991 to 2006 to the original figure.

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and has a long history of substantial federal, state, and local economic investment in the restoration and protection of its waters and habitats.[32] The funding from the above mentioned federal programs, $3,869,878 from the President's budget[33] and $34,824,972 from Congressional earmarks[34] provide the backbone of Long Island Sound financial resources, though they are only a small portion of the funds the region pours into the Sound. There are thirteen granting programs dedicated to Long Island Sound[35] and numerous others whose funding stream can also help with the protection and restoration of the Sound.[36]

The federal and state government have also provided funding to respond to specific environmental impacts. For example:

- The Long Island Sound Lobster Research Initiative allocated $6.6 million in federal funds and a $1 million in Connecticut Research grants to research the lobster die-off crisis;[37]

- New York has invested more than $11.6 billion in Clean Water Funding since 1990,[38] a portion of which protects Long Island Sound and has committed $200 million as of 2000 through its Clean Water/Clean Air Bond Act.[39] It sees future investments in TMDL nitrogen upgrades for point sources ranging from $5.1 to $6.4 billion. These costs would be in addition to the $7 billion expected to be

[32] Long Island Sound Study, Comprehensive Conservation and Management Plan ES-11-ES-12 (2006, as amended), http://www.longislandsoundstudy.net/mgmtplan.htm (last visited Mar. 23, 2007).
[33] The LISS funding chart is available through the LISS office.
[34] *Id.*
[35] Long Island Sound Study, Long Island Sound Grants-at-a-Glance, http://www.longislandsoundstudy.net/grants/index.htm (last visited Mar. 23, 2007).
[36] Continued support for and improvements in these programs will have direct benefits for the Sound. Programs that acquire land or easements include the Land and Water Conservation Fund, New York state's Environmental Protection Fund, and Section 318 of the Coastal Zone Management Act; programs that restore habitat include the federal Intermodal Surface Transportation and Efficiency Act; and programs that manage species include the Sport Fish Restoration Act (the Dingell-Johnson and Wallop-Breaux Acts), the 1993 federal Atlantic Coast Interjurisdictional Fisheries Act, the Pittman-Robertson Aid in Wildlife Restoration Act, the Endangered Species Act, and the Marine Mammal Protection Act.
[37] NY/CT Sea Grant's Long Island Sound Lobster Initiative, http://www.seagrant.sunysb.edu/LILOBSTERS/ (last visited Mar. 23, 2007).
[38] N.Y.S. Envtl. Facilities Corp., Clean Water State Revolving Fund, http://www.nysefc.org/home/index.asp?page=14 (last visited Mar. 23, 2007).
[39] N.Y.S. Dep't. of Env. Conservation, Hypoxia in Long Island Sound, http://www.dec.state.ny.us/website/dfwmr/marine/liss.htm, (last visited Mar. 23, 2007).

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spent on capital wastewater treatment in the Long Island Sound drainage basin;[40] and

- Connecticut has invested over $1.1 billion in Long Island Sound since 1986 through its Clean Water Fund[41] and $4,662,705.44 for 280 Long Island Sound license plate grants since 1993. It sees future investments in TMDL nitrogen upgrades for point sources ranging from $900 million to $1.7 billion. These costs would be in addition to the $3.5 billion expected to be spent on capital wastewater treatment.[42]

Lastly, Broadwater would be relieved of the obligation to purchase high-priced real estate on which to site its industrial operations, instead only paying a nominal leasing fee for its mooring. Siting Broadwater's facility in the middle of the Sound would conflict with the public interest as it would be equivalent to a New York State subsidy to a multinational corporation to the detriment of New York citizens.

In conclusion, the region's federal, state, and local governments have invested heavily in Long Island Sound since the 1980s, but the citizens of Long Island Sound's watershed have also provided significant individual financial investments for the restoration and protection of the Sound's resources. These are investments based on a future vision of Long Island Sound. Broadwater flies in the face of all this region has tried to accomplish in the last three decades and should it proceed, would knowingly take us back to those days when we failed to understand how profoundly our actions would impact the ecosystem and use of the Sound.

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[40] Of which $1.5 billion is needed to implement the currently planned combined sewer overflow abatement programs critical to reducing pathogens and floatable debris in the Sound. U.S. E.P.A.-New England, Long Island Sound Coastal Management Plan: Supporting Information,http://www.epa.gov/ne/eco/lis/ccmp/support.html (last visited Mar. 23, 2007).

[41] Protecting and Restoring Two of America's Great Water Bodies: Hearing on H.R. 3313 and H.R. 2957 Before the Subcomms. on Water, Resources, and Environment and Transportation and Infrastructure, 106th Cong. 24 (2000) (statement of John Rowland, Governor of Connecticut), *available at* http://commdocs.house.gov/committees/Trans/hpw106-71.000/hpw106-71_1.HTM.

[42] Of which $243 million Connecticut needed to implement the currently planned combined sewer overflow abatement programs critical to reducing pathogens and floatable debris in the Sound. *LIS CMP: Supporting Information, see* U.S. E.P.A.-New England, Long Island Sound Coastal Management Plan: Supporting Information,http://www.epa.gov/ne/eco/lis/ccmp/support.html (last visited Mar. 23, 2007).

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iii. Denial of visual and physical access to Long Island Sound (Long Island Sound Coastal Policy ("LIS CP") 9).

Broadwater will unduly limit public access and recreational use of the coastal waters, public lands, and public resources of Long Island Sound's coastal area, violating the long held public trust doctrine and LIS CP 9. This is in direct conflict with New York's desire to "maintain the public interest in public trust lands along the Sound coast by identifying these lands and ensuring that all private use of these lands comports with the public trust doctrine."[43]

The "safety/security exclusion zone" which will exist for the life of this industrial complex, will strip the use of that portion of Long Island Sound from the public for the exclusive benefit of TransCanada and Shell. There are existing limited places along Long Island Sound and river shores that have safety and security zones maintained by the U.S. Coast Guard. Some institute a safety/security zone around a land based facility, others, are put into place for those that have riparian rights through adjacent land only while vessels are in port.[44] None of these locations is in the middle of the widely traversed,[45] widely fished Long Island Sound. Thus this safety and security zone is different in size and scope than any that have been imposed in Long Island Sound, and is therefore inconsistent with LIS CP 9.

iv. Restriction of public access for boating, fishing or swimming in large portions of Long Island Sound (LIS CP 9).

[43] New York State Department of State, Division of Coastal Resources and Waterfront Revitalization, *Long Island Sound Coastal Management Plan* 38 (Jan. 1999), *available at* http://www.nyswaterfronts.com/downloads/pdfs/lis_cmp/Chap3.pdf (Chapter Three, Recommendation 27).
[44] Information on the existing safety and security zones on Long Island Sound are in 33 C.F.R. §§ 165.140, 165.154 and 165.155. *The Federal Register* notice for the regulations in part 154 can be found at Regulated Navigation Areas, Safety and Security Zones; Long Island Sound Marine Inspection and Captain of the Port Zone, 68 Fed. Reg. 48,798, 48,803 (Aug. 15, 2003) (to be codified at 33 C.F.R. 165.154).
[45] *U.S.C.G. W.S.R.*, *supra* note 9, at 30-32.

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LIS CP 9: Provide for public access to, and recreational use of, coastal waters, public lands, and public resources of the Long Island Sound coastal area.

LIS CP 9 recognizes that "the Long Island Sound shoreline is one of the most densely populated coastal regions along the eastern seaboard, yet physical and visual access to coastal lands and waters is limited for the general public"[46] and it seeks to "provide for public access to, and recreational use of, coastal waters, public lands, and public resources of the Long Island Sound coastal area."[47] There is a need to maintain and improve existing public access and facilities for residents of Connecticut and New York since the existing public and visual access "are inadequate to meet the needs" of the region.[48] The safety zone around the FSRU and the need to enforce security measures to protect the facility, will result in 1.4 square-miles-- the equivalent of 718 football fields-- of the Sound 's mid-waters being designated "no boating" and "no fishing," excluding an estimated 260,000 recreational boaters[49] and 1.5 million fishing trips per year taken by the 355,000 recreational marine anglers residing in Connecticut and New York.[50] Instead of providing *for* public access and recreational uses of public waters and lands, Broadwater seeks to *remove* those areas from the pubic. This removal of access is inconsistent with LIS CP 9.

LIS CP 9.1: Promote appropriate and adequate physical public access and recreation throughout the coastal area

[46] *LIS CMP* at 82 (Chapter Four, Policy 9), *available at* http://www.nyswaterfronts.com/downloads/pdfs/lis_cmp/Chap4.pdf; Long Island Sound Coastal Policies, N.Y. COMP. CODES R. & REGS. tit. 19, § 600.6(i) (2006).
[47] *Id.*
[48] Long Island Sound Stewardship Act of 2006 §2(a)(6); *LIS CMP* at 9.
[49] U.S. Coast Guard, *Ports and Waterways Safety Assessment (PAWSA) for Long Island Sound Final Report* 17 (July 15, 2005), attached as Appendix B to the U.S.C.G. W.S.R.
[50] Long Island Sound Task Force, *Interim Report* 32 (Mar. 8, 2006), *available at* http://www.ctlng.state.ct.us/interim_report_030806.doc.

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First, the general public's physical access to Long Island Sound, which is already inadequate,[51] will be further degraded through the addition of a safety and security zone. As can be witnessed from the numerous day sailors, and the yacht clubs that have spoken at public meetings or submitted documents into the records,[52] Broadwater will worsen the existing public access conditions and permanently and unjustifiably impact the traditional public uses of Long Island Sound by closing portions of the Sound to existing traffic. Second, LIS CP 9.1 also seeks to "ensure access for the general public at locations where state or federal funds are used to acquire, develop, or improve parkland."[53] As demonstrated in the *Public Interest* section above, the Long Island Sound region has consistently invested significant federal funds to improve its water quality and public access.

In addition to the public interest in physical use of the Sound's waters, there is a public interest in the designated uses in the immediate area surrounding the proposed industrial complex. LIS CP 9.1 is also designed to "protect and maintain existing public access and water-related recreation."[54] The location of the FSRU, is currently classified as SA saline surface waters.[55] Designated uses for this area include shellfishing for market purposes, primary[56] and secondary contact recreation[57] and fishing and suitability

[51] Long Island Sound Stewardship Act of 2006 §2(a)(6); *LIS CMP* at 9.
[52] *See* FERC docket CP06-54 and CP06-55.
[53] Long Island Sound Stewardship Act of 2006 §2(a)(6); *LIS CMP* at 9.1.
[54] Long Island Sound Stewardship Act of 2006 §2(a)(6); *LIS CMP* at 9.1.
[55] *Broadwater DEIS*, *supra* note 59 at 3-19.
[56] New York State defines *primary contact recreation* as "recreational activities where the human body may come in direct contact with raw water to the point of complete body submergence." "swimming, diving, water skiing, skin diving and surfing." Definitions, Samples, and Tests, N.Y. COMP. CODES R. & REGS. tit. 6, § 700.1(a)(35) (2006).
[57] New York State defines *secondary contact recreation* as "recreational activities where contact with the water is minimal and where ingestion of the water is not probable." "includes, but is not limited to boating and fishing." Definitions, Samples, and Tests, N.Y. COMP. CODES R. & REGS. tit. 6, § 700.1(a)(40) (2006).

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for fish propagation and survival.[58] Through the creation of exclusion zones and new industrial water discharges, the waters occupied by the FSRU would no longer be used to support those designated uses.

v. Negative visual impacts (LIS CP 9.2 and 3.1).

LIS CP 9.2: Provide public visual access from public lands to coastal lands and waters or open space at all sites where physically practical.

LIS CP 3.1: Protect and improve visual quality throughout the coastal area.

Broadwater will severely impair the existing visual quality of the Long Island Sound vista through the construction of a 1200' long, 200' wide, and 280' tall lighted industrial complex in the center of Long Island Sound where no such obstruction exists. LIS CP 9.2 seeks to "avoid loss of existing visual access by limiting physical blockage by development or activities"[59] while LIS CP 3.1 seeks to "enhance existing scenic characteristics by minimizing introduction of discordant features; anticipate and prevent impairment of dynamic landscape elements that contribute to ephemeral scenic qualities; [and] protect scenic values associated with public lands, including public trust lands and waters and natural resources"[60]

The creation of this massive industrial complex and its attending periphery would be a permanent scar on the horizon. It would be visible from the shore at least 80 percent of the time,[61] it would create a new source of light pollution in the night sky with operational and safety lighting, and it would be a constant looming visual impediment to hundreds of thousands of recreational boaters and anglers. Broadwater's impairment of

[58] Class SA Saline Surface Waters, N.Y. COMP. CODES R. & REGS. tit. 6, § 701.10 (2006); *see* N.Y. COMP. CODES R. & REGS. tit. 6, §§ 921.4, 922.4, 925.6, 700.1(a)(35), 700.1(a)(40) (2006).
[59] *LIS CMP*, *supra* note 80, at 83 (Chapter Four, Policy 9.2); Long Island Sound Coastal Policies, N.Y. COMP. CODES R. & REGS. tit. 19, § 600.6(j)(2) (2006).
[60] *Id.* at 75 (Chapter Four, Policy 3.1).
[61] *Broadwater DEIS* at 3-101.

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the Sound's coastal vista is the precise type of obstruction that LIS CP 9.2 and 3.1 seek to guard against.

vi. Non-water dependant use (LIS CP 9.4 and 1.4).

LIS CP 9.4: Assure public access to public trust lands and navigable waters.

Long Island Sound is held for the citizens of New York and Connecticut under the Public Trust Doctrine. In the landmark United States Supreme Court case *Illinois Central R.R. v. Illinois (1892)* the Court stated that "…the state can no more abdicate its trust over property in which the whole people are interested…so as to leave them entirely under the use and control of private parties…than is can abdicate it[s] role in the administration of government and the preservation of peace." Cases since have clarified that this "trust" is a real trust in the legal sense of the word, with the trustees (the State Legislature and its delegates) being responsible for, and having a duty to protect the trust. Because these are public goods to be shared by all, "the government must assume a trust-like duty not to waste or expend them for the benefit of just a few."[62] "There is a clear purpose for the trust: to preserve and continuously assure the public's ability to fully use and enjoy public trust lands, waters and resources for certain public uses." [63]

In New York the public trust doctrine generally applies to three subjects: "(1) to guarantee the public's right to use the shoreline (including public access); (2) to determine the public's right to use the water; and (3) as a limitation on the state's ability

[62] Richard Delgado, Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform, Issues in Legal Scholarship, *available at* www.bepress.com/ils/iss4/art4 (summarizing Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 478-89, 553-57 (1969-1970).
[63] Coastal States Org., Putting the Public Trust Doctrine to Work (2nd 1997).

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to convey underwater land."[64] Specifically, New York has used the public trust doctrine to determine the limitations on the ability to use underwater lands and to exclude traditional water uses. In *Smith v. State*, the appellate court found that the lower court

> erred when it failed to take into account the public benefit which will be lost if the Association is permitted to exclude the public from this area used for over a century for fishing and other recreational activities.

Smith v. State, 153 A.D.2d 737, 740 (N.Y. App. Div. 1989).

LIS CP 9, which provides "for public access to, and recreational use of, coastal waters, public lands, and public resources of the Long Island Sound coastal area," and LIS CP 3, which seeks to "protect scenic values associated with public lands, including public trust lands and waters, and natural resources," both link the common law public trust doctrine to an enforceable policy under New York's Long Island Sound Coastal Management Program. Additionally, New York has expanded the traditional public trust doctrine in its enforceable coastal policies for both the foreshore[65] and submerged lands.[66]

LIS CP 1.4: Maintain and enhance natural areas, recreation, open space, and agricultural lands.

New York is tasked with "ensuring that the public interest in access below mean high water and to navigable waters is maintained,"[67] requiring "that development or uses take appropriate advantage of their coastal location [by] reserv[ing] coastal waters for water-dependent uses and activities,"[68] and only allowing "obstructions to public access

[64] Patricia E. Salkin, Overview of the Public Trust Doctrine in New York, in The Public Trust Doctrine: The Ownership and Management of Land, Water, and Living Resources) 71, 73 (Alb. L. Sch. Gov't L. Center ed., 1991).
[65] Division of Coastal Resources & Waterfront Revitalization, N.Y. Dep't of State, *Public Access to the New York Shoreline* 139 (1988).
[66] *Id.* Submerged lands are defined as land lying below tidal waters, seaward of the ordinary low water mark, including bays, inlets, and other arms of the sea, out to the seaward boundary of the state.
[67] *LIS CMP*, *supra* note 80, at 84 (Chapter Four, Policy 9.4); Long Island Sound Coastal Policies, N.Y. COMP. CODES R. & REGS. tit. 19, § 600.6(i)(4) (2006).
[68] *Id.* at 73 (Chapter Four, Policy 1.2).

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when necessary for the operation of water-dependent uses and their facilities."[69] A water-dependent use is defined as:

> A business or other activity which can only be conducted in, on, over, or adjacent to a water body because such activity requires direct access to that water body, and which involves, as an integral part of such activity, the use of the water.

LIS CP Definition Section "water-dependant use."

Broadwater's FSRU is a storage and regasification complex which is not dependant on Long Island Sound for the activity of storing or regasifying. The lack of water dependence can also be illustrated with other LNG examples. Waterbury, in west central Connecticut, will be home to a new LNG storage, regasification, and liquefaction facility. It demonstrates that not only is it not necessary to be in Long Island Sound waters, it is not even necessary to be on Long Island Sound's coastline. In fact every one of the 16 U.S. LNG facilities FERC oversees is sited on land.[70] In this case, obstructions to public access should not be given as Long Island Sound is not necessary for Broadwater's non-water-dependant FSRU operations.

If Broadwater's FSRU were permitted to proceed in the proposed location, a non-water-dependant use would be co-opting multiple water-dependant uses. Due to safety concerns for the public and security concerns for the facility and its LNG tankers, the Coast Guard recommends closing 1.4 square miles surrounding the FSRU[71] and a nearly

[69] *Id.* at 84 (Chapter Four, Policy 9.4).
[70] *See* F.E.R.C., Liquefied Natural Gas (LNG) Projects, http://www.ferc.gov/industries/lng.asp#howmany (last visited Mar. 24, 2007); F.E.R.C., Existing and Proposed North American LNG Terminals, http://www.ferc.gov/industries/lng/indus-act/terminals/exist-prop-lng.pdf (last visited Mar. 24, 2007).
[71] U.S. Coast Guard, Waterways Suitability Report for the Proposed Broadwater Liquefied Natural Gas Facility 130 (Sept. 21, 2006), attached as Appendix D to the *Broadwater DEIS*("Based on this the safety zone around the FSRU would be a circle with a radius of 1210 yards centered on the mooring tower.").

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2.5 square miles bubble that surrounds each tanker[72] as it traverses nearly 100 miles in and out of Long Island Sound[73] to public access. The estimated 104-156 tankers calls per year[74] combined with the tanker offloading time will result in a near constant ribbon of traveling exclusionary area from the Race to the FSRU. Broadwater will not result in a mere minor, or temporary impact to existing water uses, but will dominate and displace the more than 10 yearly yacht races that travel this path,[75] substantial commercial vessel traffic,[76] and general public use.[77]

vii. Degradation of Long Island Sound's community character and development of open space (LIS CP 1).

LIS CP 1: Foster a pattern of development in the Long Island Sound coastal area that enhances community character, preserves open space, makes efficient use of infrastructure, makes beneficial use of a coastal location, and minimizes adverse effects of development.

Broadwater will mark the shift toward a privatized industrialization pattern of development in the Sound that will "result in an undesirable loss of the community and landscape character of the Long Island Sound coastal region."[78]

Broadwater does not enhance community character, preserve open space, or minimizes adverse effects of development and as such it violates LIS CP 1. First, the character of Long Island Sound and its coastal communities will be shattered by the construction and operation of an industrial complex the size of Broadwater and its

[72] *Id.* ("Based on the above, the proposed size of the moving safety zone is 2 NM (4000 yards) ahead, 1 NM (2000 yards) astern, and 750 yards on each side of the LNG carriers.").
[73] *Id.* at 14, figure 1-1.
[74] *Id.* at 56; WSR p. 56; Broadwater Energy, Resource Report No. 1: General Project Description 1-1 (May 2005).
[75] U.S. Coast Guard, Waterways Suitability Report for the Proposed Broadwater Liquefied Natural Gas Facility 34-37(Sept. 21, 2006), attached as Appendix D to the *Broadwater DEIS*.
[76] *Id.* at 30-32, figures 2-5, 2-6, 2-7.
[77] Long Island Sound Task Force at 32-34.
[78] New York State Department of State, Division of Coastal Resources and Waterfront Revitalization, *Long Island Sound Coastal Management Plan*, LISCP 1 (January 1999).

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associated tanker types[79] and magnitudes.[80] Second, the preservation of the Sound's natural quality is not only important for Long Island Sound users, but "the natural and open space qualities that exist in the Long Island Sound are critical to the significance of [New York State] parks."[81]

In addition to protecting public access as discussed in sections above, LIS CP 1.4 seeks to

> maintain and enhance natural areas, recreation, open space, and agricultural lands [by] avoid[ing] loss of economic, environmental, and aesthetic values associated with these areas and avoid[ing] expansion of infrastructure and services which would promote conversion of these areas to other uses.

New York State Department of State, Division of Coastal Resources and Waterfront Revitalization, *Long Island Sound Coastal Management Plan*, LIS CP 1.4 (January 1999).

Broadwater will displace existing water-dependent uses of commercial and recreational boaters and fishermen;[82] does not reflect the overall unique qualities of the coastline; will lower aesthetic values associated with the coast; and will strip the Long Island Sound's mid-waters and subsea area of its natural, open space, and recreational qualities. Additionally, there is concern amongst scientists that the disruptions caused by

[79] Broadwater will increase the number of foreign flagged vessels arriving into central LIS by 3.3x to 5x. *U.S.C.G. W.S.R.*, *supra* note 9, at 93, table 3.2-13. Foreign flagged vessels require protocols, monitoring, and investigation that other domestic ships do not, and as such is the appropriate figure to use.

[80] Broadwater will cause a 52x to 78x increase in foreign vessels the size of the large tankers proposed by Broadwater. *Compare id.* at 57, table 3.1-2 *with id.* at 25, table 2-3.

[81] Daniel S. Kane, New York State Office of Parks, Recreation, and Historic Preservation, Comments on the Broadwater LNG Draft Environmental Impact Statement 1 (Jan. 23, 2007), F.E.R.C. Accession No. 20070123-5093.

[82] John Whittaker, Comments on the Broadwater LNG Draft Environmental Impact Statement 2-3 (Jan. 18, 2007), F.E.R.C. Accession No. 20070122-5129 (testifies that the time he can tend his gear coincides with the schedule proposed for new LNG tanker traffic and associated exclusion zones); *see also* Capt. George Main, Comments on the Broadwater LNG Draft Environmental Impact Statement (Jan. 23, 2007), F.E.R.C. Accession No. 20070123-5007 (4th generation lobsterman discussing loss of fishing at the Race due to tanker traffic and the security zone); William G. Little, N.Y.S. Dep't of Environmental Conservation, Amended Comments on the Broadwater LNG Draft Environmental Impact Statement 2-3 (Jan. 31, 2007), F.E.R.C. Accession No. 20070131-5033.

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pipeline installations in LIS could create permanent changes in habitat.[83] These impacts are inconsistent with the character of the waterway as it exists today.

B. Use Conflicts

Broadwater's FSRU is an inappropriately sited non-water dependant use that would displace, adversely impact and interfere with the existing water-dependent uses of commercial and recreational boating and fishing. Additionally, the security zones that will accompany each LNG tanker 50 miles to the FSRU from Race on a regular basis will be escorted by private armed security.[84] This will create fearful, inconvenient and inappropriate situations for the hundreds of thousands of registered boaters and fishermen as can be witnessed from a New York citizen's reaction to the proposal.[85]

iv. Inefficiency and adverse impacts to natural and economic coastal resources (LIS CP 13).

LISCP 13.3: Ensure maximum efficiency and minimum adverse environmental impact when siting major energy generating facilities

LIS CP 13.3 asserts that this policy be achieved by "…construct[ing] new energy generating and transmission facilities so they do not adversely affect natural and economic coastal resources.[86] Broadwater's FSRU is an inappropriately sited energy facility and it will adversely affect the natural and coastal economic resources of Long Island Sound. First, Broadwater will adversely affect the natural ecosystem of the Sound and as discussed in the *Public Interest* section above, those natural resources are vital

[83] Drew A. Carey, Coastal Vision, Comments on Broadwater LNG Draft Environmental Impact Statement 7 (Jan. 22, 2007).
[84] *U.S.C.G. W.S.R.* at 142.
[85] *See* Transcript of Public Meeting Before the Federal Energy Regulatory Commission, in the Matter Of the Proposed Broadwater Draft Environmental Impact Statement, Smithtown West High School Auditorium, Smithtown, N.Y., F.E.R.C. Accession No. 20070110-4011 (Jan. 10, 2007) at 103 (Joel Ziev's comment that he supports LNG but not Broadwater because it will industrialize and militarize Long Island Sound.).
[86] *LIS CMP* at 90 (Chapter Four, Policy 13.3); Long Island Sound Coastal Policies, N.Y. COMP. CODES R. & REGS. tit. 19, § 600.6(m)(3)(i)-(iii) (2006).

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economic resources to the region. Second, the inappropriate siting of a fuel conversion plant like the FSRU, will result in impacts to other water dependant uses. In addition to the recreational boating and fishing that will be affected by the FSRU and its 1.4 square mile exclusion zone,[87] the significant concentration of commercial traffic using those mid-waters what the USCG calls a "thoroughfare"[88] will also be severely hampered.[89] Furthermore, common-sense indicates that when possible commercial vessels, commercial fishermen, and commercial charter captains will steer very far from FSRU, far past the security zone, as the entire project area poses new risks including encounters with armed security,[90] fire from accidental or intentional platform incidents[91] and increased tanker traffic.[92] Removing such a sizeable section from public and commercial use combined with the natural tendency to avoid the area in its entirety could have the unintended result of increasing vessel concentration in other areas of the Sound.

v. Interference with existing water-dependent uses (LIS CP 10).

LIS CP 10: Protect Long Island Sound's water-dependent uses and promote siting of new water-dependent uses in suitable locations.

Broadwater runs contrary to LIS CP Policy 10 which seeks to protect the nearly 200 Long Island Sound water-dependent uses[93] and promote their economic viability. In addition to the impacts caused by the FSRU at the Sound's mid-waters, the Race navigational lanes will be disrupted on a regular basis. The Race, which the US Coast

[87] *U.S.C.G. W.S.R.* at 34-37.
[88] *Id.* at 33.
[89] *Id.* at 30-34; *see also* Adam Wronowski, Cross Sound Ferry Services, Comments on the Broadwater LNG Draft Environmental Impact Statement 2 (Jan. 22, 2007), F.E.R.C. Accession No. 20070124-0150.
[90] *Broadwater DEIS* at 2-32.
[91] *Id.* at 3-200(a-m).
[92] *Id.* at 3-121.
[93] *LIS CMP* at 84 (Chapter Four, Policy 10); Long Island Sound Coastal Policies, N.Y. COMP. CODES R. & REGS. tit. 19, § 600.6(j) (2006).

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Guard calls a "critical segment" of the waterway[94] and its approach through Block Island Sound, account for nearly 65% of the US Coast Guard's assessed cumulative safety risk.[95] Such disruptions and the required scheduling of LNG tanker movement, will negatively impact commercial fishing,[96] like lobstering,[97] shipping,[98] and recreational boating.[99] Likewise, maritime transportation will also be affected.[100] The DEIS states that ferry service will be impacted in a "minor and occasional" way,[101] but Cross-Sound Ferry has stated that the impacts from the LNG carrier traffic range from periodic minor impacts to frequent major impacts over the life of the Project[102] and that a delay of any kind could significantly impact service.[103]

vi. *Interference with commercial fishing operations and recreational use of marine resources (LIS CP 11).*

LIS CP 11: Promote sustainable use of living marine resources in Long Island Sound.

New York wishes to "protect and strengthen commercial fishing harvest operations, facilities, and waterfront infrastructure to support a stable commercial fishing

[94] *See* Transcript of Public Meeting Before the Federal Energy Regulatory Commission, in the Matter Of the Proposed Broadwater Draft Environmental Impact Statement, Smithtown West High School Auditorium, Smithtown, N.Y., F.E.R.C. Accession No. 20070110-4011 (Jan. 10, 2007 at 11 (Comments of Peter Boynton, U.S.C.G. Captain of the Port of Long Island Sound).
[95] *U.S.C.G. W.S.R.* at 124, table 4-5.
[96] Patricia A. Kurkul, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Comments on the Broadwater LNG Draft Environmental Impact Statement 3-4 (Jan. 23, 2007), F.E.R.C. Accession No. 20070123-5050.
[97] *Whittaker* (who testifies that the time he can tend his gear coincides with the schedule proposed for new LNG tanker traffic and associated exclusion zones), *see also Main, N.Y.S. D.E.C.*.
[98] *See* January 16, 2007 hearing testimony to FERC of Mike Piscitelli, Dep. Dir. of City Plan for City of New Haven.
[99] *U.S.C.G. W.S.R.* at 33-36.
[100] *Broadwater DEIS* at 3-121.
[101] *Id.* at 3-120.
[102] Adam Wronowski, Cross Sound Ferry Services, Comments on the Broadwater LNG Draft Environmental Impact Statement 2 (Jan. 22, 2007), F.E.R.C. Accession No. 20070124-0150.
[103] *Id.*

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industry;"[104] "protect commercial fishing from interference or displacement by competing land and water uses;"[105] and "promote and provide opportunities for recreational use of marine resources."[106] Broadwater will harm, not protect or strengthen the commercial harvest operations,[107] will displace recreational boaters and fishermen,[108] and will change the existing designated recreational uses for the waters surrounding the FSRU. Therefore Broadwater is contrary to New York's policy to protect commercial fishing from competing water uses and promote opportunities for recreational uses.

C. Environment

Broadwater's moored FSRU, pipeline construction, and associated ballast water exchanges will degrade local habitat and water quality and is therefore inconsistent with LIS CPs 5, 6, 7 and 8.

The existing record does not support Broadwater's consistency certification with LIS CPs 5-8, as is demonstrated by the New York Department of Environmental Conservation's ("NYDEC") comment that the "DEIS inadequately supports its

[104] *LIS CMP* at 87 (Chapter Four, Policy 11.3); Long Island Sound Coastal Policies, N.Y. COMP. CODES R. & REGS. tit. 19, § 600.6(k)(3)(i) (2006).
[105] *Id.*
[106] *Id.* (Chapter Four, Policy 11.4); Long Island Sound Coastal Policies, N.Y. COMP. CODES R. & REGS. tit. 19, § 600.6(k)(4) (2006).
[107] *See* John Whittaker, Comments on the Broadwater LNG Draft Environmental Impact Statement 2-3 (Jan. 18, 2007), F.E.R.C. Accession No. 20070122-5129 (testifies that the time he can tend his gear coincides with the schedule proposed for new LNG tanker traffic and associated exclusion zones); *see also* Capt. George Main, Comments on the Broadwater LNG Draft Environmental Impact Statement (Jan. 23, 2007), F.E.R.C. Accession No. 20070123-5007 (4th generation lobsterman discussing loss of fishing at the Race due to tanker traffic and the security zone); William G. Little, N.Y.S. Dep't of Environmental Conservation, Amended Comments on the Broadwater LNG Draft Environmental Impact Statement 2-3 (Jan. 31, 2007), F.E.R.C. Accession No. 20070131-5033.
[108] *See, e.g.*, Kenneth F. Bacco, Flag Officers and Bd. of the Norwalk Yacht Club, Comments on the Broadwater LNG Draft Environmental Impact Statement (Jan. 22, 2007), F.E.R.C. Accession No. 20070206-0156 (as one of a number of comments from sailors and LIS recreational users in the FERC docket).

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conclusion that the project will not significantly impact marine resources or public use of the Sound."[109]

i. Water quality standards and water quality (LIS CP 5).

LIS CP 5, in part, seeks to

> prevent point source discharges into coastal waters and avoid…water uses which would: (1) exceed applicable effluent limitations, or (2) cause or contribute to contravention of water quality classification and use standards, or (3) materially adversely affect receiving water quality.

Broadwater would serve to contravene a water quality use standard and would materially adversely affect receiving water quality.[110] Additionally, the record does not contain sufficient data to determine whether or not Broadwater would exceed applicable effluent limitations,[111] as such, there is insufficient information to conclude that Broadwater is consistent with LIS CP 5.

The receiving waters for discharges from the FSRU and tankers are SA and may be used for shellfishing, primary and secondary contact recreation and fishing and suitability for fish propagation and survival.[112] Water quality in the immediate area

[109] *N.Y.S. Dep't of Environmental Conservation, supra* note 167, at 1.
[110] L. Raddant, U.S. Dept. of the Interior, Comments on the Broadwater LNG Draft Environmental Impact Statement 2 (Jan. 18, 2007), F.E.R.C. Accession No. 20070118-5049. [hereinafter DOI] at 2 ("Some water discharges from the carriers would be associated with cooling on-board machinery and may be an average of 3.6°F warmer than ambient temperatures.").
[111] *Id.* at 3 ("Broadwater should more thoroughly describe the water quality monitoring plan, linking their monitoring with water quality standards and biological endpoints, such as the one mentioned above for the American lobster.")
[112] *Broadwater DEIS* at 3-19; New York State defines *primary contact recreation* as "recreational activities where the human body may come in direct contact with raw water to the point of complete body submergence." "swimming, diving, water skiing, skin diving and surfing." Definitions, Samples, and Tests, N.Y. COMP. CODES R. & REGS. tit. 6, § 700.1(a)(35) (2006); New York State defines *secondary contact recreation* as "recreational activities where contact with the water is minimal and where ingestion of the water is not probable:" "includes, but is not limited to boating and fishing." Definitions, Samples, and Tests, N.Y. COMP. CODES R. & REGS. tit. 6, § 700.1(a)(40) (2006).
[113] Class SA Saline Surface Waters, N.Y. COMP. CODES R. & REGS. tit. 6, § 701.10 (2006); *see* N.Y. COMP. CODES R. & REGS. tit. 6, §§ 921.4, 922.4, 925.6, 700.1(a)(35), 700.1(a)(40) (2006).

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would be threatened by increased water temperature[113] and ballast water biocide,[114] equipment refueling spills at the FSRU,[115] storm water runoff and side-shell water curtain,[116] and hazardous waste spills.[117] These discharges, combined with the safety and security exclusion zones, will prohibit any shellfishing, primary or secondary contact recreation in the area surrounding the FSRU. Additionally, Broadwater's nitrogen based discharges or discharges that increase ambient water temperatures must be closely scrutinized as to their impacts on hypoxia incubating basins.[118] Broadwater is inconsistent with LISCP 5 because its discharges will contravene water quality use standards, adversely affect the immediate waters of Long Island Sound, and do not, based on the still insufficient record,[119] "protect water quality based on physical factors" like dissolved oxygen or "health factors" like chemical contaminants as is required to show consistency with LIS CP 5.3.

ii. *Conversion of existing benthic habitats and impacts on fishery stocks (LIS CP 6).*

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[113] "Some water discharges from the carriers would be associated with cooling on-board machinery and may be an average of 3.6°F warmer than ambient temperatures." DOI Comments, *supra* note 170.
[114] "The ballast water within the FSRU will be treated with the biocide, sodium hypochlorite, a high pH oxidizing and disinfecting agent. The treated ballast water would subsequently be discharged to the Sound. Broadwater is predicting that the discharged water would contain sodium hypochlorite at concentrations between 0.01 and 0.05 parts per million (10 - 50 parts per billion [ppb]). We recommend that Broadwater estimate the likely concentrations of total chlorine likely to be released and compare those concentrations with the New York State Department of Environmental Conservation water quality standard for chlorine of 5 ppb to assess potential biological effects. Although very little information exists on the biological effects of this chemical on aquatic organisms." *Id.* at 3, and Patricia A. Kurkul, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Comments on the Broadwater LNG Draft Environmental Impact Statement 3-4 (Jan. 23, 2007), F.E.R.C. Accession No. 20070123-5050 at 3.
[115] DEIS, *supra* note 59 at 3.2.2.1.
[116] DEIS Table 3.2.3-2 at 3-32.
[117] DEIS at 3.2.2.2.
[118] Dr. Richard Fairbanks, Columbia University, Western Long Island Sound Hypoxia: Isotope Tracers of the East River Nitrate Pump (2006). This study's surprising finding was that four small, deep basins act as 'hypoxia incubators' on the seafloor of the western Sound and that these basins spread hypoxia throughout the water column.
[119] DOI Comments, *supra* note 170, NOAA Comments, *supra* note 174, NYDEC Comments, *supra* note 167, Drew A. Carey, Coastal Vision, Comments on Broadwater LNG Draft Environmental Impact Statement (Jan. 22, 2007).

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LIS CP 6: Protect and restore the quality and function of the Long Island Sound ecosystem.

Broadwater is inconsistent with LIS CP 6 because it does not "avoid significant adverse changes to the quality of the Long Island Sound ecosystem as indicated by physical loss, degradation, or functional loss of ecological components,"[119] nor does it "maintain values associated with natural ecological communities,"[120] "avoid permanent adverse change to ecological processes,"[121] or "protect from uses or activities which would destroy habitat values or significantly impair the viability of the designated habitat beyond its tolerance range."[122] There are still significant issues directly related to ecological communities that have yet to be resolved. For example, the potential impacts of "temperature and chlorine residual on crustacea larvae and other sensitive resources in the Sound, particularly lobsters"[123] have yet to be addressed by Broadwater.

Furthermore, the Maritime Aquarium Harbor Seal Census is concerned with Broadwater's impact on essential habitat of harbor seal prey[124] because "six of harbor seal prey species are listed in [DEIS] Table 3.3.3-1 as species with essential habitat in the proposed project area;"[125] the project has been estimated to impinge/entrain between 49.8 to 101.9 million eggs and 67.4 to 173.1 million larvae annually;[126] and agencies responsible for the protection of essential fish habitat are not able "to accept at this stage that the ecological implications of project construction, installation, and operation have

[119] LISCP at 6.1
[120] *Id.*
[121] *Id.*
[122] *Id.* at 6.2
[123] NYDEC Comments at 3.
[124] *Id.*
[125] DEIS Comments by Amy Ferland, Harbor Seal Census Researcher at the Maritime Aquarium of Norwalk, CT (Jan. 23, 2007) at 2.
[126] DOI Comments, *supra* note 170 at 2.

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been characterized adequately."[127] Additionally, Broadwater would have significant adverse effects on habitat[128] and there is no evidence that it can successfully mitigate the damage.[129] Broadwater's substitution of imported rock or concrete for existing substrates of sand, gravel, sandy silt represents a permanent habitat conversion[130] in direct conflict with LIS CP 6, 6.1, and 6.2.

iii. Deleterious effect on fish and wildlife resources from toxic and hazardous substances (LIS CP 8.3).

LIS CP 8.3: Prevent release of toxic pollutants or substances hazardous to the environment that would have a deleterious effect on fish and wildlife resource.

Broadwater proposes to coat the underside of the FSRU and mooring system with a copper-based anti-fouling paint. First, the DEIS estimates that the FSRU will leach 27.8 pounds per day of toxic copper into the Sound[131] and while this figure is slightly below the EPA standards, it is merely an estimate. Broadwater has not yet specified which type of copper-based anti-fouling paints they will use.[132] Leaching paints and copolymer paints react differently over time and have different concentrations of copper,[133] therefore until Broadwater chooses a paint type, there is no way for OGS to certify that the FSRU has sufficiently mitigated the detrimental effects of the copper leaching to the maximum extent practicable, much less that is has prevented the release of toxic pollutants or substances hazardous to the environment. Second, the figure used in the DEIS for the total pounds per day of copper release is based on the FSRU and

[127] NOAA Comments, *supra* note 174 at 3.
[128] *Id.* at 5.
[129] Drew A. Carey, Coastal Vision, Comments on Broadwater LNG Draft Environmental Impact Statement 6-7 (Jan. 22, 2007).
[130] *Id.* at 7.
[131] DEIS at 3-25.
[132] *Id.*
[133] *Id.*

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mooring tower only,[134] no mention is made of the pound per day released by the LNG tankers as they connect and offload their cargo onto the FSRU. This additional copper leeching could push the total release of copper from the facility over the EPA standards. Lastly, there is significant concern that over the life of Broadwater, "particulates from spot rusting and flaking of paint from the hull of the facility and the mooring are likely to deposit particulates with elevated copper concentrations in the sediments in non-negligible concentrations."[135]

In addition to copper, Broadwater will discharge "ballast water treated with sodium hypochlorite [which] represents a high seasonal risk to planktonic larvae (lobsters, shellfish, finfish)."[136] Due to this significant risk, U.S. Fish and Wildlife found the information on chlorine concentration and biological effects to be inadequate.[137]

Because copper is a toxin at both acute and prolonged exposures and Broadwater has not taken into account all facility inputs of copper into the waters or lifetime impacts to sediments and because the addition of chlorine into the immediate area could impact wildlife resources, OGS cannot determine that Broadwater is consistent with LISCP 8.

iv. Adverse impacts on air quality (LIS CP 7)

LIS CP 7: Protect and improve air quality in the Long Island Sound coastal area.

LIS CP 7 provides for the "protection of the Long Island Sound coastal area from air pollution generated within the coastal area or from outside the coastal area which adversely affects coastal air quality."[138] While the DEIS implies,[139] and Broadwater

[134] DEIS at 3-41, 3-42.
[135] DOI Comments at 7.
[136] Drew A. Carey, Coastal Vision, Comments on Broadwater LNG Draft Environmental Impact Statement 7 (Jan. 22, 2007).
[137] DOI Comments at 3.
[138] LISCP at 7.
[139] DEIS at 1-5.

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claims,[140] that the facility is needed to positively impact air quality and water quality through the re-powering of dirtier plants, there is no evidence, not even one contract with an old plant, in the record to support that assertion. Thus, Broadwater's 1 bcf/day of natural gas combustion should be classified as new emissions being discharged into the region and assessed accordingly under a cumulative impact analysis.

LISCP 7.1: Control or abate existing and prevent new air pollution.

LIS CP 7.1 seeks to "limit pollution resulting from vehicle or vessel movement or operation."[141] In addition to the increase of fossil fuel emissions from the new supply in the region, the FSRU and each of the 100+ yearly LNG tankers, associated escort tugs, 24 hr. security force ships, and other attendant vessels will result in increased emissions in the immediate area and could impact both the air and water quality of Long Island Sound.[142] Because there is inadequate information to determine to what extent these air emissions may impact the coastal air shed, FERC has requested additional information from the applicant.[143] Without this information, OGS cannot to determine to what extent air pollution has been limited.

LIS CP 7.1 also seeks to "limit pollution resulting from new or existing stationary air contamination sources consistent with applicable standards, plans, and requirements." Once again, FERC's recent letter indicates that there are substantial data gaps that must be filled before moving forward. Many of the issues outlined in that letter, including but not limited to cumulative impacts,[144] whether LNG carrier emissions should be included

[140] *See* http://www.broadwaterenergy.com/index.php?page=environment_overview, Bullet 1.
[141] LISCP at 7.1.
[142] *See* DEIS at 3-170, 3-174, 3-177-9; *see also* requested data (Bullets 1-8), Letter from Jim Martin, FERC, to Sandra Barnett of 2/8/07 regarding Environmental Informational Request (on file with FERC).
[143] *See* Letter from Jim Martin, to Sandra Barnett of 2/8/07.
[144] *Id.* Bullet 3.

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as part of the FSRU under the PSD regulations,[145] and how Broadwater would satisfy the EPA's recent Final Rule regarding $PM_{2.5}$ emissions,[146] have direct bearing on any certification under this coastal policy. Without this information, OGS cannot determine that Broadwater is consistent with LIS CP 7 and 7.1.

V. BROADWATER HAS FAILED TO MEET THE THRESHOLD REVIEW REQUIREMENTS AND MINIMIZATION OF IMPACTS PURSUANT TO SEQRA.

The State is required to prepare an environmental impact statement ("EIS")[147] under State Environmental Quality Review Act ("SEQRA") for "any action" it might approve that could significantly effect the environment. The granting of an easement, as an "entitlement for use" of, or "permission to act" in, public lands constitutes an "action"[148] under the SEQRA,[149] and as such, OGS must complete a full State Environmental Quality Review ("SEQR").

SEQRA requires that

> Agencies use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

NY CLS ECL § 8109(1).

[145] *Id.* Bullet 5.
[146] *Id.* Bullet 8.
[147] NY CLS ECL § 8-0109(2).
[148] "'Actions' include: (i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; *or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;* (ii) policy, regulations, and procedure-making. NY CLS ECL § 8-0105(4) (LEXIS 2007) (emphasis added). "By granting an easement prior to SEQRA review," for instance, a municipal board "improperly circumvented the legislative mandate" for an environmental impact review under SEQRA. (NY CLS ECL § 8109(4); 6 NYCRR 617.12(a)). *Matter of Benvenuto v. Village of Millerton*, 2005 NY Slip Op 25502, 3 (N.Y. Misc. 2005).
[149] NY CLS ECL §§ 3-0301(1)(b), 3-0301(2)(m), and 8-0113.

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While OGS need not complete an additional Environmental Impact Statement ("EIS")[150] if the proposed action has already generated a federal EIS under the National Environmental Policy Act ("NEPA"), if the federal review document is insufficient for a an agency to make a decision the State *must* carry out its own additional analysis/review[151] before it makes a "written findings statement;"[152] in particular, to assure compliance with the mitigation requirements of SEQRA.[153]

If OGS somehow determines this failure to comply with the letter and spirit of Pub L § 75 is not to fatal to the Broadwater application, the insufficiency of the DEIS in numerous other ways, including but not limited to alternatives and mitigation, prohibits OGS from making certain findings related to alternatives as required by SEQRA before the state action of granting of an easement.[154] Therefore, the OGS cannot grant Broadwater's application.

Specifically, SEQRA's analysis requires the following be adequately addressed before rendering a decision:

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[150] 6 NYCRR § 617.15; NY CLS ECL § 8-0111(2); *see also Bronfman v. Flacke*, 512 N.Y.S.2d 225, 227 (N.Y. App. Div. 1987) (holding that a federally-prepared EIS may be used to satisfy the requirements of State law).

[151] *See* Michael Gerrard, Environmental Impact Review in New York § 8.04 (2005) (citing DEC, Final Generic Environmental Impact Statement Including Final Regulatory Impact Statement and Final Regulatory Flexibility Analysis for Revisions to 6 NYCRR Part 617, Feb. 18, 1987 at xiv ("although an agency has no obligation to prepare an EIS if a draft and final EIS under NEPA has been duly prepared, it may require additional analysis under SEQR sufficient to make its SEQR findings")).

[152] 6 NYCRR § 617.11(c), NY CLS ECL § 8-0109(8); 6 NYCRR § 617.11 ("no involved agency may make a final decision . . . until . . . the agency has made a written findings statement").

[153] *Id.*; Specifically, the regulations say that this written statement must "(1) consider the relevant environmental impacts, facts and conclusions disclosed in the final EIS; (2) weigh and balance relevant environmental impacts with social, economic and other considerations; (3) provide a rationale for the agency's decision; (4) certify that the requirements of this Part [i.e. regulations under SEQRA, Title 6 NYCRR Part 617], have been met; and (5) certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision, those mitigative measures that were identified as practicable." 6 NYCRR § 617.11(d).

[154] 6 NYCRR § 617.15(a).

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> (a) a description of the proposed action and its environmental setting;
>
> (b) the environmental impact of the proposed action including short-term and long-term effects;
>
> (c) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (d) *alternatives to the proposed action*;
>
> (e) *any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented*;
>
> (f) mitigation measures proposed to minimize the environmental impact;
>
> (g) *the growth-inducing aspects of the proposed action, where applicable and significant*; and
>
> (h) *effects of the proposed action on the use and conservation of energy resources*, where applicable and significant, provided that in the case of an electric generating facility, the statement shall include a demonstration that the facility will satisfy electric generating capacity needs or other electric systems needs in a manner reasonably consistent with the most recent state energy plan. NY CLS ECL § 8-0109(2)(a-h) (emphasis added).

SEQRA defines "environment" more broadly than does NEPA to include

> the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution or growth, and existing community or neighborhood character.

NY CLS ECL § 8-0105(6).

Unlike NEPA,[155] SEQRA mandates that environmental impacts be minimized.[156] This substantive obligation of SEQRA requires OGS to balance all the relevant factors when making the decision whether to approve an action or not and, given that balancing,

[155] *See Stryckers Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (holding that NEPA imposes upon agencies duties that are essentially procedural).
[156] NY CLS ECL §§ 8-0109(1-2), (8).

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to mitigate environmental harms "to the maximum extent practicable."[157] Because there are alternatives to Broadwater's proposal and because its impacts have not been adequately mitigated,[158] SEQRA requires that the OGS reject the request for easement.

In this case, there are system, supply, and siting alternatives each of which are available to Broadwater and each one of which would minimize adverse effects. First, Broadwater failed to identify any compelling need for the new natural gas supply in his particular region and that several alternatives that would better serve the region exist, including one LNG project under construction in Canada and two LNG facilities approved by the state of Massachusetts and by the US Maritime Administration.[159] Second, numerous practical pipeline and FSRU siting locations which would be less environmentally destructive. Lastly, siting alternatives in the Atlantic Ocean and technology alternatives such as Shuttle and Regasification Vessels ("SRV") being employed in other areas of the country, are available to Broadwater. While they have been mentioned, they have not been fully discussed in the DEIS and as such, OGS must analyze such options.

A. <u>There are reasonable siting alternatives and environmental minimization options available to Broadwater.</u>

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[157] *Id.; see Town of Henrietta v. Dep't of Envtl. Conservation*, 430 N.Y.S.2d 440, 446 (N.Y. App. Div. 1980) (establishing that SEQRA has a substantive mitigation requirement: stating that an EIS under SEQRA "is not a mere disclosure statement but rather an aid in an agency's decision-making process to evaluate and balance the competing factors"). The substantive mitigation requirement under SEQRA requires that the agency (1) mitigate environmental harm, i.e., ensure that effects revealed by the EIS process are mitigated to the maximum extent practicable, and (2) make a formal finding that adverse environmental impacts have been mitigated to the maximum extent practicable. NY CLS ECL §§ 8-0109(1-2), (8).

[158] As discussed *infra* in sections on LISCPs and Alternatives.

[159] Ezra Hausman, et.al., Synapse Energy Economics, Inc., The Proposed Broadwater Energy Import Terminal: An Analysis and Assessment of Alternatives (Mar. 2, 2006), *infra* Ex. 1, Appendix, *also available at* http://www.savethesound.org/LNG/BW_files/alternatives-analysis.pdf
Ezra Hausman, et.al., Synapse Energy Economics, Inc., Update: the Proposed Broadwater Energy Terminal (Jan. 22, 2007), *infra* Ex. 2, Appendix.

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In the case of Broadwater, the FERC DEIS failed to "rigorously explore and objectively evaluate all reasonable alternatives."[160] It failed to fully evaluate pipeline and LNG alternatives, and failed to evaluate pipeline route and Long Island Sound based FSRU siting alternatives specific to Broadwater's application. FERC also failed to "devote substantial treatment to each alternative considered."[161] According to Drew Carey, Ph.D., on behalf of Coastal Vision, LLC.:

> …the most serious omission was the lack of a detailed and supportable alternative siting analysis for the LNG import terminal and pipeline. The siting process did not consider sufficient feasible alternatives, reduced the terminal sites to one without sufficient assessment of environmental impacts or consideration of engineering alternatives, did not collect sufficient data to evaluate alternatives and rejected alternatives without due cause. I conclude that the DEIS and supporting documents have not met the minimum standard for determining the environmental impacts of the Project and have failed to properly evaluate alternative sites for the marine-based LNG import terminal and pipeline.[162]

In addition to the energy system alternatives discussed above, there are specific siting and technology applications and pipeline route alternatives that Broadwater could employ; any one of which would mitigate the detrimental impacts of Broadwater's proposal. These include a number of water based FSRU siting locations inside and outside of the Long Island

[160] It is "absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as 'the linchpin of the entire impact statement.'" *NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975) (citation omitted); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973); *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992) (holding that a "thorough discussion of the alternatives is imperative").

[161] "The 'existence of a viable but unexamined alternative renders an environmental impact statement inadequate.'" *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1994) (*quoting Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)); *see also Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot "bring into compliance with NEPA an EIS that by itself is inadequate").

[162, 162] Drew A. Carey, Coastal Vision, Comments on Broadwater LNG Draft Environmental Impact Statement 7 (Jan. 22, 2007) at 2.

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Sound estuary,[163] LNG SRVs which could be used either inside or outside of LIS,[164] pipeline route options that minimize habitat disruption, and land based siting, provided Broadwater also acquires the substantial and appropriate buffer zone acreage.

While practical and feasible FSRU site alternatives and pipeline route alternatives that minimizes environmental impacts exist, the DEIS alternatives analysis for both the FSRU and pipeline were unnecessarily restrictive and lacked supporting data to justify the chosen location over alternate sites with engineering, environmental, and socioeconomic advantages.[165]

There are ocean based alternatives that would have no impact on this unique estuary and would still allow Broadwater to proceed with sufficient reliability. There are two options that can be used in the Atlantic Ocean, specifically miles off of the South Shore of Long Island: SRVs and FSRUs, like the one currently proposed. SRVs can be moored to buoys and offload in 3.5 m significant wave heights[166] (compared to 2.0 m significant wave heights for FSRU), result in an average of only 3 days/year downtime (compared to 28 days of downtime for FSRUs),[167] and has substantially less impact to ichthyoplankton, phytoplankton and water quality from water usage in facility operations and ballast.[168] Either of these types of facilities could be considered in conjunction with the new Transco Leidy to Long Island Extension ("TLLIE") pipeline.

[163] Drew A. Carey, Coastal Vision, Offshore Memorandum (Feb. 28, 2007) at 8..
[164] *Id.* at 9.
[165] *Id.* at 7.
[166] SRVs have successfully unloaded up to 5 m. Drew A. Carey, Coastal Vision, Offshore Memorandum (Feb. 28, 2007) at 9.
[167] *Id.* at 7.
[168] *Id.* at 8.

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TLLIE, which will deliver .1 bcf of natural gas to New York, was approved by FERC in May of 2006 and expected to be operational by November 2007.[169] TLLIE was considered briefly in Broadwater's DEIS as an alternative supply project,[170] however, the DEIS overlooked the pipeline as an option that would allow alternative siting of the FSRU or the alternative SRV technology. Much like Broadwater's current proposal to tap into the Iroquois pipeline, considering this TLLIE in an alternative siting analysis could allow Broadwater to tie into New York markets by locating a facility off the South Shore of Long Island. Such an option would be located in deep water outside of marine transit corridors and, from initial review by Coastal Vision, could have reduced environmental impacts.[171]

Broadwater also failed to consider feasible alternatives within Long Island Sound that would have shortened the length of the pipeline and minimized environmental damage. The apparent cause for the limiting criteria is the jurisdictional line Broadwater did not wish to cross; every effort to remain in New York waters "despite substantial environmental and engineering obstacles"[172] was made. It was not until sunset of the Connecticut Moratorium on Long Island Sound energy infrastructure that the applicant proposed one new alternative pipeline path that touched upon Connecticut.[173]

In the case of Broadwater, FERC failed to "rigorously explore and objectively evaluate all reasonable alternatives,"[174] choosing instead to "contrive a purpose so slender

[169] Northeast Gas Association, Planned Enhancements - Northeast Pipeline & Storage Systems (July, 2006), http://www.northeastgas.org/pdf/system_enhance0706.pdf.
[170] Fed. Energy Reg. Comm'n, Draft Environmental Impact Statement for the Proposed Broadwater LNG Project, FERC/EIS-0196D at 3-123 (2006) [hereinafter *Broadwater DEIS*] at 4-14.
[171] Coastal Vision Offshore Memorandum, *supra* note 55 at 7.
[172] *Id.*
[173] *Id.*
[174] 40 C.F.R. §1502. It is "absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed

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as to define competing 'reasonable alternatives' out of consideration (and even out of existence)."[175] For example no alternative locations for the FRSU in Connecticut waters were even considered.[176] As long as the FSRU can safely operate at 4.7 miles away from each coastline, the largest of the hazard zones set by the USCG when evaluating potential effects to humans,[177] the environmentally preferable sites and routes, not geopolitical boundaries, should dictate.

According to Coastal Vision's review, moderate flexibility in pipeline location and/or FSRU siting would avoid two cable crossings and a shoal crossing[178] and could yield a pipeline pathway through a habitat with proven response to sediment disturbance.[179] Most importantly, consideration of these other locations could decrease by half the total pipeline length required, thereby substantially reducing known environmental impacts.[180] For example, moving the FRSU 8-10 miles west would still provide a buffer around the facility at least as wide as the USCG's widest safety zone[181] but would not interfere with shipping routes and has the substantial environmental benefit of eliminating up to 16 miles of pipeline installation impacts.[182] Furthermore even if the FSRU were not moved from its proposed location, there are pipeline route alternatives that would minimize habitat disruption.

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action and possible alternatives, a requirement that we have characterized as 'the linchpin of the entire impact statement.'" *NRDC v. Calloway*, 524 F.2d at 92 (citation omitted); *Silva v. Lynn*, 482 F.2d at 1285; *All Indian Pueblo Council v. United States*, 975 F.2d at 1444 (holding that a "thorough discussion of the alternatives is imperative").

[175] *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664, 660 (7th Cir. 1997).

[176] Coastal Vision DEIS Memorandum, *supra* note 29 at 8.

[177] *U.S.C.G. W.S.R.*, table 3.2-1, *supra* note 9 at 60.

[178] Coastal Vision DEIS Memorandum, *supra* note 29 at 10.

[179] *Id.*

[180] *Id.*

[181] *U.S.C.G. W.S.R.*, *supra* note 9 at 13.

[182] Further details on specific alternative sites and routes can be found in the attached Coastal Vision DEIS and Offshore Memoranda, *infra* Ex. 3 and 4, Appendix.

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Despite a wide variety of pipeline route options that could minimize environmental impacts by shortening the length to be constructed, only one alternative that traversed Connecticut waters or evaluated a different tie-in from MP 18.2 was even considered.[183] Despite the fact that this "North Route" would avoid crossing the Stratford Shoal Middle Ground Complex (an area that presents difficulties with pipeline laying and benthic resources) and result in 9.3 miles less pipeline placement, this alternative was rejected on minimal analysis and misinterpretation of scientific data.[184]

B. There are reasonable supply alternatives to Broadwater.

Broadwater is unneeded as existing and future efficiency and energy renewables programs could ensure a diverse and stable energy portfolio. Moreover, even assuming a need for more natural gas in the region, such needs will be met by new supplies that are on the way with the construction of three new LNG import facilities designed to feed the North East. Canaport in Canada is currently under construction[185] and two ocean based facilities, Northeast Gateway and Neptune, have been approved by Massachusetts and have received their deepwater port license approvals from the U.S. Maritime Administration.[186] While these facilities will serve the New England energy market, their presence will mean that natural gas from the Algonquin pipeline, which currently flows through New York and Connecticut to the Boston area, will be available to increase

[183] Coastal Vision DEIS Memorandum, *supra* note 29 at 8.
[184] *Id.* at 9-13.
[185] Canaport LNG, Project Progress: *The Construction is Proceeding on Schedule*, Canaport Connections, Summer 2006, at 1, *available at* http://www.canaportlng.com/pdfs/canaportconnections/CanaportConnections_v2.pdf.
[186] Northeast Gateway: *MARAD approves Excelerate's Northeast Gateway LNG Port*, Offshore, Feb. 9, 2007, *available at http://www.offshore-mag.com/articles/article_display.cfm?Section=ARCHI&C=FPTR&ARTICLE_ID=284297*. Neptune: MarineLink.com,*Neptune LNG Deepwater Port Project Receives Approval from MarAd*, http://www.marinelink.com/Story/Neptune-LNG-Deepwater-Port-Project-Receives-Approval-From-MarAd-205806.html (last visited Mar. 23, 2007).

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supplies in the New York and Connecticut regions. Broadwater is not and will not be required by the present or future public convenience and necessity, or the public interest, as prudent, feasible, and practical energy alternatives exist that offer significant environmental advantage over the proposed project or its components.

In a report entitled "The Proposed Broadwater LNG Import Terminal: An Analysis and Assessment of Alternatives"[187] ("Synapse Report 2006"). Synapse Energy Economics ("Synapse") identified and evaluated potential alternatives to Broadwater that could meet the long-term energy needs of the New York and Connecticut markets, including those options beyond new supplies. The Synapse Report demonstrated that: 1) Broadwater is unnecessary;[188] 2) sufficient natural gas demand reduction can be accomplished by fully implementing Connecticut and New York's existing energy efficiency programs and renewable portfolio standards and by investing in new gas efficiency programs;[189] and 3) regardless of our investment in those programs new LNG import facilities and pipeline capacity upgrades are being built in the region.[190]

While there is no dispute that on a national basis, demand for natural gas has been growing while domestic production from conventional sources has struggled to keep pace, this does not mean that a major LNG import terminal in Long Island Sound is required to meet local gas demand. In fact, the Broadwater Energy documentation does not substantiate any particular requirement for additional natural gas supplies in the target

[187] Ezra Hausman, et.al., Synapse Energy Economics, Inc., The Proposed Broadwater Energy Import Terminal: An Analysis and Assessment of Alternatives (Mar. 2, 2006), *infra* Ex. 1, Appendix, *also available at* http://www.savethesound.org/LNG/BW_files/alternatives-analysis.pdf
Ezra Hausman, et.al., Synapse Energy Economics, Inc., Update: the Proposed Broadwater Energy Terminal (Jan. 22, 2007)..
[188] *Id.* at 1.
[189] *Id.* at 1
[190] *Id.* at 2; Synapse Report 2007 Update, *supra* note 29 at 2.

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region.[191] Synapse showed that the region targeted by Broadwater has and will continue to have ample natural gas import capacity to supply the regional demand for most days of the year and that any import capacity shortfalls would only manifest themselves during peak demand periods during the winter heating season, due to the strong seasonality of gas use.[192] And that better infrastructure for storage to meet peak demand, not vast quantities of new supply, is better suited to the actual needs of the CT/NY region.[193] If it is assumed for the sake of argument that there is a need in the Northeast for new supplies of natural gas, FERC's previous chairman has said that we only need two gas plants and that those facilities can be built in Canada.[194] Synapse found that new import LNG terminals in Canada[195] and Massachusetts,[196] which have local support and permits, are designed to meet the requirements of the northeast[197] and will be online before Broadwater is built.[198] These facilities which are located "downstream" of the study region can deliver gas to this region.[199] Today, New England gets much of its gas supply from the Algonquin pipeline, which passes through Connecticut from the southeast

[191] Synapse Report 2006, *supra* note 29 at 2-5.
[192] *Id.* at 3.
[193] *Id.*
[194] Peter J. Howe, 2 Gas Plants Needed for N.E. But Facilities Can Be Built in Canada Instead of Here, US Official Says, Boston Globe, Sept. 14, 2004, at C5.
[195] Synapse Report 2006, *supra* note 29
[196] Tom Haywood, Massachusetts Green-Lights Two LNG Buoy Projects Off Gloucester, Natural Gas Week, Dec. 25, 2006, at 2.
[197] Synapse Report 2007 Update, *supra* note 29 at 2.
[198] In addition to those supplies, the following applications are moving in parallel to this proceeding: the Islander East Pipeline; Connecticut Light and Power's Glenbrook Cables project and Long Island Sound Replacement Cables; the Millennium Pipeline, which will serve the Southern Tier, Lower Hudson, and New York City markets through its pipeline interconnections with up to 525,000 Dth/day starting November, 2008 (please note that the Millennium Pipeline could be a link in the larger "NE 07 Project" that includes new facilities for Algonquin Gas Transmission, Empire State Pipeline and Iroquois Gas Transmission to connect the Dawn supply hub to eastern markets in New York, New Jersey and New England through Millennium); Yankee Gas' LNG facility in Waterbury with the storage equivalent of 1.2 billion cubic feet of natural gas, which may be able to take advantage of other regional LNG facility overflow; the Long Island Offshore Wind Initiative; new proposals for Long Island Sound tidal energy proposed to FERC; and Atlantic Sea Island Group, LLC's South Shore Long Island LNG facility application.
[199] Synapse Report 2007 Update, *supra* note 29 at 7.

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corner of the state to the northwest corner.[200] This transport through function accounts for about 90% of the activity on Algonquin in this region. Once additional LNG-based supplies are available in New England, much of that existing pipeline capacity would be available for delivering gas supplies from domestic sources (i.e., the Gulf of Mexico) to the same markets Broadwater is proposing to serve.[201] In addition, decreased competition for this pipeline capacity means that transportation costs to the region are likely to decrease. Thus the availability of new LNG terminals in New England and eastern Canada will benefit New York and Connecticut's availability of supply, even if the physical molecules of gas are not delivered to the region.

Synapse also demonstrated that there are much more cost effective ways to balance supply and demand in the target region,[202] which have much lower risks—security, environmental, cost, geopolitical—than engaging in industrial LNG development. Broadwater, a development that would increase our reliance on fossil fuels from politically unstable regions of the Mideast and Africa, and facilitate the exposure of the domestic gas market to an OPEC-style international market,[203] could be obviated by implementation of existing Renewable Portfolio Standards and cost-effective demand management programs in electricity and gas. These programs are among the most cost-effective ways for the states to meet growing demand, to accomplish climate change emission reduction goals and to reduce energy bills.[204] Such renewable energy and

[200] *Id.*
[201] *Id.*
[202] Synapse Report 2006, *supra* note 29 at 10, 12.
[203] Synapse Report 2007 Update, *supra* note 29.
[204] Synapse Report 2006, *supra* note 29 at A-1.

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demand side measures also add far greater diversity to the mix of energy supply in the region and a much better hedge against fuel prices than the Broadwater LNG project.[205]

Furthermore, Synapse found that full implementation of renewable portfolio standards in New York and Connecticut would save approximately 52 bcf of gas each year and that electric energy efficiency initiatives could save an additional 81 bcf at very low cost compared to the cost of natural gas.[206] Together these measures alone would offset roughly 75% of the expected gas demand growth in the region. When supplemented by gas demand side management, expanded use of combined heat and power, and repowering of existing power plants, these measures represent more than enough potential savings to offset all anticipated demand growth over the next decade.

Due to its unprecedented nature, its elimination of public trust waters from the public's own use, its impact on the aquatic and visual resources, and the overwhelming public opposition, Broadwater is clearly inconsistent with the social and economic considerations in the long-term planning, protection, and restoration of Long Island Sound. Furthermore, there are numerous energy system and LNG siting alternatives which could minimize or avoid Broadwater's adverse social and environmental effects.

Because these reasonable alternatives have not yet been investigated,[207] and practicable[208] mitigation measures exist, Broadwater cannot proceed as proposed without violating SEQRA.

VI. BECAUSE THE DEIS FAILS TO MEET SEQRA STANDARDS OGS MUST TAKE A SEPARATE HARD LOOK.

[205] Synapse Report 2007 Update, *supra* note 29 at 11.
[206] Synapse Report 2006, *supra* note 29 at 10.
[207] 6 NYCRR § 617.9(b)1.
[208] NY CLS ECL §§ 8-0109(1-2), (8).

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As discussed in the SEQRA section above, when the federal EIS fails to adequately assess a given impact, the state must take up the review in order to issue sufficient written findings. In this case, FERC failed to sufficiently address critical cumulative impacts on air, environmental resources and industrialization as required by the LISCMP. It is therefore incumbent upon New York to undertake a supplemental review of these cumulative impacts before issuing a written finding, particularly for LIS CP 1.5.

According to the LIS CMP New York seeks

> to minimize 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.

LIS CP 1.5

The U.S. Environmental Protection Agency ("EPA") guidance on the evaluation of cumulative impacts states:

> Cumulative impacts result when the effects of an action are added to or interact with other effects in a particular place and within a particular time. It is the combination of these effects, and any resulting environmental degradation, that should be the focus of cumulative impact analysis. While impacts can be differentiated by direct, indirect, and cumulative, the concept of cumulative impacts takes into account all disturbances since cumulative impacts result in the compounding of the effects of all actions over time. Thus the cumulative impacts of an action can be viewed as the total effects on a resource, ecosystem, or human community of that action and all other activities affecting that resource no matter what entity (federal, non-federal, or private) is taking the actions.[209]

Such cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.[210]

[209] http://www.epa.gov/compliance/resources/policies/nepa/cumulative.pdf.
[210] 40 C.F.R. § 1508.7 (LEXIS 2007).

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A. The DEIS was insufficient to determine Broadwater's cumulative impacts.

An oyster crash (linked to shellfish disease), two separate lobster die-offs, and the continued persistence of hypoxic conditions have signaled the need for increased efforts to protect the Long Island Sound's ecosystem. The introduction of botanical and zoological invasive species, loss of native eel grass, and over-development of the shoreline threaten the biological integrity of the estuary. Usage issues, such as dredging, utility crossings, and recreational water rights, have impacted seafloor habitats and raised policy question of how to best balance traditional public trust rights of the human community. Point and non-point source pollution contribute stormwater, heavy metals, nitrogen, pesticides and marine debris to the ecosystem which shutdown shellfishing, impacts wildlife, and greatly limits the public's ability to use shoreline resources. Finally, global warming and its effects on water temperature and sea level changes will likely impact fisheries, sensitive tidal marshes, and may lead to the eventual loss of these critical wildlife habitats.

Cumulative impacts need to be considered in light of the baseline conditions, which may include some degree of pre-existing environmental impairment.[211] Broadwater could prove to be an incremental impact to each of these already progressing issues the final result of which is collectively significant. The DEIS chose to focus only on other utility and dredge disposal impacts[212] which may combine with the assumed

[211] See Considering Cumulative Effects under the National Environmental Policy Act (CEQ 1997).
[212] DEIS *supra* note 18 at E-39-45.

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impacts of Broadwater and fails to examine the cumulative affects of Broadwater in the context of each of the above described environmental trends.

The DEIS only discussed the impact of other utility and dredge disposal projects located in the Long Island Sound region to the extent that their activities could result in cumulative impacts on water quality and habitats in Long Island Sound. The DEIS failed to assess numerous other cumulative impacts, the following of which are of particular concern for the Department of State's review: cumulative energy and air impact on the Long Island Sound region posed by the currently approved and proposed northeastern LNG facilities[213] once they become operational[214] and the cumulative air quality impact on the Long Island Sound region from emissions at the industrial complex and from the large increase in related tanker and tug traffic.

Additionally, the DEIS contains ten pages on cumulative impacts,[215] but the bulk merely describes other utility projects. There is no mention of cumulative acoustic impacts caused by the operation of the FSRU and its on board components or the potential cumulative impact of light pollution from facility's operational lights,[216] in fact no lighting plan has been submitted into the docket.

In conclusion, the DEIS did not sufficiently evaluate the cumulative effect Broadwater poses to the seafloor, water quality, wildlife, air quality, aural and visual resources, or future industrialization of the Long Island Sound region.

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[213] *See* FERC proposed and potential LNG in the regional planning discussions section.
[214] When consequences of similar actions will be felt cumulatively (such as coal mines within one region) they should be considered jointly. *Kleppe, Secretary of the Interior, et al. v. Sierra Club et al.*, 427 U.S. 390.
[215] DEIS *supra* note 18 at 3-239 through 3-240
[216] *See* DOI Comments, *supra* note 131at 3 for information on best practices for warning lights as related to migrating birds.

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B. Industrialization of Long Island Sound

If Broadwater is permitted it would result in the cumulative industrialization of Long Island Sound. First, Broadwater would serve to show any industrial or commercial developer that Long Island Sound is for sale and will provide relatively inexpensive submerged lands to anchor a floating proposal when the developer chooses not to acquire expensive coastal property.[217] Second, the FERC DEIS uses KeySpan's platform located 1.8 miles off of Northport and Conoco-Phillips platform 1 mile off of Riverhead[218] to explain that Broadwater's approval would not spur more offshore LIS construction.[219] However, platforms associated with the KeySpan and Conoco-Phillips are ancillary to the companies' primary operations on the shoreline. Furthermore, the Northport platform, has been in operation since 1967[220] and the Conoco-Phillips platform has been in operation since 1974[221]— both constructed before the advent of modern environmental regulation and New York's Coastal Consistency Program.[222] It is odd that the DEIS uses these existing platforms to support a claim that Broadwater will not industrialize the Sound, since it only reinforces the point that industrialization invites industrialization and establishes that indeed a project such as Broadwater sets a precedent to be used in future justifications for exclusive use regardless of exact type, scope or riparian interest.

[217] NY CLS Pub L § 75(7)(b); *Matter of Lupo v. Board of Assessors of Town of Huron*, 2005 NY Slip Op 25295, at 6 (N.Y. Misc. 2005). ("Such grants may only be made to the upland riparian owner ('proprietor of the adjacent land'), a limitation designed to recognize and protect the riparian right of access to navigable water.")
[218] DEIS *supra* note 18 at 3-245.
[219] *Id.* at 3-87.
[220] *Id.*
[221] *Id.*
[222] New York's Coastal Program was approved in 1982. http://coastalmanagement.noaa.gov/mystate/ny.html.

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In considering severity of impact, one factor to consider is the "degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration."[223] If Broadwater were permitted, it would set a precedent for the industrial use of the Sound's mid-waters,[224] establish a defacto industrial marine zone, and create a policy of excluding the public from public trust waters for the exclusive benefit of a private corporate entity that holds no adjacent shoreline.[225]

Broadwater's proposal is also inconsistent with recent marine zoning efforts. Marine zoning in Long Island Sound has been discussed for years,[226] first as a way to improve fishery stocks, then as a way to thoughtfully site energy projects—never has a conclusion been reached. This indecision resulted in many debates centered on issues of public use; fishermen and boaters fought to keep their right to freely access all portions of the Sound and resource managers worried that such a paradigm might invite unintended consequences. The result was a draft bill on marine zoning that was floated but never enacted by the Connecticut General Assembly and a Long Island Sound Watershed Alliance conference on Long Island Sound and marine reserves. Now in one massive move Broadwater seeks to, without an established policy or structure for researched marine zoning, create its own defacto marine zone. The results of which are the very reasons Long Island Sound stakeholders were hesitant from the outset. In a final twist, this "marine zone" is being used to create an industrial center in the Sound that will

[223] 40 C.F.R. §1508.27(b).
[224] *See supra* IIIA (vi.) discussion on LISCP 1.
[225] *Id.*
[226] *See* 2004 Summit, Long Island Sound Watershed Alliance, and 2003 Annual Report of the Long Island Sound Task Force LIS Taskforce (on file at Save the Sound, Inc.).

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negatively impact its waters, habitat, and traditional use and is antithetical to the original intention of Long Island Sound protection.

Just as existing subsea pipelines, and platforms permitted before modern coastal regulation, have been used by project proponents to bolster its approval, so too would others seeking to industrialize and exclude the public from the center of the Sound in generations to come use Broadwater.

VI. Conclusion

The scope, scale and nature of the Broadwater proposal are unprecedented for Long Island Sound. As set forth above, it would permanently and completely eliminate public and other commercial access to a large part of the Sound, it would create substantial pollution problems and present substantial issues of security that the shoreline towns and their citizens will be left to grapple with. All of this would be to benefit an exclusively private and industrial purpose for which a genuine public need has not been established. OGS should deny the application for easement because 1) Broadwater is not an adjacent land holder, 2) the requirements of SEQRA have not been complied with, and 3) Broadwater's application violates numerous LISCPs for which OGS has an independent responsibility to ensure consistency.

If one wants evidence of how vital this issue is to the future of a healthy and thriving Long Island Sound, one need look no further than the vigorous and almost universal opposition by Long Island and Connecticut towns that will be affected, as well as the overwhelming opposition of individual citizens within those towns. OGS could