

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

BROADWATER ENERGY LLC
BROADWATER PIPELINE LLC
BROADWATER PIPELINE LLC

Docket Nos. CP06-54-000
CP06-55-000
CP06-56-000

THE COUNTY OF SUFFOLK, NEW YORK'S OBJECTIONS TO
THE FEBRUARY 26, 2007 REQUEST OF BROADWATER
ENERGY, LLC AND BROADWATER PIPELINE, LLC FOR
LEAVE TO FILE SUPPLEMENTAL COMMENTS ON THE
DRAFT ENVIRONMENTAL IMPACT STATEMENT

LA20-1

Pursuant to Rule 213 of the Federal Energy Regulatory Commission ("FERC"), the County of Suffolk, New York ("Suffolk County"), by its attorneys, Farrell Fritz, P.C., hereby submits these objections to the February 26, 2007 Request Of Broadwater Energy, LLC And Broadwater Pipeline, LLC (collectively "Broadwater") For Leave To File Supplemental Comments On The Draft Environmental Impact Statement ("Broadwater's Proposed Supplement"). FERC must reject Broadwater's Proposed Supplement on the grounds that Broadwater's lengthy filing is an unwarranted attempt by the applicant to, in effect, cross-examine the intervenors' evidence without providing the same opportunity to the intervenors and the public to evaluate Broadwater's proffered evidence. Moreover, Broadwater's assertions are wrong.

All of the information contained in Broadwater's Proposed Supplement should have been included in Broadwater's previous filings with FERC, including but not limited to, the various Resource Reports it filed with FERC. Having chosen to withhold information it contends is supportive of its position until after the issuance of FERC's Draft Environmental Impact Statement ("DEIS"), after the close of the public hearings, after the time expired to submit

LA20-1

In this comment letter, Suffolk County has provided comments on three items: Broadwater's supplemental comments on the draft EIS, the draft EIS, and the public review process for the draft EIS. Regarding the first item, we do not consider it appropriate for us to respond to comments directed to Broadwater. Further, the comments provided on the draft EIS in this letter essentially reiterate the comments presented in one of Suffolk County's earlier letters and do not raise any new issues. We have addressed those previous comments in our responses to Letter LA-1. Our response to the county's comments on the public review process for the draft EIS is presented below.

LA20 – Suffolk County

20070315020 Received FERC OSBC 03/13/2007 11:07:45 AM Docket# CP06-54-000, ET AL.

written comments to the DEIS and after the intervenors and other opponents submitted their comments to the DEIS, Broadwater must not be allowed to supplement the record in this fashion. In the event that FERC grants Broadwater's request and considers Broadwater's Proposed Supplement, it must re-open the DEIS record, hold supplemental DEIS public hearings and hold the evidentiary hearings previously requested by Suffolk County.

Broadwater contends in its Proposed Supplement that: (1) FERC provided ample opportunity for meaningful participation in the National Environmental Policy Act ("NEPA") process; (2) NEPA Standards were met by the DEIS; (3) the DEIS adequately addressed factual issues raised by other parties; and (4) the DEIS adequately addressed legal arguments raised by other parties. Broadwater's contentions are simply incorrect.

LA20-2

As to Broadwater's first contention, the record before FERC establishes beyond doubt that FERC limited and impeded public participation in the NEPA process. First, the January 2007 DEIS public hearings were held at locations with inadequate facilities, which prevented many attendees from even being in the same room as the proceedings. In addition, many attendees were prevented from speaking at the public hearings. Second, although many members of the general public and many governmental authorities demanded that FERC hold additional public hearings because of these logistical problems, FERC summarily rejected these requests, indicating that rigidly sticking to its artificially-imposed time table was more important than fairly and fully evaluating the substance of the DEIS. Broadwater admits that governmental authorities have statutory responsibilities and their opinions are entitled to deference (see Broadwater's Proposed Supplement at p. 4), yet it and FERC ignored the demands of United States Senators and Representatives, State and County Executives and Legislators and local

LA20-2

In January 2007, we held public meetings as a courtesy to the public, allowing them an opportunity to provide both verbal and written comments on the draft EIS. This was an additional opportunity for the public because we were accepting all written comments on the draft EIS sent to FERC. Public comment meetings are not a requirement of NEPA, but FERC conducts them whenever possible to provide an additional opportunity for public input. Due to the large number of participants, one of the meeting venues did not have adequate capacity within the main seating area. However, we held three other public meetings, including one at Smithtown High School in Suffolk County, and each of those facilities had sufficient capacity to accommodate the participants. Similar meetings were held during the scoping process, including one at Wading River, and no problems were encountered.

In total, we held nine public meetings for the Project and only one experienced difficulties. Due to a time limit for use of the auditorium, some of those wishing to provide verbal comments were not able to do so. Those who did not have the opportunity to speak had the opportunity to leave their written comments with us. Further, as noted above, we accepted all written comments on the draft EIS beyond the already extended comment period. Therefore, an additional public meeting was not necessary and we do not believe that anyone was denied an opportunity for comment.

Local Government Agencies and Municipalities Comments

LA20 – Suffolk County

200703135020 Received FERC OSEC 03/13/2007 11:07:45 AM Docket# CP06-54-000, ET AL.

governmental representatives to hold additional public hearings. In other words, Broadwater's governmental deference only applies to governmental authorities that agree with it.

As to Broadwater's second contention, the DEIS is, in fact, woefully inadequate and does not comply with NEPA. It also does not comply with the State Environmental Quality Review Act ("SEQRA") pursuant to which New York State agencies are required to comply with as they evaluate the various permits, licenses and approvals Broadwater needs from those agencies. (See Comments of Suffolk County, dated January 22, 2007, submitted to FERC and other governmental authorities ("Suffolk County's January 22, 2007 Submission") for a full discussion of the inadequacies of the DEIS.)

As to Broadwater's third contention, the DEIS, in fact, fails to adequately address factual issues including essential safety, security, and environmental issues. As highlighted in Suffolk County's January 22, 2007 Submission, the DEIS failed to adequately evaluate many crucial issues. For example, the DEIS failed to adequately evaluate the cryogenic system Broadwater proposes to use on its massive floating storage and regasification unit ("FSRU") and the adverse air pollution impacts it will have. The DEIS failed to adequately evaluate the storage, handling and disposal of large quantities of petroleum-based fuel and lubricants and solvents used on the FSRU. The DEIS failed to adequately evaluate the FSRU's daily intake and discharge of massive amounts of water from the Long Island Sound and the use of anti-fouling chemicals proposed to be used on the FSRU and to be added to discharge wastewater. The DEIS failed to adequately evaluate the thermal pollution associated with Broadwater, including the discharge of cooling water at elevated temperatures. The DEIS failed to adequately evaluate the impact of the project to other users of Long Island Sound, including interference with users of the area known as the Race, with cross-sound ferry service, with commercial fisheries and with recreational

LA20 – Suffolk County

200703135020 Received FERC OSEC 03/13/2007 11:07:45 AM Docket# CP06-54-000, ET AL.

users of the Long Island Sound. The DEIS failed to adequately evaluate impacts to endangered species including piping plovers and terns and other migrating and foraging birds and other wildlife. The DEIS failed to adequately evaluate the impacts that the Broadwater proposal would have on first responders and other emergency personnel. (See Suffolk County's January 22, 2007 Submission, including the affidavits of Vito Minei, P.E., Director of Environmental Quality of the Suffolk County Department of Health Services, and Joseph Williams, Commissioner of Suffolk County Department of Fire, Rescue and Emergency Services.) Broadwater did not respond to the safety and security issues raised by Commissioner Williams and Mr. Minei, P.E., and that silence speaks volumes.

The DEIS also failed to adequately evaluate the inability of the United States Coast Guard ("USCG") to be able to provide the personnel, vessels and equipment needed to secure the USCG-mandated safety and exclusion zones. Broadwater downplays this crucial point by asserting that the USCG-mandated safety and exclusion zones are merely "deterrent" in nature and that private security personnel can perform these types of tasks. Broadwater's concession, however, that private security firms cannot act in law enforcement capacities is wholly inconsistent with its assertion about the use of private firms, as deterrence is one of many law enforcement functions that the exclusion zone security forces will undertake. See Broadwater's Proposed Supplement at p. 72.

As to Broadwater's fourth contention regarding legal arguments raised by other parties, Broadwater's Proposed Submission incorrectly analyzes applicable law. As explained in Suffolk County's January 22, 2007 Submission, federal, state and local laws prohibit approval of Broadwater. Suffolk County limits its comments in this response to the Public Trust argument raised by Broadwater, as its tortured interpretation of that doctrine is clearly wrong. The Public

LA20 – Suffolk County

200703135020 Received FBRC OSBC 03/13/2007 11:07:45 AM Docket# CP06-54-000, ET AL.

Trust Doctrine mandates denial of the Broadwater project as it is a textbook violation of that long-standing legal principal.

Broadwater's Proposed Supplement misconstrues the Public Trust Doctrine and mischaracterizes its own proposal in a transparent attempt to evade the doctrine's fatal impact to that proposal. Broadwater asserts that its proposal does not violate the Public Trust Doctrine because it is similar to land-based facilities located along parts of waterfront areas, or to moorings of small watercraft in harbors or to the 700-yard exclusion zone near a land-based nuclear power plant. See Broadwater's Proposed Submission at pp. 69 through 72.

Broadwater's arguments, however, ignore the essential nature of its own proposal, an exceptionally large, floating factory in the middle of commercial transit lanes in the middle of Long Island Sound. The applicable exclusion zones are not 700 yards, rather they are 950 acres around the FSRU and 1,722 acres around each supply tanker. Broadwater's project requires that large portions of Long Island Sound be turned over to it for its permanent and exclusive control.

Broadwater attempts to obscure the fact that its proposed project is set at the center of critical commercial shipping routes to and from New York City, portions of Connecticut, Long Island and Westchester and will repeatedly obstruct these traffic lanes for long stretches of time virtually every day of its operation. See USCG's Waterways Suitability Report at pp. 31 and 33. Further, the LNG supply tankers and their moving security zones will unduly impact recreational vessel operators, especially in the Race. The storage unit is to be refilled by frequent shipments of LNG that are made via large tanker ships. Broadwater states that these refill shipments will occur every two days and will take 12 to 18 hours to unload. As part of Broadwater's proposed safety precautions, each LNG delivery requires a virtual shut down of Long Island Sound. Thus, out of every 48 hours, 18 will be required to unload and the Long Island Sound will be shut

LA20 – Suffolk County

200703135020 Received FERC OSEC 03/13/2007 11:07:46 AM Docket# CP06-54-000, ET AL.

down for these periods. The USCG requires that each shipment be met by armed gun ships (which the USCG concedes in its Waterways Suitability Report that it does not have) that will escort the tankers to the floating storage unit. During these frequent deliveries, other recreational and commercial uses of Long Island Sound will be stopped. In other words, the Sound will be virtually closed for 18 out of every 48 hours or 37% of the time. This is in addition to the 950 acre exclusion zone required around the FSRU, which will be off-limits 100% of the time. The continuous disruption posed by these shipments will have significant and severe economic, recreational and safety impacts.

Over a century ago, the United States Supreme Court determined that the Public Trust Doctrine prohibits the use of public trust land for private uses similar to the one being sought by Broadwater in this matter. See *Illinois Central Railway Co. v. Illinois*, 146 U.S. 387 (1892)(voiding a State's transfer of a thousand-acre portion of the bed of Lake Michigan because it was "a gross perversion of the trust over the property under which it was held" by the State.) *Id.* at 455. The Public Trust Doctrine preserves the public's free and unobstructed use of navigable waters "so that the public "may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. *Id.* at 452. (Emphasis added.)

New York State's highest court also recognized the Public Trust Doctrine more than a century ago. See *Coxe v. State of New York*, 144 N.Y. 396 (1895)(voiding the transfer of submerged land to a private party that placed a physical obstruction to the public's access to navigable waters because the transfer violated the Public Trust Doctrine.) The *Coxe* Court articulated the test for a Public Trust Doctrine violation, holding that when the state holds title to submerged land under its sovereign powers, it cannot surrender, alienate or delegate that power

LA20 – Suffolk County

200703135020 Received FERC OSEC 03/13/2007 11:07:45 AM Docket# CP06-54-000, ET AL.

“except for some public purpose, or some reasonable use which can be fairly said to be for the public benefit.” *Id.* at 406. Like the voided transfer in *Coxe*, the Broadwater project will “seriously interfere with the navigation upon the waters” because it will deprive the public of access to vast areas of Long Island Sound, which is a recreational mecca and critical commercial highway, possibly in perpetuity. *Id.*

Twenty years later, in *Long Sault Dev. Co. v. Kennedy*, 212 N.Y. 1 (1914), the Court of Appeals found that the Public Trust Doctrine was violated when a private corporation is given exclusive use of navigable waters. The Court of Appeals voided the transfer of rights to navigable water to a private party ruling that the State may *never* surrender its control over navigation to a private corporation. Seventy-five years later, the courts of the State of New York, reaffirmed the *Coxe* principles, finding a violation of the Public Trust Doctrine when the public is denied access to surface waters for fishing and navigation. See *Smith v. State of New York*, 153 A.D.2d 737, 737 (2d Dep’t 1989).

There is no public purpose being served by Broadwater. Rather, it is a public hardship, which, if built, will permanently remove thousands of acres of navigable waters from access and use by the public. Broadwater eliminates public access to a 950-acre area of Long Island Sound in perpetuity, and to a 1,722-acre moving area of the Long Island Sound every time one of the supply vessels navigates to or from the FSRU. Given this pervasive and continuous negative impact on navigable waters, Broadwater’s proposal is void under the Public Trust Doctrine.

The Broadwater project raises significant safety, security and environmental concerns that cannot be properly evaluated without an evidentiary hearing. A full examination of all impacts must be analyzed in an open and public forum in which all parties may present real

LA20 – Suffolk County

200703135020 Received FERC OSEC 03/13/2007 11:07:45 AM Docket# CP06-54-000, ET AL.

evidence subject to the time-honored test of cross-examination. The safety, security and environmental integrity of Long Island Sound demand it.

CONCLUSION

For the reasons listed above, Suffolk County urges FERC to deny Broadwater's applications in their entirety. The safety, security and environmental health of Long Island Sound and the safety, security and health of the area's millions of residents demand such a result.

Dated: Uniondale, NY
March 13, 2007

Respectfully submitted,

FARRELL FRITZ, P.C.

By: 
Charlotte Biblow, Esq.
John M. Armentano, Esq.
Attorneys for the County of Suffolk, New York
1320 Reekson Plaza
Uniondale, New York 11556-1320
(516) 227-0700
cbiblow@farrellfritz.com
jarmntano@farrellfritz.com

Of Counsel:

G.S. Peter Bergen, Esq.
27 Pine Street
Port Washington, New York 11050
pbergen@optonline.net

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the forgoing document upon each person designated on the official service list in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Uniondale, New York, this 13th day of March, 2007.



Charlotte Biblow, Esq.

Farrell Fritz, P.C.
*Attorneys for the
County of Suffolk, New York*
1320 Reekson Plaza
Uniondale, NY 11556-1320
Tel.: (516) 227-0686
Fax.: (516) 336-2266
cbiblow@farrellfritz.com

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LA21 - Towns of Riverhead and Southold

200703125008 Received FERC OSEC 03/12/2007 10:14:47 AM Docket# : CP06-54-000, ET AL.

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Broadwater Energy LLC) **Docket Nos. CP06-54-000**
Broadwater Pipeline LLC) **CP06-55-000**
) **CP06-56-000**

**Comments of the
Towns of Riverhead and Southold in Response to
Broadwater's Supplemental Comments
Served February 26, 2007**

LA21-1

Pursuant to FERC Rule 213, the Towns of Riverhead and Southold, New York (collectively the "Towns"), intervenors in these dockets, respectfully request leave to file these comments in response to the supplemental comments of Broadwater Energy and Broadwater Pipeline (collectively "Broadwater") served February 26, 2007.

In these comments, the Towns focus on Part IV of Broadwater's filing. First, despite Broadwater's claim that no statutory or case law exists, the Towns cite and explain the very apt statutory and case law showing that Broadwater's LNG terminal facilities may not lawfully be authorized, either in whole or in part, by a certificate of public convenience and necessity issued pursuant to section 7 of the Natural Gas Act (NGA). Section 7 applies only to pipeline facilities in interstate commerce. Pipelines are excluded from the definition of "LNG terminal" in the NGA, which regulates import facilities in foreign commerce. Second, the Towns respond to Broadwater's comments on the public trust doctrine in New York State, which Broadwater inaptly confuses with federal powers. Third, the Towns respond to Broadwater's discussion of Coastal Zone consistency and the Southold LWRP, which applies to all waters of the Race between Orient Point and Fisher's Island, and through which LNG tankers would need to travel.

LA21-1

The towns of Riverhead and Southold have provided comments on Broadwater's supplemental comments on the draft EIS. In this letter, the towns have not provided any comments directly related to the draft EIS. Therefore, we have not provided responses in addition to those presented for comments presented in Letter LA-19.

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC OSEC 03/12/2007 10:14:47 AM Docket# CP06-54-000, BT AL

Other matters raised in Broadwater's February 26 filing were addressed in the Towns' January 19, 2007 Comments, and require no more discussion at this juncture.

A. FERC may not issue a Section 7 certificate to approve any part of the LNG terminal.

The Towns' January 19, 2007 comments observed that New York OGS may not grant easements of State-owned underwater lands for the Broadwater LNG terminal's FSRU or YMS because: (1) The FSRU and YMS are LNG terminal facilities, and are not "pipelines" within the meaning of § 3(2) of the Public Lands Law (PLL). (2) OGS lacks the capacity to grant easements for the FSRU and YMS under PLL § 75 because Broadwater is not an adjacent upland owner.¹ These points are directly relevant to FERC because, given OGS's lack of authority, the question becomes whether Broadwater could condemn the necessary easements under the NGA.

In response to this question, it is clear that an authorization to construct an LNG terminal facility under § 3 of the NGA does not grant condemnation power. Broadwater concedes this point at ¶ 141 of its comments.²

So, the question then becomes whether Broadwater may "take" underwater lands for the FSRU and YMS by eminent domain under NGA § 7. The Towns submit that the answer is "no." Broadwater, on the other hand, is petitioning FERC to issue a certificate of public convenience and necessity under NGA § 7 to Broadwater Pipeline, LLC for permission to construct and operate all of the YMS and the forward part of the FSRU (the first 330 feet from the pivot of the YMS). Broadwater is also petitioning for an Order that would authorize Broadwater Energy,

¹ See Towns' January 19, 2007 Comments at pp. 6-10.

² FERC Orders noting that eminent domain rights are not conveyed under NGA § 3 include Weaver's Cove Energy LLC, Docket CP04-36-000, 112 FERC ¶ 61,070 (July 15, 2005) at FN 26, and Cameron LNG, LLC, Docket No. CP02-374, et al, 104 FERC ¶61, 269 (September 11, 2003), at ¶ 12.

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC OSEC 03/12/2007 10:14:47 AM Docket# : CP06-54-000, ET AL.

LLC to construct and operate the back part of the FSRU under § 3 authorization. This relief was requested in Broadwater's January 2006 FERC applications³, and was subsequently displayed vividly in Broadwater's "point of separation" drawings in Broadwater Pipeline's and Broadwater Energy's Petitions to NYS OGS for easements in underwater lands, filed with FERC on December 1, 2006.⁴

Broadwater claims that the Town's position that the FSRU and YMS are not subject to the Commission's jurisdiction under NGA § 7 is "simply not supported by statute or case law" (Comments at p. 80, ¶ 136). However there is ample and directly relevant statutory and case law to support the Towns' position. In short, the statutory and case law show that NGA regulates LNG import terminal facilities in *foreign* commerce under NGA § 3, while pipeline facilities that are in *interstate* commerce are regulated under NGA § 7. The two concepts of foreign commerce and interstate commerce are distinct, and Congress kept these concepts separate and distinct in the NGA. Under the NGA, foreign commerce ends at the "tailgate" of the LNG import terminal. At that point, gas intended to enter interstate commerce must connect to a "pipeline subject to the jurisdiction of the Commission under section 7." The Town's support for this conclusion has a solid history under the NGA, as shown below.

1. Statutory support: EPACT, applicability of the NGA, and the definition of LNG terminal

In the Energy Policy Act Amendments of 2005 (EPACT), Congress amended § 1(b) of the NGA to make clear the NGA applies not only to transportation of natural gas in *interstate* commerce, but also "to the importation or exportation of natural gas in *foreign* commerce and to

³ Application of Broadwater Energy, LLC in Docket No. CP06-54-000, January 30, 2006, at pp 1-12; Application of Broadwater Pipeline, LLC in Docket Nos. CP06-55-000 and CP06-56-000, January 30, 2006, at pp 1-7.

⁴ See Broadwater's Petitions to NY OGS, especially the Maps 5 of 6 (in Accession No. 20061204-0101, public) and Figures 2 and 5 (in accession No. 20061234-0102, CEI), posted in FERC's Broadwater Docket December 1, 2006.

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC OSEC 03/12/2007 10:14:47 AM Docket#: CP06-54-000, ET AL.

persons engaged in such importation or exportation...⁵ (emphasis added). Congress also amended NGA § 3, relating to natural gas imports and exports, by adding § 3(c), stating that FERC “shall have exclusive authority to approve or deny an application for an LNG terminal.”⁶ Taken together, these amendments make clear that importing LNG is *foreign* commerce, and that FERC has exclusive authority to approve or deny applications to construct and operate LNG import terminals.⁷ Notably, Congress did not grant FERC authority to certificate LNG terminals, or fragments of LNG terminals, under NGA § 7, which regulates “natural gas companies,” defined as persons engaged in the transportation of natural gas in *interstate* commerce.⁸

EPACT’s definition of “LNG terminal,” together with EPACT’s amendments to NGA §§ 1(b) and 3, is the statutory support that Broadwater asserts does not exist. EPACT states that the term:

“(11) “LNG terminal” includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported into the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include –

- (A) waterborne vessels used to deliver natural gas to or from any such facility, or
- (B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.⁹ (Emphasis added).

Congress spoke expressly. Contrary to Broadwater’s implicit arguments, there is no room here for “Chevron deference.” LNG terminals do not include pipelines subject to § 7. The wording of the “pipeline” exception does not give FERC room to use discretion to certificate the YMS and part of the ESRU under NGA § 7, because language of the statute is unambiguous.

⁵ EPACT, P.L. 109-58, at § 311(a), amending NGA § 1(b), 15 U.S.C.A. § 717(b).

⁶ EPACT, P.L. 109-58 at § 311(c)(2), adding NGA § 3(c)(1).

⁷ LNG is “natural gas” within the meaning of § 2(c) of the NGA. *Dynegy LNG Production Terminal*, I.P. 97 FERC

¶51,231 (November 21, 2001) at FN 9; *Columbia LNG Corp.*, 47 FERC 1624, 1630 (1972).

⁸ NGA § 2(6), 15 U.S.C.A. § 717a(6).

⁹ EPACT, P.L. 109-58 at § 311(b)(11), adding NGA § 2(11), 15 U.S.C.A. 717a(11).

LA21 - Towns of Riverhead and Southold

200703125006 Received FERC OSEC 03/12/2007 10:14:47 AM Docket# CP06-54-000, ET AL.

FERC (and any reviewing court) is bound by Congress' pronouncement.¹⁰ The term "LNG terminal" plainly includes all of Broadwater's ISRU and YMS, and excludes "any pipeline." The term "pipeline" as used in the exclusion from the definition of "LNG terminal" means that the terminal ends, and any pipeline subject to certification under NGA § 7 begins, at the "tailgate" of the LNG terminal. As applied to Broadwater, the "tailgate" is the point where the terminal facilities deliver re-vaporized gas to the pipeline at the seabed floor at the base of the YMS.

2. Case law support: The "pipeline" exclusion's history

EPACT's exclusion of "any pipeline subject to ... section 7" from the definition of "LNG terminal" is rooted in the Natural Gas Act's jurisprudence on natural gas imports and exports, including imports of LNG. The statutory exclusion expressed in EPACT obviously carries forward and codifies the existing case law and FERC practice, holding that LNG import terminals are in *foreign* commerce, subject to regulation under NGA §3, while NGA § 7 pipeline regulation applies to *interstate* commerce, which begins at the "tailgate" of an LNG import facility, and where foreign commerce ends.

Historically, this distinction originated with the *Border Pipeline* case,¹¹ holding that NGA § 7 did not apply to facilities used to export of natural gas from the United States to Mexico, but that NGA § 3 did apply. The rationale of *Border* is that regulation of export facilities is foreign commerce, while § 7 applies only to natural gas companies that construct and operate facilities in interstate commerce. *Border* was revisited some 25 years later in *Distrigas*, an LNG import case.¹² The Court in *Distrigas*, adhering to *Border*, held that LNG import terminals were

¹⁰ See *ExxonMobil Gas Marketing v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002), at 1083, citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

¹¹ *Border Pipeline Company v. F.P.C.*, 171 F.2d 149 (D.C. Cir., 1948).

¹² *Distrigas Corporation v. F.P.C.*, 495 F.2d 1057 (D.C. Cir., 1974).

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC OSEC 03/12/2007 10:14:47 AM Docket# CP06-54-000, RT-AL.

facilities in foreign commerce that are properly authorized under NGA § 3, and may not also be subject to § 7. The Court said that the:

“definition of interstate commerce [in § 2 (7) of the NGA] does not expressly include foreign commerce;¹³ on the contrary, the *Border* Court found strong indication in the legislative history that Congress had purposefully excluded foreign commerce from the definition. These factors, in addition to the consistent Commission practice prior to *Border*, led the Court to conclude that Congress intended to treat interstate commerce and foreign commerce separately, and that because *Border*'s facilities were used solely for exports, they were elements of foreign commerce to which Section 7's requirements do not apply.”¹⁴

The Court in *Distrigas* expressly declined to overrule *Border*. *Border* and *Distrigas* are important case law that Broadwater claims not to exist.

3. The Hackberry Ruling

FERC more recently reviewed this history in 2001, when Dynegy petitioned for a ruling asking FERC to disclaim jurisdiction over the siting, construction and operation of a proposed LNG import facility in Hackberry, Louisiana. FERC, in a landmark Order establishing present day LNG import policy, denied Dynegy's petition, and opted to maintain the *status quo* established by *Border* and *Distrigas*, which FERC stated to be that “the Commission retains its long-held authority to review LNG import facilities under NGA § 3.”¹⁵ FERC noted that “the rationale behind *Distrigas* still holds...[T]he *Border* decision ... held that the Commission did not have jurisdiction over export or import facilities under section 7... [*Border*] held that the Commission had jurisdiction over import or export facilities under the ‘terms and conditions’ language of Section 3, rather than section 7.”¹⁶ (Emphasis added).

¹³ Court's (in citing and quoting NGA § 2(7), 15 U.S.C.A. § 717a (7)) is omitted.

¹⁴ *Distrigas Corp. v. FPC* 495 F.2d 1057 at 1062 (D.C. Cir., 1974).

¹⁵ Order Addressing Petition for Declaratory Order, in *Dynegy LNG Production Terminal, L.P.*, FERC Docket No. CP01-423-000, 97 FERC ¶ 61,231, issued November 21, 2001 at p. 15.

¹⁶ *Id.* at p.14.

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC GSEC 03/12/2007 10:14:47 AM Docket# CP06-54-000, ET AL.

4. EPACT codified the *Border/Distrigas* doctrine

This history shows that the language of the “pipeline” exclusion from the definition of “LNG terminal” in NGA § 2(11), and the §§ 1(b) and 3(e) amendments added by EPACT purposely continued the *Border / Distrigas* doctrine, under which LNG import facilities are in foreign commerce and regulated under NGA § 3 only, and (as codified by EPACT) terminals do not include pipelines “subject to the jurisdiction of the Commission under NGA § 7.” In the words of the *Distrigas* opinion, the jurisdiction of the Commission under section 7 “attache[s] at the tailgate of the importer’s plant.”¹⁷ Just last January, FERC, in an order authorizing expansion of the LNG facility in Hackberry, Louisiana, stated that the Hackberry LNG terminal had been authorized pursuant to NGA § 3, and that its “takeaway” pipeline (which had been certificated under NGA § 7) begins at the “tailgate” of the LNG terminal.¹⁸

5. FERC follows the *Border/Distrigas* doctrine

FERC’s *Hackberry* Order in 2001 established contemporary FERC policy with respect to new LNG terminals and with respect to approvals of their respective pipeline connections to the nation’s interstate pipeline system. Beginning with *Hackberry*, and as recently as Gulf LNG in February 2007, FERC has authorized LNG terminals under NGA § 3, and granted certificates for their “takeaway” or “send-out” pipelines under NGA § 7, adhering to the *Border* and *Distrigas* doctrines.

¹⁷ *Distrigas*, supra at p.1060.

¹⁸ Cameron LNG, LLC, FERC Docket CP06-422, Order issued January 18, 2007 at ¶¶ 4 and 7.

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC OSEC 03/12/2007 10:14:47 AM Docket# CF06-54-000, BT AL.

(a) The Hackberry LNG terminal

With respect to the Hackberry LNG terminal, initially proposed by Dynegy and which gave rise to FERC's seminal Order in 2001¹⁹, FERC in December 2002 issued a preliminary determination, finding that subject to final environmental evaluation, the proposed *Hackberry* LNG import terminal was in the public interest and approvable under NGA § 3.²⁰ FERC also approved Hackberry's proposal under section 7(c) to construct and operate a pipeline connecting the LNG terminal to Transco's interstate transmission system.²¹ FERC's discussion in *Hackberry* is instructive because it makes clear that the § 3 LNG terminal facilities end, and the pipeline facilities certificated exclusively under § 7 begin, at a specific point of separation: the tailgate of the LNG terminal where the re-vaporized LNG is delivered to the pipeline. To quote from relevant excerpts of the Hackberry Order:

"20. Since the proposed LNG terminal facilities will be used to import gas from a foreign country, the construction and operation of the facilities and site of their location require approval by the Commission under section 3 of the Natural Gas Act. [Footnote omitted]. The Commission's authority over facilities constructed and operated under section 3 includes the authority to apply terms and conditions as necessary and appropriate to ensure that the proposed construction and siting is in the public interest. [citing *Distigas* and FERC's *Dynegy* ruling discussed above]. Until now, the Commission has not had the occasion to consider what criteria to apply to a project where one part (the pipeline) is built under section 7(c) and another (the LNG terminal) is built under section 3..." (Emphasis added).²²

The Commission's Order added:

¹⁹ *Supra* FN 15.

²⁰ The terminal was to be built and operated by Dynegy's wholly-owned subsidiary, Hackberry LNG.

²¹ Preliminary Determination in Hackberry LNG Terminal, LLC, Docket No. CP02-374 et al., 101 FERC ¶61,294, issued December 18, 2002, at ¶ 3.

²² *Id.* at ¶ 20.

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC OSEC 03/12/2007 10:14:47 AM Docket# CP06-54-000, ET AL.

“23. ... The sale of natural gas from these facilities would occur at, or downstream of, the tailgate of the LNG plant, where re-vaporized LNG would be delivered to Hackberry’s pipeline...” (Emphasis added).²³

The Hackberry LNG project received final approval in September 2003, although Dynegy withdrew, and the name of the facility was changed to Cameron LNG. FERC approved the Cameron LNG terminal pursuant to NGA § 3, and the takeaway pipeline pursuant to NGA § 7.²⁴

(b) LNG Terminals authorized after Hackberry

The Hackberry case set the FERC policy with respect to LNG terminal authorizations. The policy is that LNG import terminal facilities are to be authorized pursuant to NGA § 3, except for those terminal facilities found not to be consistent with the public interest.²⁵ Pipelines transporting natural gas from LNG import terminals into interstate commerce, if found to be required by the public convenience and necessity, are to be approved under NGA § 7.²⁶ The decisional standards under NGA 3 and NGA 7 are different, reflecting their different foreign and interstate commerce foundations and purposes.²⁷ Send-out pipelines from LNG terminals serving only *intrastate* commerce are not within FERC’s jurisdiction under NGA § 7.²⁸

FERC practice currently follows the *Border/Distrigas* doctrines, which have now been codified in EPACT, including the definition of “LNG terminal,” which expressly excludes “pipelines subject to the Commission’s jurisdiction under section 7.” The pipelines begin where

²³ *Id.* at ¶ 23.

²⁴ Cameron LNG, LLC, Docket No. CP02-374, et al., 104 FERC ¶61, 269 (September 11, 2003).

²⁵ FERC has denied at least one LNG terminal application as not consistent with the public interest. KeySpan LNG, Docket No. CP04-223, 112 FERC ¶ 61,028 (June 5, 2005), rehearing denied, 114 FERC ¶ 61,054 (January 20, 2006), appeal pending sub nom KeySpan LNG v. FERC, No. 06-1097, (D.C. Cir.).

²⁶ NGA § 7(e), 15 U.S.C.A. § 717i(e). Also see for example, Weaver’s Cove Energy LLC, FERC Docket CP04-36, Mill River Pipeline, FERC Dockets CP04-44 et al., 112 FERC ¶ 61,070, Orders issued July 15, 2005; Port Arthur LNG, LP, Docket CP05-83, et al., 115 FERC ¶ 61,344 (June 19, 2006); Gulf LNG Energy, LLC, FERC Dockets CP06-12-000 et al., 118 FERC ¶61,128 (February 16, 2007).

²⁷ Cameron LNG, LLC, *supra* FN 23 at ¶ 12.

²⁸ Freeport LNG Development, L. P., Docket No. CP03-75-000, 107 FERC ¶ 61,278 (June 18, 2004).

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC OSEC 03/12/2007 10:14:47 AM Docket#: CP06-54-000, ET AL.

the re-vaporized LNG is delivered from the tailgate of the LNG terminals into interstate commerce.

6. Broadwater's applications to FERC

The above concepts are engrained in Broadwater's FERC applications. Broadwater Pipeline's FERC application states at p.5: "Broadwater Pipeline is essentially a tailgate facility necessary to connect the offshore FSRU to the ...interstate pipeline grid..." Broadwater Energy's FERC Application was filed pursuant to NGA § 3 for authorization to build an LNG receiving terminal "as a place of entry for the importation of LNG." (Application p. 1). The proposed terminal "will consist of a floating storage and regasification unit ("FSRU")..." (p.6). "The main components of the FSRU are (1) the LNG Receiving Facilities; (2) the LNG Storage Tanks; (3) the Regasification Plant; (4) the Yoke Mooring System; (5) the Nitrogen Plant; (6) Power Generation; and (7) the Accommodation Area." (p. 9). Importantly, Broadwater Energy's application to FERC states that the YMS is one of the six major components of the FSRU, and is needed to moor the FSRU and to allow it to rotate on its mooring with the wind (to "weathervane")" (Id).

7. Commingling of §§ 3 and 7 facilities is barred by EPACT's definition of "LNG terminal" and the Border-Distigas doctrine

Broadwater argues (pp. 80-84) that FERC could regulate parts of the FSRU and YMS under both § 3 and § 7. The Towns respond that the *Border-Distigas* doctrine, as carried forward by EPACT, precludes Broadwater's interpretation. Under NGA § 1(a) LNG imports are foreign commerce, and under § 3(e) LNG import facilities are approved or denied by FERC. Under § 2 (11) an "LNG terminal" includes all natural gas facilities ... in State waters that are used to receive, unload, store, transport, gasify, or process" imported natural gas. Clearly

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC OSEC 03/12/2007 10:14:47 AM Docket# CP06-54-000, BT AL.

imported natural gas would be received, unloaded, stored, transported, gasified and processed on the FSRU, which plainly is an LNG terminal. Moreover, Broadwater's FERC applications show that the YMS is an integral component of the FSRU, essential to the FSRU's safe anchorage and operation. The YMS is part of the terminal facility, not the pipeline. Imported natural gas, moreover, would be processed and transported within the YMS component of the FSRU, in that the gas is processed through the jumpers, and the YMS's gas swivel (a component of the FSRU's weathervane mechanism), and is then conveyed through a sleeve in one leg of the YMS (a structural part of the YMS). At this point the gas exits the leg of the YMS and enters the pipeline on the seabed.

This is the earliest downstream point at which the imported gas can be claimed to exit foreign commerce and enter interstate commerce. Alternatively, it could be argued that the gas does not exit foreign commerce and enter interstate commerce until it connects with the Iroquois pipeline 21 miles to the east, in which case the pipeline from the YMS to Iroquois would need to be authorized under NGA § 3.²⁹ But the jurisdictional grasp of NGA § 7 cannot extend upstream into the import terminal facilities, because the terminal facilities are in foreign commerce, and NGA § 7 applies only to transportation in interstate commerce.

This principle was codified by Congress when EPCRA was enacted. Broadwater's contrary arguments disregard the plain meaning of NGA § 2(11). Broadwater's applications seeking FERC § 7 certification of the YMS and the front part of the FSRU out to a distance of 330 feet are conceptually flawed. No part of the FSRU or YMS may be certificated under NGA § 7. Therefore, § 7(h), which grants the power of eminent domain only to holders of § 7 certificates of public convenience and necessity, is available to for Broadwater to use to

²⁹ See *Sound Energy Solutions*, Docket No. CP04-58-000, 106 FERC ¶ 61,279 (March 24, 2004).

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC OSEC 03/12/2007 10:14:47 AM Docket# CE06-54-000, BT AL

condemn easements of underwater lands for Broadwater's FSRU and YMS terminal facilities. Finally, OGS can not consider the terminal facilities to be "appurtenances" of the send-out pipeline in order to support an argument that the easements should be issued by OGS under PLL § 3(2). This is because the terminal facilities are neither "appurtenances" under OGS's rules, nor approvable in a certificate of public convenience and necessity under section 7 of the NGA.

B. The Public Trust Doctrine

Broadwater whistles in the dark (Comments at pp. 69-72) in response to the Towns, Suffolk County, and others who commented on the Broadwater Project's patent conflict with the public trust doctrine. Suffolk County pointed out that Broadwater would permanently deprive the public access to 950 acres of Long Island Sound plus and additional 1772 acres at least four to six time a week, and would severely interfere with recreational and commercial shipping and fishing³⁰. Broadwater brushes aside the negative impacts that privatizing these enormous areas would have on public. The public trust doctrine exists to prevent those impacts.

Contrary to what Broadwater's Comments would have us believe, the public trust doctrine is not a one-size-fits-all principle, identical in every state. Each state may develop its own public trust jurisprudence.³¹ The public trust doctrine as applied in and by New York State is more restrictive than in some other states. For example, the Towns have shown (1) that PLL § 75 limits OGS's authority to grant easements in underwater lands for moorings and structures, such as the FSRU, to the owners of riparian upland adjacent to the underwater lands being conveyed; and (2) that PBI, § 3(2) applies only to "pipelines" and not to LNG terminals.³² Thus, OGS has only limited power to make grants of State-owned underwater lands. Legislative grants

³⁰ County's Comments at pp 8-9.

³¹ *Shively v Bowlby*, 152 U.S. 1 (1894).

³² Town January 19, 2007 Comments at p. 8.

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC GSEC 03/12/2007 10:14:47 AM Docket# CP06-54-000, ET AL.

of large areas of underwater lands in New York, comparable to the grants that Broadwater seeks, have been struck down.³³ Broadwater conveniently overlooks the restrictive character of New York public trust law, a policy that may well account for the relative absence of artificial islands, and offshore import-export terminals, storage tanks, offshore drilling rigs, and the like, cluttering Long Island Sound and New York State waters generally.

Broadwater comments with some frustration (p. 70) that claim that the public trust doctrine bars Broadwater is "tantamount to asserting that no private entity is allowed to anchor, moor, or attach a structure to submerged land under navigable waters of the United States within the territorial waters of the states." Broadwater's statement is overblown. The Towns' January 19th discussion of the public trust related to New York law only. Relevant federal law has been addressed in the previous section.

C. Coastal Management – Southold LWRP

Broadwater's Comments attach an addendum intended to refute the Towns' January 19 point that the Broadwater Project is inconsistent with Coastal Policies, including the Southold Local Waterfront Management Plan (LWRP). Broadwater observes that Southold's LWRP does not apply to the site where the FSRU and YMS would be located, which is to the West, within the Town of Riverhead. However, the Broadwater Project is nevertheless inconsistent with important elements of Southold's LWRP. Southold is unique, in that its boundaries extend across the Race and include Fisher's Island. Southold's LWRP applies to all Town waters, including the Race, which is the entrance to Long Island Sound when ships arrive from the East. The gist of the Broadwater Project's inconsistency with the Southold LWRP is that the arriving

³³ See Suffolk Comments, pp 4-10, citing *Coxe v. State*, *Long Sault Development Co. v. Kennedy*, and *Smith v. State of New York*.

LA21 - Towns of Riverhead and Southold

200703125006 Received FERC OSEC 03/12/2007 10:14:47 AM Docket# CP06-54-000, ET AL.

and departing LNG tankers will necessarily cross through Southold waters, and each ship's security zone will create a confusing and perpetual moving exclusion area to the detriment of commercial fishing and lobstering, recreational boating, and the public generally. The Towns' concerns were and are that Broadwater's continual supply needs will be inconsistent with LWRP Policy 9, to provide for public access to, and recreational use of, coastal waters and resources of Southold; and with LWRP Policy 11, to promote commercial and recreational fishing. Accordingly, the Towns submit that the Broadwater Project is inconsistent with the Southold LWRP.

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC OSEC 03/12/2007 10:14:47 AM Docket# CP06-54-000, ET AL.

Conclusion

The Towns of Riverhead and Southold submit that Broadwater's applications to FERC seek relief that is not available under the Natural Gas Act, and should be dismissed. Moreover, Broadwater's applications to NY OGS are not approvable under the Public Lands Law, and conflict fatally with the public trust doctrine. Also, Broadwater's applications are inconsistent with applicable Coastal Zone Management plans, including the Southold LWRP. The Broadwater Project is not in the public interest.

Respectfully submitted,

s/ G. S. Peter Bergen
G. S. Peter Bergen
Attorney for the Towns of Riverhead
and Southold
27 Pine Street
Port Washington, NY 11050
(516) 767-3449
pbergen@optonline.net

Of Counsel:

Dawn Thomas, Esq.
Town Attorney, Town of Riverhead
200 Howell Avenue
Riverhead, NY 11901
(631) 767-3200 ext. 216
thomas@riverheadli.com

Patricia A. Finnegan, Esq.
Town Attorney, Town of Southold
54375 Main Road
Southold, NY 11969-0959
(631) 765-1939
patricia.finnegan@town.southold.ny.us

Port Washington, NY
March 12, 2007

LA21 - Towns of Riverhead and Southold

200703125008 Received FERC GSEC 03/12/2007 10:14:47 AM Docket# CP06-54-000, ET AL.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Port Washington, NY this 12th day of March, 2007.

/s/ G. S. Peter Bergen
G. S. Peter Bergen

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.



1320 Reckson Plaza
Uniondale, New York 11556-1320
Telephone 516.227.0700
Fax 516.227.0777
www.farrellfritz.com

Charlotte Biblow
Partner

Direct Dial 516.227.0686
Direct Fax 516.336.2266
cbiblow@farrellfritz.com

Our File No.
19301-100

April 5, 2007

Via Electronic Filing

Ms. Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First St., N.E., Room 1A
Washington, DC 20426

Re: Broadwater Energy – LNG Project
FERC Docket Nos.: CP06-54-000
CP06-55-000
CP06-56-000

Dear Secretary Salas:

This firm represents the County of Suffolk, New York, (“Suffolk County”) an intervener party in the above-referenced proceedings. I enclose herewith Suffolk County’s objections to an easement that Broadwater Energy LLC is requesting from the New York State Office of General Services (“NYSOGS”). Suffolk County’s objections, filed with the NYSOGS, are applicable to the decisions that FERC will render in this matter and demonstrate why this project cannot be approved by FERC.

Very truly yours,

Charlotte Biblow

cc: All counsel on the official service list (w/enclosure)

FERC/CS/1738/052.01

Bridghampton * East Hampton * Melville * New York

Local Government Agencies and Municipalities Comments

N-440

BW030917

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

STATE OF NEW YORK
OFFICE OF GENERAL SERVICES

-----X
In the Matter of the Petition of Broadwater Energy LLC
for the grant of an easement in the lands under the waters
of Long Island Sound situated approximately nine miles
off the coast of the Towns of Riverhead, Brookhaven, and
Smithtown which are located in the County of Suffolk,
New York.
-----X

**OBJECTION OF THE
COUNTY OF SUFFOLK, NEW YORK
TO BROADWATER'S NOTICE OF APPLICATION**

LA22-1

The County of Suffolk, New York ("Suffolk County"), by its attorneys, Farrell Fritz, P.C., hereby submits this objection to the Notice of Application filed by Broadwater Energy LLC ("Broadwater") on March 15, 2007 (the "March 2007 Notice") served on Suffolk County on March 19, 2007, requesting an easement under §75 of the New York State Public Lands Law ("Public Lands Law") for a proposed liquid natural gas ("LNG") project. Suffolk County demands that the New York State Office of General Services ("NYSOGS") deny Broadwater's application for an easement.

Suffolk County strenuously objects to any easement being granted on public trust lands to Broadwater by NYSOGS on a variety of grounds: (1) Broadwater's request is premature because the Draft Environmental Impact Statement ("DEIS") issued by the Federal Energy Regulatory Commission ("FERC") contains numerous serious deficiencies and the Final Environmental Impact Statement ("FEIS") is not expected to be issued by FERC for several more months; (2) NYSOGS does not have the authority under the Public Lands Law to grant this pervasive and intrusive easement that will adversely affect not only underwater lands but also massive areas of surface water in Long Island Sound; (3) the easement sought by Broadwater violates a Suffolk County local law that prohibits LNG facilities in Long Island Sound; (4) the easement sought by

LA22-1

This letter from Suffolk County is in response to Broadwater's application on 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, Suffolk County has not provided any comments directly related to the EIS; therefore, we have not provided responses in addition to those for comments presented in Letter LA-1. In responses to comments LA22-2 and LA22-3, we have responded to issues raised regarding information in the GAO Report (GAO 2007) and the New York State Office of Homeland Security report entitled *Focus Report: Maritime Terrorist Threat*.

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

Broadwater violates the Public Trust Doctrine; (5) the easement sought by Broadwater violates the federal Long Island Sound Stewardship Act of 2006; (6) Broadwater is inherently dangerous and violates the safety and security of all residents of Suffolk County; (7) NYSOGS cannot issue the requested easement without first complying with the State Environmental Quality Review Act ("SEQRA"); and (8) NYSOGS must conduct a hearing before it can issue the easement requested by Broadwater. As a result, NYSOGS must deny Broadwater's request for an easement.

I. Introduction

Broadwater Energy, LLC and Broadwater Pipeline, LLC previously served two notices (the "October 2006 Notices") seeking easements from NYSOGS for their proposed floating storage regasification unit ("FSRU"), the safety zones established by the United States Coast Guard ("USCG"), the Yoke Mooring System (the "YMS" or "mooring tower") and the pipeline. The October 2006 Notices declared that the easement requests were only being made pursuant to § 3(2) of the Public Lands Law, that neither Broadwater entity was an upland owner, and that any legal provisions relating to the grant of easements to upland owners was "not applicable" to the Broadwater proposed project. In its March 2007 Notice, however, Broadwater seeks an easement for the FSRU, the safety zones and the YMS pursuant to § 75 of the Public Lands Law, which concerns easements to upland owners. As the March 2007 filing is an admission by Broadwater that NYSOGS cannot issue easements for the FSRU, the safety zones and the YMS under §3(2) of Public Lands Law and its October 2006 filing is an admission that NYSOGS cannot issue easements for the FSRU, safety zones and YMS under §75 of the Public Lands Law, Broadwater has no legal basis to be issued any of the easements it seeks.

As it tried to do in its October 2006 Notices, Broadwater wants NYSOGS to evaluate the easement requests as if Broadwater's proposed project was a *de minimis* intrusion into the

underwater land beneath the Long Island Sound and the waters of Long Island Sound. Broadwater's proposed project, however, is massive in size and includes not just the FSRU, the mooring tower and its footings, but also the 25-mile long pipeline it intends to build as part of the project, and the enormous safety zones recommended by the USCG around the FSRU and the large LNG supply tankers.

The Broadwater proposed project will have catastrophic and negative effects on the use and safety of Long Island Sound. In particular, the surface of Long Island Sound will be impacted, in terms of: (i) the size and breadth of the proposed facility; (ii) the ability of the FSRU to pivot in various directions; (iii) the significant reduction in useable area of Long Island Sound on an almost daily basis; and (iv) the additional prohibition of access to Long Island Sound during the transit of the LNG tankers through the Long Island Sound on their way to and from the FSRU and during the transfer of product at the FSRU. As more fully explained herein, Broadwater cannot demonstrate how the requested easement promotes the public interests or does not substantially impair the public interest and public trust use of the waters of Long Island Sound. Simply put, the Broadwater Project is NOT in the public interest, it violates long-standing doctrines establishing the rights of the public in this area of Long Island Sound and it creates intolerable dangers to the public health and safety.

II. Grounds for Objections

1. Broadwater's Request For an Easement is Premature

Initially, it must be noted that Broadwater's easement application from NYSOGS is wholly premature. First, the FERC proceedings are far from complete. Although FERC issued the DEIS under the National Environmental Policy Act in November 2006, the document contains extensive deficiencies. FERC is not likely to issue the FEIS for several months. It is unclear whether FERC will appropriately address and correct the many glaring errors and

omissions contained in the DEIS. What is clear, however, is that FERC has certainly not issued any approvals or certificates to Broadwater. It is still uncertain whether Broadwater will ever be licensed by FERC. No other federal agency to which Broadwater has applied for a permit has yet to issue any such approval.

In addition, none of the necessary approvals from New York State agencies has been issued and many of those applications are on hold or have been adjourned because of the status of the FERC proceeding. In particular, Broadwater requires a finding from the New York State Department of State ("NYSDOS") that the proposed project is consistent with the Long Island Sound Coastal Zone Management Plan. NYSDOS and Broadwater announced that they entered into a tolling agreement on March 29, 2007, effectively staying the six-month coastal zone consistency review period for three months beginning on April 1, 2007, specifically to "await receipt of the Final Environmental Impact Statement." In addition, the New York State Department of Environmental Conservation ("NYSDEC") has not issued any required permits.

There is no reason for NYSOGS to grant an easement at this time. NYSOGS should follow NYSDOS's lead and decline to rule on Broadwater's easement requests until after FERC rules on Broadwater's application. Simply put, Broadwater's requests for an easement is wholly premature and must be denied.

2. NYSOGS Does Not have The Authority To Convey an Easement to Broadwater

The State of New York owns portions of the underwater land of the Long Island Sound. However, pursuant to Chapter 695 of the Laws of 1881, Suffolk County has jurisdiction of the waters of Long Island Sound to the Connecticut boundary. Thus, while the New York State Legislature delegated certain powers to grant easements in underwater lands owned by the State to NYSOGS pursuant to the Public Lands Law, it has also expressly granted jurisdiction over the

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

waters to Suffolk County. Accordingly, NYSOGS has no authority to grant an easement to Broadwater that includes the right to use significant portions of the waters of Long Island Sound.

At the time the Public Lands Law was enacted, no one envisioned that easements would be sought for the nature and magnitude of the project Broadwater is proposing, which would permanently remove vast areas of Long Island Sound from public use. The requested easement would permanently exclude from public use several thousand acres of Long Island Sound. The Public Lands Law was never intended to permit NYSOGS to transfer to a private for-profit company the exclusive right to use this amount of acreage of navigable waters. Putting aside the fact that Broadwater must obtain permission from Suffolk County because it has jurisdiction over the waters of Long Island Sound and the fact that Suffolk County has banned LNG facilities from being sited in Long Island Sound, (*see* Point 3, *infra*) the easement to the underwater lands being sought by Broadwater can only be obtained from the New York State Legislature, not from NYSOGS.

Even if NYSOGS believes it has the authority to consider such a pervasive easement request, which it does not, it would still have to deny Broadwater's application. As previously explained in Suffolk County's November 2006 Objections to the October 2006 Notices, mooring easements under § 75(7)(a) of the Public Lands Law may only be granted to adjacent riparian landowners; easements to any other person are void. Public Lands Law § 75(7)(a). Broadwater admitted that it does not qualify as an adjacent riparian landowner with respect to underwater land situated in the middle of Long Island Sound in one of its October 2006 Notices. Therefore, any conveyance to Broadwater under Public Lands Law § 75 is void.

Further, under §75 of the Public Lands Law, Broadwater must demonstrate that its request is "consistent with the public interest in the use of state-owned lands underwater for the purpose of navigation, commerce, fishing, bathing, and recreation; environmental protection; and

access to the navigable waters of the state.” Public Lands Law § 75. Similarly, NYSOGS regulations require NYSOGS to consider whether the requested easement is “consistent with the public interest in navigation, commerce, public access, fishing, bathing, recreation, environmental and aesthetic protection, and to ensure the waterfront owners reasonable exercise of riparian rights and access to those underwater lands.” 9 NYCRR § 270-1.1. NYSOGS must also consider the “size, character and effects of the project,” the “potential for interference with navigation, public use of waterway and riparian/littoral rights” and “consistency with the public interest for purposes of fishing, bathing, and access to navigable waters.” 9 NYCRR § 270-3.2(a). Broadwater is wholly inconsistent with any of these factors. Further, NYSOGS cannot even begin to make such findings based on the mere Notice filed by Broadwater. At the very least, NYSOGS must comply with SEQRA and hold public hearings on the requested easement so that all interested parties may be heard. (See Point 7, *infra*.)

NYSOGS does not have the authority to grant the easement requested by Broadwater. Assuming *arguendo*, that it did have such authority, Broadwater’s proposed project conflicts with NYSOGS’s policies and regulations. Broadwater’s request for an easement must, therefore, be denied.

3. The Easement Sought By Broadwater Violates Suffolk County’s Laws

The waters of Long Island Sound are within the jurisdiction of Suffolk County pursuant to the Laws of 1881, Chapter 695. This statute provides in, pertinent part, that: “the jurisdiction of the legally constituted offices of Queens and Suffolk Counties and of their respective towns of said counties bordering on Long Island Sound is hereby extended over the waters of said Sound to the Connecticut State line.” Thus, it is beyond dispute that the waters involved in the Broadwater Project are within the jurisdiction of Suffolk County.

New York State Navigation Law §§ 1 and 2(4) establishes Suffolk County’s jurisdiction

to protect the waters of Long Island Sound by exempting from the definition of "navigable waters of the state" all tidewaters bordering on and lying within the boundaries of Nassau and Suffolk Counties." Suffolk County has consistently maintained jurisdiction and regulation of all tidewaters bordering on and lying within its boundaries.

Suffolk County banned this type of use in all of its waters when the Suffolk County Legislature adopted Resolution No. 821 of 2006. This local law prohibits the construction and operation of an LNG FSRU in all of the waters of Long Island Sound under the jurisdiction and control of Suffolk County.¹

Since the Broadwater Project is banned by Suffolk County Law, NYSOGS cannot violate that statute and its own regulations by issuing an easement to Broadwater for this prohibited use.

4. The Easement Sought By Broadwater Violates The Public Trust Doctrine

Pursuant to the public trust doctrine, the State holds lands under navigable waters in its sovereign capacity as trustee for the beneficial use and enjoyment of the public. Its power to transfer lands under navigable waters is sharply limited. Over a century ago, the United States Supreme Court explained the public trust doctrine and how it prohibits easements such as the one being sought by Broadwater in this matter. In *Illinois Central Railway Co. v. Illinois*, 146 U.S. 387 (1892), the Illinois legislature purported to transfer rights to the Illinois Central Railroad Company for a one-thousand-acre portion of the bed of Lake Michigan adjacent to Chicago. *Id.* at 452. The Supreme Court ruled that the purported transfer was "a gross perversion of the trust over the property under which it was held" by the State of Illinois. *Id.* at 455.

In *Illinois Central*, the Supreme Court emphasized that the public trust doctrine is derived from the overriding need to preserve the public's free and unobstructed use of navigable waters.

¹ A copy of Resolution No. 821 of 2006 is attached as Exhibit "A" to Suffolk County's November 2006 Objections, previously submitted to the NYSOGS.

LA22 – Suffolk County

200704055013 Received FERC OSEC-04/05/2007 11:24:39 AM Docket# CE06-54-000, ET AL.

The Court explained that “[t]he doctrine is founded upon the necessity of preserving to the public *the use of navigable waters from private interruption and encroachment . . .*” *Id.* at 436. (Emphasis added.) The Court also explained that under the public trust doctrine, the State holds underwater lands in trust for the public so that the public “may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, *freed from the obstruction or interference of private parties.*” *Id.* at 452. (Emphasis added.)

The New York State Court of Appeals also has a long history of utilizing the public trust doctrine to prohibit the kind of easement being sought by Broadwater. In *Coxe v. State of New York*, 144 N.Y. 396 (1895), a physical obstruction of the public’s access to navigable waters was found to violate the public trust doctrine. *Coxe* involved the State Legislature purporting to transfer the State’s title to all of the submerged lands adjacent to Staten Island and Long Island, an area extending over four counties. *Id.* at 401. The Court of Appeals rejected that transfer as being “absolutely void,” stating that: “so far as the statutes [conveying the land] attempted to confer titles to such a vast domain which the state held for benefit of the public, they were absolutely void . . .” *Id.* at 405.

The *Coxe* Court articulated the test for a public trust doctrine violation. It held that: “title which the state holds and the power of disposition is an incident and part of its sovereignty that cannot be surrendered, alienated or delegated, except for some public purpose, or some reasonable use which can be fairly be said to be for the public benefit.” *Id.* at 406. The *Coxe* Court further noted that the public trust doctrine is so broad that it would also prohibit transfers that are “for the public benefit” if they encroach upon navigable waters.

[W]hen we consider that the locality where the operations of the [purported transferee] were to be carried on is *the great highway of commerce which should be open and common to all*, it is not difficult to see that such power, if upheld, *might seriously interfere with the navigation upon the waters*, and consequently with the freedom of commerce.

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

Id. at 408. (Emphasis added.) Like the voided transfer in *Coxe*, Broadwater's proposed project will "seriously interfere with the navigation upon the waters" because it will deprive the public of access to vast areas of Long Island Sound, which is a recreational mecca and critical commercial highway, possibly in perpetuity. *Id.*

In *Long Sault Dev. Co. v. Kennedy*, 212 N.Y. 1 (1914), the Court of Appeals reconfirmed that the public trust doctrine was violated when a private corporation is given exclusive use of navigable waters. That case involved the State Legislature enacting a law purporting to convey to the Long Sault Development Company a franchise on the St. Lawrence River for purposes of constructing dams, bridges, locks and canals. The Court of Appeals concluded that the transfer violated the public trust doctrine because the State may *never* surrender its control over navigation to a private corporation. The Court explained:

[T]he legislature cannot authorize the conveyance of a navigable portion of the St. Lawrence to a private company to maintain and control navigation thereon, thereby parting for all time with its own power to improve such navigation. The privilege of the state to control the St. Lawrence as a navigable river (subject to the direction of Congress) cannot be assigned to others in the manner attempted by this legislation. *As long as the waters are maintained as navigable, they remain public waters of the state; and as long as they remain public waters of the state the state is bound to retain control over them in the public interest.*

Id. at 10. (Emphasis added.) According to *Long Sault*, not only is it impermissible for the State to permit private parties to construct obstacles to navigation, the State is *powerless* to even make a conveyance that would permit a private corporation to control navigation to the exclusion of the State or the public.

The Second Department in 1989 reaffirmed the *Coxe* principles and explained that deprivation of public access to surface waters for fishing and navigation violates the public trust doctrine. *Smith v. State of New York*, 153 A.D.2d 737, 737 (2d Dep't 1989). In *Smith*, the East Island Association claimed that it held title to the underwater land and waters around East Island

LA22 – Suffolk County

200704055013 Received: FBRC/OSBC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

in Glen Cove pursuant to an 1888 land patent. It sought to prohibit the general public from using the waters and beaches around East Island. Members of the public who had been excluded from using the water and beaches sought an injunction against the East Island Association to prevent it from excluding the public based on the public trust doctrine. The appellate court noted that excluding the public from an area they have lawfully enjoyed for over 100 years would constitute an impermissible impairment of the public interest. *Id.* at 739. After invoking the Supreme Court's *Illinois Central* decision and the Court of Appeals' *Coxe* decision, the appellate court found that the public benefit will be lost if the East Island Association can exclude the public from this area used for over a century for fishing and other recreational activities. *Id.* at 740.

In 2005, the New York State Attorney General acknowledged that transfers of underwater lands that are "injurious to the public's use of the waters" violate the public trust doctrine. The Attorney General, relying upon *Coxe*, stated that "the public owner of lands used for navigation does not hold the lands in a proprietary capacity" and that "a trust is engrafted upon this title for the benefit of the public of which the [public owner] is powerless to divest itself." The Attorney General further stated that "underwater lands must be for a use that either benefits the public or at least is not injurious to the public's use of the waters." See 2005 Op. Att'y Gen. 11, 2002 WL 870807, at *2. Broadwater runs afoul of this policy as it will make tremendous areas of Long Island Sound entirely inaccessible to every other user of Long Island Sound except Broadwater, a single private corporation.²

The public trust doctrine cases make it clear that *the size of the transfer matters* to the

² See also, *Trustees of the Freeholders and Commonalty of the Town of Brookhaven v. Smith*, 185 N.Y. 74, 77 (1906) (explaining that any "obstruction [of] the public right of navigation, or the *ius publicum*, could be abated as a nuisance"); *People of the State of New York v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 76 (1876) (explaining that grants that interfere with the public right of access to navigable waters, convey a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters are void.)

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

analysis. In *Illinois Central*, the voided conveyance involved 1,000 acres. *Illinois Central*, 146 U.S. at 433-34. Similarly, in *Coxe*, the Legislature attempted to convey underwater land adjacent to the shoreline in four counties. *Coxe*, 144 N.Y. at 401-02. There, the Court indicated that the “extensive character” was a factor in its analysis. *Id.* at 401.

The easement requested by Broadwater violates the public trust doctrine. As in *Illinois Central*, where the Supreme Court was troubled by a state’s conveyance that gave a private company the power to manage and control the Chicago harbor, Broadwater’s requested easement will result in its permanent and exclusive management and control of a significant portion of Long Island Sound.

Based on the USCG Waterway Suitability Report, issued September 21, 2006, (the “Waterway Suitability Report”), Broadwater’s FSRU must be surrounded by a circular security exclusion zone with a radius of 1,210 yards, equivalent to an area of 950 acres.³ Thus, Broadwater will permanently deprive the public of access to 950 acres of the surface of the Long Island Sound.⁴ The Waterway Suitability Report requires each LNG tanker used to supply LNG to the FSRU to have a moving security zone around it that is 1,550 yards wide and 5,000 yards long (plus the length of the carrier itself)⁵, equivalent to an area of 1,722 acres.⁶ This moving security zone will prohibit public access to 1,722 acres of the surface of Long Island Sound at least four to six times a week.

That permanent 950-acre exclusion zone around the FSRU is almost identical in size to the prohibited transfer in *Illinois Central*. In addition, the moving security zone around each

³ Waterways Suitability Report at § 4.6.1.5, p. 130.

⁴ This was calculated as follows. The area of the circular exclusion zone is $3.14 \times 1,210 \text{ yards} \times 1,210 \text{ yards}$, which equals, 4,579,274 square yards. As one acre equals 4,840 square yards, 4,579,274 square yards equals 949.85 acres.

⁵ Waterways Suitability Report at § 4.6.1.4, pp. 128-30.

⁶ This was calculated as follows. The area of the rectangular tanker exclusion zone is $5377.43 \text{ yards long} \times 1,550 \text{ yards wide}$ or 8,335,016.5 square yards. As one acre equals 4,840 square yards, 8,335,016.5 square yards equals 1,722.11 acres.

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

LNG carrier will deprive the public of access to an additional 1,722 acres of Long Island Sound each time an LNG tanker traverses Long Island Sound.⁷ Denying public access to such enormous portions of Long Island Sound is the quintessential public trust doctrine violation.

To further exacerbate the severity of the violation of the public trust doctrine, Broadwater's proposed project is set at the center of critical commercial routes to and from New York City, portions of Connecticut, Long Island and Westchester. It will deprive the public of access to the area for no less than thirty years, and possibly in perpetuity. Figure 2-6 of the Waterways Suitability Report depicts long-established commercial traffic routes abutting the proposed location of the FSRU. See Waterways Suitability Report at 31 and 33. That figure unequivocally demonstrates that the FSRU will obstruct these traffic lanes. Moreover, that figure grossly under-represents the extent to which the FSRU will actually interfere with Long Island Sound vessels. Figure 2-6 only tracks a few thousand vessels with on-board AIS Tracking Systems. The figure does not take into account the other 180,000 registered vessels in Connecticut, the 80,000 registered vessels in New York and the 43,000 registered vessels in Rhode Island, all of which use Long Island Sound, but do not have on-board AIS Tracking Systems.

Further, with respect to the LNG tanker moving security zones, the USCG indicated that the "vessel traffic routing scheme" it will have to impose around the tankers will "have an undue impact on recreational vessel operators," especially in The Race.⁸ This interference violates the doctrines of *Long Sandt*, *Coxe* and *Illinois Central*.

Broadwater violates the public trust doctrine because it eliminates "public access" to a 950-acre area of Long Island Sound in perpetuity, and to a 1,722-acre moving area of the Long

⁷ Waterways Suitability Report at § 3.1.4.1, p. 56.

⁸ *Id.* at § 4.6.1.5, p. 130-31.

Island Sound every time one of the supply vessels navigates to or from the FSRU. Broadwater expects two or three shipments per week, meaning that the 1,722-acre moving exclusion zone will impact the public's use of Long Island Sound 4 to 6 times a week for extended periods of time during the transport vessels entering and leaving Long Island Sound. Given this pervasive and continuous impact on navigable waters, the NYSOGS cannot approve Broadwater's requested easement.

4. The Easement Sought By Broadwater Violates The Long Island Sound Stewardship Act of 2006

The Long Island Sound Stewardship Act of 2006 (the "Act") was signed into law by President Bush on October 16, 2006. The Act declares that Long Island Sound is a "national treasure of great cultural, environmental, and ecological importance." Act § 2(a)(1). The Act further declares that Long Island Sound-dependent activities "contribute more than \$5,000,000,000 each year to the regional economy." Act § 2(a)(3). Congress warns that "the portion of the shoreline of the Long Island Sound that is accessible to the general public . . . is not adequate" and that "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." Act §§ 2(a)(4), 2(a)(6).

The Act's principal goal is to preserve Long Island Sound for "ecological, educational, open space, public access, or recreational" use. Act § 2(b). To do so, the Act establishes the "Long Island Sound Stewardship Initiative." Act § 2(b), which includes: (i) designating certain areas of Long Island Sound as "stewardship sites," (ii) developing management plans that addresses threats to "stewardship sites", and (iii) protecting and enhancing "stewardship sites." Act § 6(a)(1). Plainly put, the Act requires the identification and preservation of desirable parcels of property adjacent to Long Island Sound that may serve important ecological,

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

educational, open space, public access, or recreational uses of Long Island Sound. Act § 9(b)(2)(a). All of this, of course, is to make Long Island Sound more accessible to and useable by the public. It is not intended to carve out huge areas of Long Island Sound for private profit-making use or to exclude the public from vast areas of this treasured body of water.

Broadwater is entirely inconsistent with the federal policy, embodied in the Act, of preserving and improving public access to Long Island Sound. The permanent mooring of the FSRU containing ninety million gallons of toxic and flammable liquid natural gas in the center of Long Island Sound conflicts with this federally-declared purpose. In addition, the exclusion zones discussed above prohibit public access to large areas of Long Island Sound. In short, the Broadwater Project violates the letter and spirit of this new federal statute and the easement must be denied.

6. **The Easement Sought By Broadwater Endangers The Safety and Security of the Residents of Suffolk County**

NYSOGS must consider safety in its deliberations about Broadwater's requested easement. There is considerable public opposition to the Broadwater Project primarily focusing on the inherent safety risks of the proposal. This is not tried and true technology. Rather, it is experimental, i.e., if approved, it will be the first floating FSRU ever built in the world. None exists today. By its easement request, Broadwater wants to make Long Island Sound a laboratory for a very risky and unproven venture.

Safety is of paramount importance to Suffolk County. Safety is also of concern in FERC proceedings. In the *Weaver's Cove LNG* proceeding, FERC stated the following: "The primary consideration before us is whether the proposed Weaver's Cove facilities can be constructed and operated safely."⁹ Thus, not only must FERC be assured that Broadwater can be constructed and

⁹ Order Granting Authority Under Section 3 of the Natural Gas Act and Issuing Certificate in *Weaver's Cove*

LA22 – Suffolk County

200734055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

operated in a safe manner, Suffolk County and its residents and the State of New York must also be assured that all safety issues associated with the proposed project are sufficiently identified and assessed before any approvals or easements can be granted.

Broadwater has yet to provide any adequate answer to Suffolk County's concerns about first responders from local communities not having the training, equipment and resources necessary to handle Broadwater-related emergencies. The fact that Broadwater intends to provide safety training to its on-board personnel fails to acknowledge that these on-board personnel may be disabled by the emergency and that local rescue and fire squads must respond to such emergencies. Because Broadwater has failed to establish that its facility can be constructed and operated safely, and has yet to even prepare an Emergency Response Plan, NYSOGS cannot grant the requested easement.

Suffolk County's safety concerns are buttressed by a February 2007 report issued by the federal Government Accountability Office ("GAO") entitled "Maritime Security: Public Safety Consequences of a Terrorist Attack on a Tanker Carrying Liquefied Natural Gas Need Clarification." In the report, the GAO noted significant flaws in the Sandia National Laboratories' study of LNG fires, which is the leading study that federal agencies use to assess proposals for LNG import terminals, including the Broadwater Project. Specifically, the GAO's experts "disagreed on the specific heat hazard and cascading failure conclusions reached by the Sandia study."

According to the GAO report, the term "heat hazard" refers to the distance at which 30 seconds of exposure to the heat of an LNG fire can burn people. The Sandia study concluded that "a good estimate of the heat hazard distance would be about 1 mile." The GAO's experts concluded, however, that the heat hazard from an LNG fire might be as high as 1 ¼ miles, or,

Energy, LLC et al Docket No. CP04-36-000 (Issued July 15, 2005), 112 FERC ¶ 61,070, at p 12 ¶ 32.
15

LA22-2

LA22-2

The findings of the GAO Report (GAO 2007) indicate that the primary hazard to the public would be heat from a fire and that 11 of 15 responding experts described current methods for estimating LNG fire heat hazard distances as "about right" or too conservative. The sizes of the proposed fixed safety and security zone around the FSRU and the proposed moving safety and security zone around each LNG carrier were calculated to protect users of the Sound from the potential effects of an LNG fire. The expert consensus in the GAO Report supports the methods used to determine the proposed safety and security zones for the Broadwater facilities. Although the GAO Report suggested that further study of the consequences of a large release of LNG to water should be conducted, it also endorsed the use of current modeling methods.

The GAO expert panel agreed that cascading failure is an area with a need for future research. Regardless of the specific mechanics, likelihood, and number of tanks involved in cascading failures, the GAO panel of experts agreed (12 of 16 responders) that the consequences of cascading LNG tank failures would increase the estimated hazard distances by 20 to 30 percent. Broadwater's selection of an offshore location, 9 miles from the Long Island shoreline and 10 miles from the Connecticut shoreline, provides a large safety buffer in excess of any inherent uncertainty in modeling potential LNG spills, including cascading tank failure scenarios.

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

2,000 meters. Here, the radius of the proposed security zone surrounding Broadwater's FSRU is only 1,210 yards. Thus, if the GAO's experts are correct in their conclusions that the heat hazard of an LNG explosion on the FSRU can be as high as 1 1/4 miles, then unsuspecting passers-by, even those well outside of the USCG's proposed security zones for Broadwater, may be severely burned by a catastrophic fire on the FSRU or on an LNG tanker.

LA22-2

As further explained in the GAO's report, the term "cascading failure" refers to the "sequential failure of LNG cargo tanks" on an LNG tanker. The Sandia report concluded that only "up to three of the ship's five tanks could be involved" in an LNG fire. Some of the GAO's experts concluded, however, that "an LNG spill and subsequent fire could potentially result in the loss of all tanks on board the tanker." Here, the USCG relied on the assumptions contained in the Sandia study in calculating the safety risks arising from the Broadwater Project. Yet, as the GAO report makes clear, even basic questions, such as the likelihood of a total or partial "cascading failure," remain very much unsettled. NYSOGS must not permit Long Island Sound to become the proving ground for determining whether a catastrophic LNG fire would cause total or partial "cascading failure."

LA22-3

The safety concerns of Suffolk County and the GAO were also raised in a report, issued in February 2006, by the New York State Office of Homeland Security entitled "Focus Report: Maritime Terrorist Threat." This report discusses safety and security concerns associated with facilities such as the Broadwater Project, among other maritime concerns. The report notes that there are serious security issues raised by foreign-flagged vessels loading LNG in poorly secured overseas ports and the lack of appropriate vetting processes to ensure that employees on LNG tankers are properly trained about safety and emergency procedures. The report also notes that little information is known about multiple system failures occurring simultaneously on the FSRU and tankers and notes that the available data is limited to assessing each system separately. The

LA22-3 We have provided information regarding the *Focus Report: Maritime Terrorist Threat* in Section 3.10.8 of the final EIS.

LA22 – Suffolk County

200704055013 Received PERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

LA22-3

report also discusses the catastrophic consequences of an LNG tanker accident closing The Race in Long Island Sound, an issue that Broadwater sloughs off. Such an accident will significantly impact and impair other commercial and recreational users of Long Island Sound; who use The Race to enter and exit the Sound, Broadwater has provided no analysis of the impact on such LNG supply disruptions on its own FSRU operations.¹⁰ Broadwater's analysis also fails to provide any information on the impact on national security if The Race is blocked, which prevents United States Navy vessels from entering or exiting Long Island Sound.

Suffolk County's position is further supported by the Water Suitability Report, which identified major safety risks of the Broadwater Project. As noted above, the USCG evaluated the intensity of use of Long Island Sound by vessels with AIS Tracking Systems in Block Island Sound and The Race, all in an area which must be traversed several times a week by the vessels supplying the FSRU. When non-AIS Tracking Systems vessels are included in the analysis, there are over 300,000 vessels using Long Island Sound. Because of this, the USCG noted in its Water Suitability Report that special precautions are necessary to protect the vessels carrying the LNG, as well as the FSRU facility.

The USCG also recognized safety concerns in Long Island Sound. The USCG noted that:

[t]he proposed frequency of LNG shipments to the terminal would be 2-3 times per week, on average. The total duration for operations from transit beginning at the Point Judith Pilot Station, discharging cargo, and ending with disembarking the pilot at Point Judith is expected to take approximately 40 hours per LNG carrier. At a transit speed ranging between 12 and 15 knots, from Point Judith Pilot Boarding Station to the proposed location of the FSRU, a distance of approximately 69.1 miles, transit would take between approximately 5 to 6 hours. The remainder of the time would be spent berthing, deberthing and conducting cargo operations, approximately 25 to 30 hours.¹¹

The USCG further noted that because of the dangerous nature of the LNG cargo, the

¹⁰ See NYS Department of Homeland Security Report, a copy of which is attached as Exhibit "B" to Suffolk County's November 2006 Objections, previously submitted to the NYSOGS.

¹¹ *Id.* at p. 56.

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

vessel carrying the LNG will be required to be met in the area of Port Judith, Rhode Island and escorted to and then through The Race, and then to the proposed LNG facility. During this transit, the moving safety exclusion zones required by the USCG will interfere with other users of Long Island Sound. As noted above, each LNG tanker must have exclusion zones of 4,000 yard buffer zone in front of the vessel, a 2,000 yard buffer zone at the stern of the vessel and 750 yards on each side of the ship.¹² Once the LNG tankers are attached to the FSRU, they will remain there for 12 to 18 hours under armed guards in the USCG-mandated FSRU exclusion zone.¹³

The USCG also acknowledged that adverse weather conditions, particularly in an area east of The Race and the Block Island Sound, are of grave concern because the wind speeds in those areas average about 15 miles per hour throughout the year, and the conditions are very similar to the conditions on the high seas. The Race is a deep navigable portion of the Sound generally thought to be only 1.4 miles wide and runs between Race Rock and Valiant Rock in the area of Block Island Sound.¹⁴ The USCG further noted that "there are always strong rips and swirls in the wake of all broken ground in The Race, except for about one-half hour at slack water. The rips are exceptionally heavy during heavy weather, and especially when a strong wind opposes the current or the current sets through against a heavy sea."¹⁵ Under such circumstances, the 15 knot transit speed through The Race asserted by Broadwater is certainly not a realistic estimate of transit times through The Race, a fact acknowledged by the USCG.

In the winter months, the USCG noted that there is an added safety problem of ice flow and intense fog.¹⁶ All of this activity is occurring while other heavy commercial traffic is also

¹² *Id.* at p. 130.

¹³ *Id.*

¹⁴ *Id.* at p. 77-78.

¹⁵ *Id.* at p. 78.

¹⁶ *Id.* at p. 79.

attempting to transit the 1.4 mile wide Race and ferries are plying between Orient Point and New London, and the military is using its nuclear submarine base in Groton. Into this calculus, one must add the fact that the USCG readily admitted that it does not have the personnel or equipment to properly secure the safety of the FSRU and the LNG tankers.

The USCG also noted that Broadwater was a particular safety challenge due to the FSRU's location in a "thoroughfare used by a wide variety of waterway users."¹⁷ The USCG further admitted that the LNG vapor cloud from a collision in Long Island Sound could cross over Fisher's Island, Plum Island, and portions of the North Fork of Long Island before dispersing.¹⁸

Critically, analyzing the resources required to adequately and properly provide for security and safety of the Broadwater Project, the USCG stated:

Based on current levels of mission activity, Coast Guard Sector Long Island Sound currently does not have the resources required to implement the measures that have been identified as being necessary to effectively manage the potential risk to navigation safety and maritime security associated with the Broadwater energy proposal. Obtaining the required resources would require either curtailing current activities within the Sector, reassigning resources from outside of the Sector, or for the Coast Guard to seek additional resources through the budget process...

In addition to the resources identified in Section 7.2, additional Coast Guard resources may be required to implement the vessel traffic management recommendations that were identified in Sections 4.6.1.6 and 4.6.1.7 as well as some of the maritime security measures identified in Section 5.5 of the SSI portion of this Report. The resources required to implement these measures cannot be identified insofar as additional analysis is required to establish specific operational capabilities. Resource requirements would be identified after the operational capabilities are established. **State or local law enforcement agencies could potentially assist with implementing some of the measures identified for managing potential risks to maritime security associated with the proposed Broadwater Energy project. With the appropriate legal agreement (i.e. Memorandum of Understanding), State law enforcement personnel could enforce Coast Guard safety or security zones either around the FSRU**

¹⁷ *Id.* at p. 104.

¹⁸ *Id.* at 111.

LA22 – Suffolk County

200704055013 Received FBRC O&EC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

or the transiting LNG carrier. This assumes the state law enforcement agency has the appropriately trained and outfitted personnel in addition to small boats capable of operating in the most probable worst case sea condition of Long Island Sound. Currently the agencies that could potentially provide such assistance do not have the necessary personnel, training, or equipment.¹⁹ (Emphasis added.)

The above is a candid admission by the USCG that it does not have the resources to provide any safety and security for the FSRU and the LNG tankers.

Broadwater also identified significant safety issues in its filings with FERC. Some of these are described below.

History of Marine Accidents Involving LNG. Broadwater admits that at least 20 marine accidents involving LNG facilities and tankers have occurred worldwide. See Broadwater Resource Report Nos. 10 and 11. Broadwater further admits that eight of these incidents involved spillage of LNG. *Id.* It also admits that LNG carrier groundings and collisions have occurred, including one with a submarine surfacing beneath an LNG carrier. *Id.* Groton, Connecticut, located on Long Island Sound near The Race and the proposed route for the LNG tankers, is home to a United States Navy nuclear submarine base.

Flammable Vapor Release. Broadwater admits that an LNG spill may occur and if the material does not ignite into a fireball, a large LNG vapor cloud will be dispersed over a wide area of Long Island Sound. *Id.*

Fracture of Tanks from Exposure to LNG. Broadwater admits that the failure of two or more LNG cargo tanks due to exposure to ultra-cold LNG would increase the extent of the fireball or vapor cloud by 20 to 30 percent. *Id.*

Remoteness of Site is not a Panacea. Broadwater admits that the remoteness of the site does not eliminate safety risks to the public. Broadwater's Resource Reports note that:

¹⁹ *Id.* at p. 156-157.

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

“[a]ccidents could occur on the FSRU, on transiting or berthed LNG carriers, or during the performance of facility support operations. Despite the facility’s remote location, such accidents could impact the public, facility personnel, or the facility itself.” *Id.* at 11-13.

Sloshing of LNG Damaging Membrane Containment System. Broadwater admits that “forces produced by wave action acting on the FSRU in its marine environment could cause sloshing of LNG in the cargo tanks on the FSRU, potentially damaging the membrane containment system.” *Id.* at 11-19.

Yoke Mooring Never Attempted for an FSRU. Broadwater admits that a “yoke mooring system has not been used in conjunction with an FSRU application” *Id.* at 11-27. Broadwater is admittedly using untested technology.

Simulations Show LNG Vessel Berthing May be Unsafe. Broadwater conducted a study in which it simulated an LNG vessel’s berthing with the FSRU. Broadwater admits that “four of the 25 simulations resulted in less than acceptable safety margins.” *Id.* at 11-46. That means that berthing operations were unsafe more than fifteen percent of the time. Assuming there are only two LNG offloads per week (a conservative estimate), that means that there will be approximately 16 unsafe offloads per year.

Broadwater’s Inability to Comply With State Safety Statutes and Regulations. The New York State Department of Public Service (“NYSDPS”) has been designated at the State’s liaison with Broadwater for purposes of “consulting with FERC on all siting and safety matters regarding Broadwater’s applications.” NYSDPS Safety Advisory Report, dated February 28, 2006 at 2-3. NYSDPS identified many New York statutes with which Broadwater cannot comply. For example, “[s]ince the structure is floating on water, the exiting system of the facility could never terminate at a public way. Therefore, the exiting system cannot meet the requirements of the Building Code.” *Id.* at Appendix B at 1. Similarly, although Broadwater

proposes to “dump[] [spilled] LNG to the port side of the FSRU . . . [t]his does not meet the intent of isolation” required by the State Fire Code. *Id.* at Appendix C at 1. Other state-law safety violations are identified throughout the report. *See, Id.* at Appendix A-D.

Overall, given the significant and wide-ranging safety risks, NYSOGS cannot issue an easement to Broadwater.

7. SEQRA

Since SEQRA applies to actions by State agencies (*see* New York State Environmental Conservation Law (“ECL”) §§ 8-0105(1) and 8-0105(4)(i)), and since NYSOGS is a duly created State agency under Public Lands Law § 2(a), SEQRA applies to Broadwater’s easement application. To grant such an easement is an “action” which is subject to SEQRA and requires that NYSOGS consider the environmental impacts associated with the proposed action and ways to minimize or avoid adverse environmental effects. *See Town of Henrietta v. NYSDEC*, 76 A.D.2d 215 (4th Dept 1980) and comments to ECL § 8-0109(c). Generally, any applicant requesting that a governmental agency take an action must, at minimum, file an Environmental Assessment Form (“EAF”) to analyze the potential environmental impacts. In this regard, the Court of Appeals has recently declared that:

[a]ll “actions” subject to SEQRA (i.e., a Type I and unlisted actions) initially require the preparation of an EAF whose purpose is to aid the agency “in determining the environmental significance or nonsignificance of actions” (6 NYCRR 617.2[m]; see also 617.6[a][2][3]).

City Council of Watervliet v. Town Board of Colonie, 3 N.Y.3d 508, 519 (2004).

NYSOGS’s own regulations requires that prior to issuing an easement, NYSOGS must:

ascertain the probable effect of the use, structure or facility on the public interest in State-owned lands underwater and in consultation with the Department of Environmental Conservation (DEC), Department of State (DOS) and Office of Parks, Recreation and Historic Preservation (OPR&HP) or such other agencies or authorities as required by law, shall examine 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.

9 NYRCC § 270-3.2(a).

NYSOGS's regulations also provide that the applicant:

submit an environmental assessment form, including marine project information, indicating the purpose, scope and potential impacts of the project. The commissioner shall solicit the written comments of DEC, DOS and OPR&HP in their respective areas of expertise and give due regard to incorporating those comments in the review of the application and any plan of the use, structure or facility and shall incorporate into any grant, lease, easement, permit or lesser interest those conditions deemed necessary by the Department of Environmental Conservation to adequately protect the affected environment or natural resource. If the environment or natural resource cannot be protected as determined in findings by the Commissioner of Environmental Conservation, the proposed application shall be denied.

9 NYRCC § 270-3.2(b).

Broadwater has failed to comply with any of these requirements. In light of that failure and in light of the multitude of environmental concerns set forth above, such an omission is fatal to Broadwater's application. Clearly, Broadwater believes it is above the law and that SEQRA does not apply to it. Broadwater is wrong again, because the easement request to NYSOGS is not exempt from the ECL, the Public Lands Law, the ECL regulations and the Public Lands Law regulations. In fact, State agencies are required by SEQRA to stop, look and listen before any way risking environmental impacts. See *H.O.M.E.S. v. NYSDEC*, 69 A.D.2d 222 (4th Dept 1979).

8. Hearing

Broadwater's request for an easement raises significant safety, security and environmental concerns that cannot be properly evaluated by NYSOGS without an evidentiary

LA22 – Suffolk County

200704055013 Received PERC OSBC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

hearing. Moreover, a full examination of all environmental impacts must be analyzed under SEQRA and a public hearing on the DEIS and FEIS should be held in which all parties may present real evidence subject to the time-honored test of cross-examination. The safety, security and integrity of Long Island Sound demand it.

CONCLUSION

For the reasons listed above, NYSOGS cannot issue Broadwater its requested easement.

Dated: Uniondale, NY
April 5, 2007

Respectfully submitted,

FARRELL FRITZ, P.C.

By: Charlotte Biblow
Charlotte Biblow, Esq.
John M. Armentano, Esq.
Attorneys for the County of Suffolk, New York
1320 Reckson Plaza
Uniondale, New York 11556-1320
(516) 227-0700
cbiblow@farrellfritz.com
jamentano@farrellfritz.com

Of Counsel:

G.S. Peter Bergen, Esq.

To: Robert Alessi, Esq.
LeBoeuf, Lamb, Greene & MacRae, LLP
99 Washington Avenue, Suite 2020
Albany, NY 12210

LA22 – Suffolk County

200704055013 Received FERC OSEC 04/05/2007 11:24:39 AM Docket# CP06-54-000, ET AL.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Uniondale, New York, this 5th day of April, 2007


Charlotte Biblow, Esq.
Farrell Fritz, P.C.
Attorneys for the
County of Suffolk, New York
1320 Reckson Plaza
Uniondale, NY 11556-1320
Tel.: (516) 227-0686
Fax.: (516) 336-2266
cbiblow@farrellfritz.com

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LA23 – Town of Riverhead

200704025006 Received FERU OSEC 04/02/2007 10:40:53 AM Docket# CE06-54-000, BT AL.

**STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES**

In the Matter of the Application of Broadwater Energy, LLC
for use of land under the waters of
Long Island Sound in the Town of Riverhead, Suffolk County

**OBJECTION OF THE
TOWN OF RIVERHEAD**

The Town of Riverhead ("Riverhead" or "Town") was served on March 19, 2007 with Broadwater Energy, LLC's Notice of intent to apply to the Commissioner of the Office of General Services ("OGS") for permission to use State-owned underwater lands beneath Long Island Sound. The underwater lands, while 9 miles offshore, are within the Town of Riverhead. Broadwater Energy wants to use the lands to moor and operate a liquefied natural gas ("LNG") import terminal, described as a floating storage and regasification unit ("FSRU"). The Notice states that any objection by Riverhead should be filed with OGS no later than April 16, 2007, or within 20 days of receipt of the Notice.

Riverhead's Objection

Pursuant to the Notice and Part 270 of OGS' rules, Riverhead hereby objects to any grant of an easement, fee interest, lease, or other form of permission by OGS that would allow Broadwater Energy LLC, Broadwater Pipeline LLC, or other party to use State-owned lands beneath Long Island Sound for an LNG import terminal or an associated sendout pipeline.

LA23-1

LA23-1

This letter from the Town of Riverhead is in response to Broadwater's application to NY SOGS 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, the Town has not provided any comments directly related to the EIS that are different from those presented in its previous letter (Letter LA-19). Therefore, we have not provided responses in addition to those for Letter LA-19.

LA23 – Town of Riverhead

200704025006 Received FERC OSEC 04/02/2007 10:40:53 AM Docket# CP06-54-000, ET AL.

Broadwater's March 2007 Notice Compared to its Two Prior Notices

Broadwater Energy's March 2007 Notice is similar to two prior Notices served on the Town on October 24, 2006, one by Broadwater Energy, LLC and the other by Broadwater Pipeline, LLC. The three Notices collectively announce Broadwater's intention to ask OGS for permission to occupy State-owned underwater lands for components of its proposed LNG import terminal and sendout pipeline.¹ However, the caption of the March Notice indicates that Broadwater now intends to apply to OGS "pursuant to" § 75 of the Public Lands Law ("PLL"). In this respect, the March Notice differs materially from the October, 2006 Notices, which say that Broadwater is petitioning OGS "pursuant to" § 3(2) of the PLL.

The March Notice does not clearly specify the form of the permission that Broadwater Energy intends to ask for, such as an easement, fee interest, lease, or other license, even though the PLL and OGS's Rules impose differing requirements, depending on the nature of the grant being applied for.² In the interest of full disclosure, the Town requests Broadwater to provide a copy of Broadwater Energy's new OGS application to all interested parties promptly.

¹ Broadwater Pipeline is wholly owned by Broadwater Energy. See Broadwater Pipeline's FERC Application filed January 30, 2006, at p. 2. Broadwater Energy and Broadwater Pipeline are sometimes referred to collectively as "Broadwater." Broadwater's applications to FERC and related documents, including OGS filings, are available at www.ferc.gov/docs-filing/eLibrary.asp in dockets CP06-54, 55, and 56.

² Compare Subpart 270-4 of OGS's Rules with Subpart 270-5.

LA23 – Town of Riverhead

200704025006 Received FERC OSEC 04/02/2007 10:40:53 AM Docket# CP06-54-000, ET AL.

Objections to the October, 2006 Notices

In November 2006, Riverhead objected to each of the October Notices, and continues those objections and merges them with this Objection.³ Objections were also filed in November by Suffolk County, the Town of Brookhaven, State of Connecticut, and the Connecticut Fund for the Environment.

Riverhead's November Objections noted that Broadwater Energy's Notices were clearly defective, because any request for permission to moor the LNG terminal would need to be made pursuant to PLL § 75, not § 3(2). Apparently the March Notice seeks to cure this defect with respect to Broadwater Energy. No comparable new Notice on behalf of Broadwater Pipeline has been received, however.

Riverhead's November Objections further pointed out that OGS may not grant the requested easements for the purpose of siting the LNG terminal facilities pursuant to PLL § 75, because Broadwater is not the owner of adjacent riparian land.⁴ This defect remains unaddressed by Broadwater.

Moreover, in order to approve any grant under PLL § 75, OGS would need to make SEQRA findings, based on a record supporting SEQRA's "hard look" test, showing that "adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided." No SEQRA EIS is being prepared for the Broadwater project, although a NEPA EIS has been drafted and circulated for comment in connection with Broadwater's applications to FERC. Riverhead submits that the final NEPA record may well not be adequate

³ See "Objection of the Town of Riverhead," dated November 13, 2006 objecting to the Notice filed on behalf of Broadwater Energy, LLC; and see "Objection of the Town of Riverhead to Notice of Broadwater Pipeline LLC," dated November 15, 2006 objecting to the Notice filed on behalf of Broadwater Pipeline, LLC.

⁴ "Objection of the Town of Riverhead," dated November 13, 2006 at p. 9. "Objection of the Town of Riverhead to Notice of Broadwater Pipeline LLC," dated November 15, 2006 at p. 7.

LA23 – Town of Riverhead

200704025006 Received FERC OSEC 04/02/2007 10:40:53 AM Docket# CE06-54-000, BT AL

to support the necessary findings under SEQRA. For example, the NEPA DEIS acknowledges that shorter pipeline routes cause less impact (EIS § 4.5.2). On the other hand, Broadwater's preferred pipeline route is 9.3 miles *longer* than the shortest alternative route needed to connect with the Iroquois Gas line beneath Long Island Sound, (EIS at Table 4.5.1), which is inconsistent with SEQRA's requirement that adverse impacts must be "minimized." This is to recount just one instance of the multiple defects and self-serving nature of Broadwater's DEIS.

Riverhead's November Objections also requested OGS to hold public hearings. These requests remain unanswered to date.

Broadwater's November 2006 Petitions to OGS

On November 27, 2006 Broadwater Energy and Broadwater Pipeline petitioned OGS to grant easements for the proposed LNG import terminal and pipeline. Copies were posted in FERC's Broadwater Docket on December 1, 2006.⁵ Shortly thereafter, in mid-December, FERC invited the public to comment on the Broadwater project. FERC scheduled joint public hearings on its NEPA DEIS, the NYS DOS Coastal Consistency Determination, and the Corps of Engineers Permit Applications.⁶ FERC set January 23, 2007 as the deadline for written comments. Because of intense public interest, FERC has also received written comments after January 23.

⁵ These filings were posted in FERC's Broadwater Docket because the Natural Gas Act encourages cooperation among Federal and State agencies, with respect to natural gas projects. The NGA also directs FERC to maintain a consolidated record of involved agency filings, and designates FERC as lead agency for NEPA purposes. See 15 U.S.C.A. § 717n (b) and (d) as amended by the Energy Policy Act of 2005, PL 109-58.

⁶ Agencies represented at the joint public hearings were FERC, the Corps of Engineers, the Coast Guard, and the New York State Department of State (DOS). The Town understands that OGS and DOS are coordinating their response to Broadwater's various applications.

LA23 – Town of Riverhead

200704025006 Received FERC OSEC 04/02/2007 10:40:53 AM Docket# CP06-54-000, BT AL

Riverhead's and Southold's Comments in January, 2007

In response to various public hearing notices, Riverhead and its easterly neighbor, the Town of Southold, submitted joint comments to FERC, OGS, and the other State and Federal agencies involved in the Broadwater matter.⁷ As to OGS, the Towns explained that OGS could not lawfully grant Broadwater's November 27 Petitions for easements to use underwater lands for the LNG import terminal.

Each of Broadwater's November OGS Petitions requested a grant of easements "pursuant to" PLL § 3(2). The Petitions described the mid-Sound easements as two concentric circular underwater tracts, the inner one, having a 330 ft. radius, to be used by Broadwater Pipeline, and the second one, being circle with a 1380 ft. radius, excepting the inner 330 ft. radius tract, to form a donut-shaped tract to be used by Broadwater Energy."⁸ The Petitions and FERC applications reveal that Broadwater Pipeline proposes to use its inner tract to anchor the LNG import terminal's Yoke Mooring System (YMS) to the seabed. Broadwater Pipeline's petition also requests easements for a 30 ft. wide strip running from the YMS westerly for 21 miles to the proposed interconnection with the existing Iroquois pipeline. The aft 1050 ft of the FSRU would float above Broadwater Energy's easement. The FSRU's forward 330 ft length would occupy

⁷ See "Comments of the Towns of Riverhead and Southold in Response to the Draft Environmental Impact Statement, and the Requests for Comments by FERC, the Corps of Engineers, the New York State Department of State, and Supplemental Comments for the New York State Office of General Services", dated January 19, 2007, filed as submittal 20070119-5012 in FERC's Broadwater Docket, CP06-54. The Town hereby incorporates those comments herein by reference.

⁸ Id. at pp. 6-8. See also Broadwater's November Petitions at Maps 5 of 6 and 6 of 6; and see Figure 5, showing the point of separation between Broadwater Pipeline and Broadwater Energy.

LA23 – Town of Riverhead

200704025006 Received FERC OSEC 04/02/2007 10:40:53 AM Docket# CE06-54-000, BT AL

Broadwater Pipeline's easement, including the FSRU's mooring, a yoke mooring structure, essentially four huge piles driven deep into the seabed.⁹

The Towns commented that the FSRU, including its YMS, are a "structure" or "mooring," not a pipeline, and therefore can not be granted an easement under PLL § 3(2). Moreover, the Towns further noted that neither Broadwater entity can be granted easements under PLL § 75, because neither Broadwater Energy, nor Broadwater Pipeline, own adjacent lands, a statutory prerequisite to grant of an easement pursuant to PLL § 75.¹⁰ Accordingly, the Towns concluded that any grant by OGS would be void under the terms of PLL § 75, and that OGS lacks the legislative capacity to grant the requested easements.

The Towns further commented that no right to condemn the underwater lands needed for the LNG terminal would be conveyed to either Broadwater Energy or Broadwater Pipeline by reason of a FERC approval under the NGA. This is because the NGA grants eminent domain powers only to natural gas companies that transport natural gas in interstate commerce and hold certificates of public convenience and necessity granted under § 7 of the NGA. On the other hand, FERC approvals of LNG import terminal facilities are made pursuant to NGA § 3, which regulates importation of natural gas in foreign commerce. NGA § 3 does not convey the power of eminent domain. The FSRU and YMS are LNG import terminal facilities in foreign commerce. They are not in interstate commerce.

⁹ See Broadwater Energy's November Petition at Tab 6, showing Figure 5, Point of Separation between Broadwater Energy and Broadwater Pipeline. (CEID). See also Figures 1-8(a) and 1-8(b) attached to Riverhead's Objection filed November 13, 2006.

¹⁰ PLL § 75(7) (a): OGS may grant easements "to the owners of adjacent land.... Any such grant made to any other person shall be void."

LA23 – Town of Riverhead

200704025006 Received FERC GSEC 04/02/2007 10:46:53 AM Docket# CP06-54-000, ET AL.

Broadwater's Answering Comments of February 2007 and the Towns' Reply of March 12

In response to the Towns' January comments, Broadwater claimed that the LNG import terminal could receive NGA § 7 approval, in addition to § 3 approval.¹¹ The Towns replied that LNG import terminals are facilities in foreign commerce, and are regulated exclusively under NGA § 3, as recent amendments to the NGA and a rich history of case law explain.¹² The Towns showed that FERC's § 7 jurisdiction over the LNG terminal's sendout pipeline begins at the point where its § 3 jurisdiction over the LNG terminal ends, which (at the earliest under the applicable facts) is the point at which the terminal's sendout gas exits the leg of the YMS at the bottom of Long Island Sound and connects to the seabed pipeline. Congress and the Courts have made clear that Section 7 does not apply to import terminal facilities, and that FERC's powers under § 7 and § 3 are not intended to overlap.¹³

As germane to Broadwater's pending and anticipated applications to OGS, this means that no part of Broadwater's LNG terminal facilities, of which the YMS mooring is a major and critical component, can be considered to be a pipeline or a pipeline "appurtenance" as that term is used in OGS's Part 271 Rules. Therefore, OGS can not legitimately claim that terminal facilities are "appurtenances" to a pipeline on the ground that FERC has included, or has been

¹¹ See "Request of Broadwater Energy, LLC and Broadwater Pipeline, LLC for leave to file Supplemental Comments on the Draft Environmental Impact Statement," February 26, 2007, Submittal 20070226-5044 in FERC Docket CP06-54, et al, at pp 72-84.

¹² See "Comments of the Towns of Riverhead and Southold in Response to Broadwater's Supplemental Comments Served February, 26, 2007," dated March 12, 2007, submittal No. 20070312-5008 in FERC Docket CP06-54; as corrected by "Erratum to Comments of the Towns of Riverhead and Southold dated March 12, 2007," dated March 14, 2007, submittal No. 20070314-5007. These comments are incorporated herein by reference.

¹³ Id.

LA23 – Town of Riverhead

200704025006 Received FERC OSEC 04/02/2007 10:40:53 AM Docket#: CP06-54-000, ET AL.

asked to include, the LNG terminal, or part of it, in a § 7 certificate. Accordingly, PLL § 3(2) can not properly be applied by OGS as the basis for granting an easement for any part of the LNG terminal.

It seems clear that Broadwater Energy's anticipated April 2007 new application to OGS acknowledges that PLL § 3(2) is unavailable as authority to grant Broadwater Energy's November Petition for an easement for LNG terminal facilities. That being so, Riverhead submits that neither does PLL § 3(2) support granting Broadwater Pipeline's November 2006 Petition to OGS. This is self-evident because Broadwater Pipeline proposes to use its 660 ft. diameter inner circle as the site on which to anchor the YMS, which clearly is a component of the LNG terminal.¹⁴ However, Broadwater has not given notice of intent to revise its November Petition for Broadwater Pipeline, despite its tacit acknowledgement that LNG terminal facilities are ineligible for grants of easements under PLL § 3(2). Riverhead submits that a determination by OGS to grant Broadwater Pipeline's November 2006 petition pursuant to PLL § 3(2) would not be in accordance with the Public Lands Law and would be arbitrary and capricious. Moreover, such a grant pursuant to PLL § 75 would be void because Broadwater Pipeline is not an adjoining riparian landowner.

¹⁴ Application of Broadwater Energy, LLC in Docket No. CP06-54-000, January 30, 2006, at pp 1-12; Application of Broadwater Pipeline, LLC in Docket Nos. CP06-55-000 and CP06-56-000, January 30, 2006, at pp 1-7. See also Broadwater's Petitions to NY OGS, especially the Maps 5 of 6 (in Accession No. 20061204-0101, public) and Figures 2 and 5 (in accession No. 20061234-0102, CHD) posted in FERC's Broadwater Docket December 1, 2006.

LA23 – Town of Riverhead

200704025006 Received FERC OSEC 04/02/2007 10:40:53 AM Docket# CP06-54-000, ET AL.

Conclusion

Accordingly, OGS should dismiss the various Applications by Broadwater Energy and Broadwater Pipeline. OGS is powerless to issue the requested easements or permissions. As the Towns of Riverhead and Southold have already pointed out on the record in this case, the Broadwater project is unsafe, not in the public interest, and environmentally unsound. Also, Broadwater's proposal is prohibited by Suffolk County Law.

In the event that OGS nevertheless continues to entertain Broadwater's applications, then Riverhead respectfully requests that OGS convene a full hearing pursuant to §10 of the PLL and Part 270 of OGS's Rules for further airing of these issues.

Respectfully submitted,

s/ G. S. Peter Bergen
G. S. Peter Bergen
G. S. Peter Bergen, Attorney at Law
27 Pine Street
Port Washington, NY 11050
(516) 767-3449
pbergen@optonline.net

Of Counsel:

Dawn Thomas
Town Attorney, Town of Riverhead
200 Howell Avenue
Riverhead, NY 11901
(631) 767-3200 ext. 216
thomas@riverheadli.com

Port Washington, NY
April 2, 2007

LA23 – Town of Riverhead

200704025006 Received FERC OSEC 04/02/2007 10:40:53 AM Docket# CE06-54-000, BT AL

**STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES**

In the Matter of the Application of Broadwater Energy, LLC
for use of land under the waters of
Long Island Sound in the Town of Riverhead, Suffolk County

CERTIFICATE OF SERVICE

I hereby certify that I have this day served two copies of the Objection of the Town of Riverhead, dated April 2, 2007, upon Robert J. Alessi, Esq., counsel for Broadwater Energy, LLC by first class mail at his office, LeBocuf, Lamb, Greene & MacRae, LLP,
99 Washington Avenue, Suite 2020
Albany, NY 12210

s/ G. S. Peter Bergen
G. S. Peter Bergen

April 2, 2007