

No. \_\_\_\_\_

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**UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF COMMERCE**

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Broadwater Energy LLC and Broadwater Pipeline LLC,

Appellants

vs.

New York Secretary of State Lorraine Cortés-Vázquez,

Respondent.

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**REPLY BRIEF ON APPEAL OF BROADWATER ENERGY LLC  
AND BROADWATER PIPELINE LLC UNDER THE  
COASTAL ZONE MANAGEMENT ACT**

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## TABLE OF CONTENTS

INTRODUCTION .....	1
DISCUSSION.....	1
I.    The NYSDOS Objection is Defective Because Many of the Purported Coastal Effects Imputed to the Broadwater Project Result From the U.S. Coast Guard’s Prospective Creation of Safety and Security Zones, Which Are “Federal Agency Activities” .....	1
II.   The NYSDOS Objection is Defective Because it is Based Upon Materials That Are Not Enforceable Policies of the LISCMP Under 16 U.S.C. § 1456 .....	3
III.  The Broadwater Project Is Consistent With the Objectives of the CZMA.....	5
A.    Element 1 – The Project Furthers the National Interest in a Significant and Substantial Manner.....	5
B.    Element 2 – The National Interests Furthered by the Broadwater Project Outweigh Any Putative Coastal Effects.....	9
i.    Commercial and Recreational Fishing and Navigation .....	9
ii.   Impingement and Entrainment.....	11
iii.  Stratford Shoal .....	13
iv.   Visual/Aesthetic Impacts .....	14
v.    Public Trust Doctrine.....	17
vi.   Cumulative Impacts .....	18
C.    Element 3 – There Are No Reasonable Alternatives to the Broadwater Project Consistent With the Enforceable Policies of the Applicable Coastal Management Program .....	18
i.    NYSDOS Has Failed To Carry Its Initial Burden and Violated 15 C.F.R. Part 930 Because the Objection Does Not State That Alternatives 1 and 2 Are Consistent with the LISCMP .....	18
ii.   The Two Alternatives Identified by NYSDOS, Which Have Not Been Described With Sufficient Specificity, Are Neither Available Nor Reasonable .....	19
IV.   CONCLUSION.....	25

## TABLE OF AUTHORITIES

### Cases

<u>Broadwater Energy LLC</u> , 122 F.E.R.C. ¶ 61,255 (2008).....	6, 11, 16, 17
<u>Crowley’s Yacht Yard, Inc. v. Pena</u> , 863 F. Supp. 18 (D.D.C. 1994).....	5
<u>Dodd v. U.S.</u> , 545 U.S. 353 (2005).....	2
<u>New England Power Co. v. FERC</u> , 533 F.3d 55 (1st Cir. 2008).....	5

### Administrative Proceedings

<u>Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, L.L.C. From an Objection by the State of Maryland</u> (June 26, 2008).....	6, 7, 8, 9, 18
<u>Decision and Findings in the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of Alaska</u> (July 20, 1990) .....	3
<u>Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc. from an Objection by the California Coastal Commission</u> (Oct. 29, 1990) .....	9
<u>Decision and Findings of the U.S. Secretary of Commerce in the Consolidated Consistency Appeal Islander East Pipeline Company, L.L.C</u> (May 5, 2004).....	9, 19, 22
<u>Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Millennium Pipeline Co., LP From an Objection by the State of New York</u> (Dec. 12, 2003).....	20
<u>Decision and Findings of the U.S. Secretary of Commerce in the Consolidated Consistency Appeals of Weaver’s Cove Energy, L.L.C. and Mill River Pipeline, L.L.C. From Objections by the Commonwealth of Massachusetts</u> (June 26, 2008).....	2, 6, 9
<u>Decision and Findings in the Consistency Appeal of Yeamans Hall Club From an Objection by the South Carolina Coastal Council</u> (Aug. 1, 1992).....	20

### Statutes and Regulations

33 U.S.C. § 1330.....	7
16 U.S.C. § 1452(2)(D) .....	6
16 U.S.C. § 1455(d)(8) .....	8
16 U.S.C. § 1456.....	3
15 C.F.R. Part 923 .....	19
15 C.F.R. Part 923, Subpart H.....	5, 8, 19

15 C.F.R. Part 930 .....	1, 2, 18
15 C.F.R. Part 930, Subpart C .....	1, 2, 3
15 C.F.R. Part 930, Subpart D .....	2
15 C.F.R. § 930.32 .....	1
15 C.F.R. § 930.43 .....	1
15 C.F.R. § 930.51 .....	2
15 C.F.R. § 930.57 .....	1
15 C.F.R. § 930.63 .....	18
15 C.F.R. § 930.64 .....	1
15 C.F.R. § 930.120 .....	1
15 C.F.R. § 930.128(c)(1) .....	3, 6, 9
19 NYCRR § 600.6 .....	3
19 NYCCR §§ 600.6(m)(4)(i-ii) .....	4
19 NYCRR § 600.6(m)(4)(ii) .....	4
19 NYCRR § 600.6(m)(5)(i) .....	4
19 NYCRR § 600.6(j)(3)(i) .....	16
33 C.F.R. § 165.110(b)(1) .....	18
33 C.F.R. § 165.154 .....	17
33 C.F.R. § 165.155 .....	17
33 C.F.R. §§ 165.500 .....	18
Coastal Zone Management Act (“CZMA”) § 303(2)(D) .....	6
CZMA § 306(d)(8) .....	8
CZMA § 307 .....	2
CZMA § 307 (c) .....	1
Long Island Sound Stewardship Act of 2006, Pub. L. No. 109-359, § 10(c), 120 Stat. 2049, 2056 .....	7
Natural Gas Act § 3 .....	4

N.J.A.C. § 7:7E-7.4(s) ..... 4

**Legislative History**

H.R. Doc. No. 96-1012, at 40 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4362, 4388 ..... 6

**New York State Register**

XXVIII N.Y. Reg. 108 (Nov. 15, 2006) ..... 5

XXX N.Y. Reg. 102 (May 14, 2008) ..... 5

XXX N.Y. Reg 107 (June 18, 2008) ..... 5

## GLOSSARY

<u>Amoco Production</u>	<u>Decision and Findings in the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of Alaska</u> (July 20, 1990)
Approval Order	<u>Broadwater Energy LLC</u> , 122 FERC ¶ 61,255 (2008)
April 2, 2008 Culp Letter	April 2, 2008 Letter from Broadwater Project Director Jimmy Culp to Jeffrey Zappieri of NYSDEC's Division of Coastal Resources
Bcf/d	billion cubic feet per day
Broadwater	Broadwater Energy LLC and Broadwater Pipeline LLC
Broadwater Br.	Broadwater Initial Brief on Appeal dated July 7, 2008
Chevron	<u>Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc. from an Objection by the California Coastal Commission</u> (Oct. 29, 1990)
CMP	Coastal Management Program
COTP	Captain of the Port
CTDEP	Connecticut Department of Environmental Protection
Coast Guard	U.S. Coast Guard
CZCC	Coastal Zone Consistency Certification
CZCD	Coastal Zone Consistency Determination
CZMA	Coastal Zone Management Act
DEC Visual of Policy	New York State Department of Environmental Conservation Program Policy – Assessing and Mitigating Visual Impacts
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
ENS	Estuary of National Significance
FEIS	Final Environmental Impact Statement, issued January 11, 2008.
FERC	Federal Energy Regulatory Commission
FSRU	Floating Storage and Regasification Unit
<u>Islander East</u>	<u>Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of the Islander East Pipeline Co., LLC</u> (May 5, 2004)
LINSHA Plan	Long Island North Shore Heritage Area Management Plan
LISCMP	Long Island Sound Coastal Management Program
LNG	liquefied natural gas
LOR	Coast Guard Letter of Recommendation
<u>Millennium Pipeline</u>	<u>Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Millennium Pipeline Co., LP From an Objection by the State of New York</u> (December 12, 2003)

NGA	Natural Gas Act
NJCMP	New Jersey Coastal Management Program
NJDEP	New Jersey Department of Environmental Protection
NOAA	National Oceanic and Atmospheric Administration
NMFS	National Marine Fisheries Service
NYSCMP	New York State Coastal Management Program
NYSDEC	New York State Department of Environmental Conservation
NYSDOS	New York State Department of State
NYSDOS Br. or Brief	NYSDOS August 15, 2008 Principal Brief
Objection	New York State Department of State's April 10, 2008 Objection to the Broadwater Project's Coastal Zone Consistency Certification
OCRM	Office of Coastal and Coastal Resource Management, U.S. Department of Commerce
Project	The FSRU, Sendout Pipeline, and appurtenant structures
Riverhead Plan	Town of Riverhead's Comprehensive Plan
Secretary	Secretary of Commerce
Sound	Long Island Sound
<u>Sparrows Point II</u>	<u>Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, L.L.C. From an Objection by the State of Maryland (June 26, 2008)</u>
SSZs	safety and security zones
USACE	U.S. Army Corps of Engineers
Volume 2	Volume 2 of the Long Island Sound Coastal Management Program
VRA	Visual Resource Assessment
Weaver's Cove	<u>Decision and Findings of the U.S. Secretary of Commerce in the Consolidated Consistency Appeals of Weaver's Cove Energy, L.L.C. and Mill River Pipeline, L.L.C. From Objections by the Commonwealth of Massachusetts (June 26, 2008)</u>
WSR	U.S. Coast Guard's Water Suitability Report for the Broadwater Project
WIS	Wave Information System
Yeamans Hall Club	<u>Decision and Findings in the Consistency Appeal of Yeamans Hall Club From an Objection by the South Carolina Coastal Council (August 1, 1992)</u>
YMS	Yoke Mooring System

## INTRODUCTION

Broadwater Energy LLC and Broadwater Pipeline LLC (collectively “Broadwater”) submit the following Reply Brief in response to the arguments raised by the New York State Department of State (“NYSDOS”) in its August 15, 2008 Principal Brief (“NYSDOS Br.” or “Brief”). Broadwater set forth the relevant facts underlying this appeal in its Initial Brief on Appeal dated July 7, 2008 (“Broadwater Br.”). Because the record in this matter demonstrates that the coastal-dependent Broadwater Project (“Project”) clearly meets the objectives of the Coastal Zone Management Act (“CZMA”), Broadwater respectfully requests that the Secretary of Commerce (“Secretary”) override NYSDOS’s April 10, 2008 Objection to the Project’s Coastal Zone Consistency Certification (“CZCC”).

## DISCUSSION

### **I. THE NYSDOS OBJECTION IS DEFECTIVE BECAUSE MANY OF THE PURPORTED COASTAL EFFECTS IMPUTED TO THE BROADWATER PROJECT RESULT FROM THE U.S. COAST GUARD’S PROSPECTIVE CREATION OF SAFETY AND SECURITY ZONES, WHICH ARE “FEDERAL AGENCY ACTIVITIES”**

Although grossly exaggerated by NYSDOS, essentially all of the minimized coastal effects identified in the Objection with respect to the commercial fishing/lobster industry and navigational use conflicts would actually result from the Coast Guard’s creation of safety and security zones (“SSZs”), not the Project itself. Because the Coast Guard’s creation of the SSZs is a direct “federal agency activity,” the coastal effects resulting from that activity are not a proper basis for NYSDOS’s Objection. 15 C.F.R §§ 930.57, 930.64, 930.120.

Based on a direct statutory mandate contained in CZMA § 307(c), the 15 C.F.R. Part 930 regulations establish two wholly distinct CZMA review processes for direct “federal agencies activities” and “federal license or permit activities” (Subparts C and D, respectively).<sup>1</sup> The Coast Guard’s establishment of SSZs “is considered rulemaking” (33 C.F.R. § 165.7[a]) and is indisputably a “federal agency activity” subject to CZMA review under 15 C.F.R. Part 930, Subpart C. Under Subpart C, the determination as to whether the SSZs are consistent “to the maximum extent practicable” with the LISCMP is the exclusive province of the Coast Guard. 15 C.F.R. §§ 930.32, 930.43. While NYSDOS may voice opposition to a Coast Guard CZCD, under Subpart C it may not prevent creation of the SSZs. Id.

A Coast Guard Letter of Recommendation (“LOR”), on the other hand, “is a determination made by the Captain of the Port (COTP) as to the suitability of waterways for LNG marine traffic as it relates to the proposed project.”<sup>2</sup> “Because an applicant is not able to construct or operate an LNG facility without an LOR from the Coast

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<sup>1</sup> Broadwater Br. at 3-4. Under Subpart C, federal agencies file a Coastal Zone Consistency Determination (“CZCD”) with the relevant state coastal agency before undertaking direct “federal agency activities” in the state’s coastal zone.

<sup>2</sup> December 1, 2005 Memorandum from Tom Hayes, Chief of Coast Guard Office of Environmental Law, at 2 (BW17592).

Guard,” and 15 C.F.R. § 930.51 defines a federal license or permit as including “any required authorization, certification, approval, lease or other form of permission which any Federal agency is empowered to issue,” an “LOR should be considered a federal permit for the purposes of CZMA regulations.”<sup>3</sup> Accordingly, transit of the LNG carriers addressed in the Coast Guard’s LOR, like the other elements of the Project itself (*e.g.*, construction and operation of the FSRU, YMS and subsea pipeline), is a “federal license or permit activity” covered by Subpart D.

NYSDOS’s Objection and Brief ignore the bifurcated nature of the statutory and regulatory scheme by treating the Coast Guard’s creation of SSZs no differently than the “federal license or permit activities” that comprise the Project itself. In so doing, NYSDOS arrogates a power Congress expressly denied to state coastal agencies under CZMA § 307 and 15 C.F.R. Part 930: the power to conditionally veto a direct “federal agency activity.” Accepting NYSDOS’s conduct would render the separate CZCD process provided for in Subpart C a nullity because state coastal agencies opposing a project would always proceed under Subpart D if given the choice.<sup>4</sup>

NYSDOS mistakenly argues that the Secretary’s holding in Weaver’s Cove<sup>5</sup> allows the coastal effects of a “federal agency action” to serve as the basis of a state agency objection issued pursuant to Subpart D. The appellants in Weaver’s Cove argued that the coastal effects of LNG tanker transit and delivery were beyond the purview of the Commonwealth of Massachusetts. Weaver’s Cove at 18. The Secretary rejected the appellants’ effort to disavow the coastal effects resulting from the LNG tanker transits because, “[b]y regulation, the adverse coastal effects relevant to the analysis include any reasonably foreseeable effect on any coastal use or resource *resulting from a Federal license or permit activity.*” Id. at 18 (emphasis supplied). Because the LNG tanker transits were subject to a Coast Guard LOR, they were “federal license or permit activities.” Id. at 18-20. In stark contrast, the coastal effects that NYSDOS includes in its flawed Objection (and now seeks to introduce into this appeal) include those clearly resulting from the Coast Guard’s proposed creation of the SSZs, which is a direct “federal agency action” not a “federal license or permit activity.” Far from supporting NYSDOS’s conduct, Weaver’s Cove *confirms* the defective nature of the Objection. In sum, the scope of NYSDOS’s evaluation under Subpart D must be limited to those activities to be authorized under federal licenses or permits.

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<sup>3</sup> Id.

<sup>4</sup> See Dodd v. U.S., 545 U.S. 353, 371 (2005) (“It is, of course, a basic canon of statutory construction that we will not interpret a congressional statute in such a manner as to effectively nullify an entire section.”).

<sup>5</sup> Decision and Findings of the U.S. Secretary of Commerce in the Consolidated Consistency Appeals of Weaver’s Cove Energy, L.L.C. and Mill River Pipeline, L.L.C. From Objections by the Commonwealth of Massachusetts (June 26, 2008) (“Weaver’s Cove”).

The foregoing notwithstanding, Broadwater has worked diligently and successfully to offset any coastal effects resulting from the Coast Guard's proposed creation of SSZs,<sup>6</sup> and those effects will likely be further minimized as the Coast Guard and NYSDOS engage in the Subpart C process. The FEIS, which reviewed multiple direct, secondary and cumulative impacts of the SSZs, correctly concluded that they would not "significantly affect other waterway users."<sup>7</sup> Thus, even if the Secretary considers coastal effects from the SSZs, they are minor (see Section III.B, *infra*.)

**II. THE NYSDOS OBJECTION IS DEFECTIVE BECAUSE IT IS BASED UPON MATERIALS THAT ARE NOT ENFORCEABLE POLICIES OF THE LISCMP UNDER 16 U.S.C. § 1456**

NYSDOS's Brief (like its Objection) ignores the Secretary's unambiguous admonishment to state coastal agencies in Amoco Production.<sup>8</sup>

[T]his decision puts all state coastal management agencies on notice that should they base an objection on a policy that is not part of their Federally approved coastal management program and that objection is appealed, the Department will find, as a threshold matter, that the objection is not valid and that the proposed activity may be permitted by Federal agencies.

The Objection's analysis of the Project's alleged inconsistency with the "community character" of the Sound is heavily based on materials that were never submitted to or approved by NOAA.<sup>9</sup> NYSDOS argues that these non-approved materials were relied on only for "current data, statistics and information," and "to the extent that any of the referenced documents contained policy directives, they were not followed by NYSDOS."<sup>10</sup> The text of the Objection belies NYSDOS's position:

Preservation of community character, comprising the interrelated elements of natural and scenic resources, traditional uses, and open space, including the open water of Long Island Sound, is a central tenet in a suite of local and regional plans for Long Island's North Shore coastal area.<sup>11</sup>

The Objection then quotes whole tracts from the LINSHA Plan and the Riverhead Plan in order to define community character on "Long Island's North Shore" in a manner that prohibits any reduction in open water (so as to bar any

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<sup>6</sup> Broadwater Br. at 29-34.

<sup>7</sup> FEIS § 3.10.5 (BW29142). The regulations governing this appeal require the Secretary to "accord greater weight to those Federal agencies whose comments are within the subject area of their technical expertise." 15 C.F.R. § 930.128(c)(1).

<sup>8</sup> Decision and Findings in the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of Alaska, at 12 (July 20, 1990) ("Amoco Production").

<sup>9</sup> Broadwater Br. at 4-7. NYSDOS goes so far as to claim that Volume 2 of the LISCMP ("Volume 2") was submitted to and approved by NOAA as an enforceable policy. NYSDOS Br. at 4, n. 17. NYSDOS provides literally no evidence to substantiate this startling assertion. The February 2002 NOAA approval letter (NYSDOS Supplemental Document ["SD"] 4) neither references nor encloses Volume 2. That approval letter also makes clear that the enforceable policies are limited to the LISCMP text as codified at 19 NYCRR § 600.6, and that text does not include Volume 2. Moreover, informal discussions between Broadwater and NOAA staff confirmed that Volume 2 was neither submitted to nor approved by NOAA.

<sup>10</sup> NYSDOS Br. at 4.

<sup>11</sup> Objection at 17 (BW33751).

offshore energy development, particularly above-water energy development).<sup>12</sup> For example, NYSDOS states that the LINSHA Plan “requires preservation of Long Island Sound as a scenic landscape feature,” while the Riverhead Plan defines “community character” as including “scenic, environmental and open space attributes.”<sup>13</sup> Thus, NYSDOS’s contention that it cites these materials simply for “data, statistics and information” is counterfactual.

The Objection also belies NYSDOS’s contention that it “exclusively relied upon the LISCMP policies and subpolicies as the standards in reaching its conclusion.”<sup>14</sup> In fact, the Objection’s analysis of community character contains not a single citation to text of the approved policies of the LISCMP.<sup>15</sup> Instead, all of NYSDOS’s quotes to the “LISCMP” are actually taken from Volume 2, a 498-page document that has never been approved by NOAA and is *not* an enforceable policy of the LISCMP.<sup>16</sup>

NYSDOS favors unapproved local land use documents over the NOAA-approved policies of the LISCMP or LWRPs because those approved materials contradict NYSDOS’s contention that offshore LNG facilities are antithetical to the Sound’s community character. LISCMP Policy Standards 13.4 and 13.5 describe with specificity the types of non-LNG industrial/energy projects that are inconsistent with community character. 19 NYCCR §§ 600.6(m)(4)(i-ii), (m)(5)(i). But when referencing LNG facilities, Policy 13.4 states only that such facilities in the Sound’s coastal zone “must be safely sited and operated.” 19 NYCRR § 600.6(m)(4)(ii). There can be no better evidence than Policy 13.4 that a safely sited and operated LNG facility is consistent with the Sound’s community character; but the 73-page Objection mentions Policy 13.4 not a single time.

NYSDOS now attempts to justify this glaring omission by arguing that Policy 13.4 has been preempted. As the basis for this position, NYSDOS cites an October 4, 2006 letter<sup>17</sup> from OCRM to the New Jersey Department of Environmental Protection (“NJDEP”) asserting that a proposed amendment to the New Jersey CMP stating that LNG facilities “are discouraged in the coastal zone”<sup>18</sup> was “likely” preempted by section 3 of the Natural Gas Act (“NGA”). NYSDOS’s preemption argument is devoid of merit. First, this argument was not included in the Objection and cannot

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<sup>12</sup> Id. at 17-18 (BW33751-33752).

<sup>13</sup> Id.

<sup>14</sup> NYSDOS Br. at 4.

<sup>15</sup> Objection at 16-24 (BW33750-33758).

<sup>16</sup> See, e.g., Objection at 17-19 (BW33751-33753). NYSDOS also attempts to confuse the issue of its heavy and improper reliance on Volume 2 (in lieu of the NOAA-approved text of the LISCMP) by intimating that Broadwater is somehow “challenging OCRM’s ability to evaluate and approve a routine program change,” and that “such a collateral attack on the February 20, 2002 approval of the LISCMP by OCRM must be rejected in its entirety.” NYSDOS Br. at 4, n. 17. Broadwater has not challenged the enforceability of the LISCMP, and NYSDOS’s argument is a *non sequitur*.

<sup>17</sup> NYSDOS SD 10.

<sup>18</sup> N.J.A.C. § 7:7E-7.4(s).

be posited for the first time in an appeal. See New England Power Co. v. FERC, 533 F.3d 55, 60 (1st Cir. 2008) (“An administrative order ‘must stand or fall on the grounds articulated by the agency’ in that order.”). Second, NYSDOS’s own conduct demonstrates that its preemption argument is nothing more than a *post hoc* rationalization of its decision to ignore Policy 13.4 in the Objection. See Crowley’s Yacht Yard, Inc. v. Pena, 863 F. Supp. 18, 21 (D.D.C. 1994) (a reviewing entity cannot “accept *post hoc* rationalizations proffered by the agency’s counsel” to justify an agency’s action). Broadwater repeatedly referenced Policy 13.4 as support for the Project’s consistency with the LISCMP in written communications with NYSDOS throughout a four-year period.<sup>19</sup> In response, at a June 13, 2007 meeting, NYSDOS distributed to Broadwater a “Summary of Applicable Coastal Policies.”<sup>20</sup> Policy 13.4 is listed on page 3 of the document. Thus, eight months after OCRM forwarded its October 2006 letter to the NJDEP, NYSDOS was still treating 13.4 as fully enforceable. Third, unlike the provision in the NJCMP, Policy 13 contains nothing that can be read to discourage LNG facilities in the Sound’s coastal zone (to the contrary, 13.4 establishes that “safely sited and operated” LNG facilities are *consistent* with the LISCMP), and NYSDOS cites literally no legal authority in support of its preemption argument. Finally, if NYSDOS actually believed that 13.4 was unenforceable, the proper course of action was to seek OCRM concurrence through the CMP amendment process of 15 C.F.R. Part 923, Subpart H, not to unilaterally cease enforcement of a NOAA-approved policy that encourages a project in a given location. NYSDOS has taken advantage of the Subpart H amendment process (“routine program changes”) at least three times since October 2006 without addressing the alleged unenforceability of Policy 13.4 with OCRM.<sup>21</sup>

### **III. THE BROADWATER PROJECT IS CONSISTENT WITH THE OBJECTIVES OF THE CZMA**

#### **A. Element 1 – The Project Furthers the National Interest in a Significant and Substantial Manner**

In its initial Brief, Broadwater established that the Project furthers the national interest as defined in sections 302 and 303 of the CZMA in a significant and substantial manner.<sup>22</sup> NYSDOS’s Brief does not dispute the Project’s

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<sup>19</sup> See, e.g., April 2006 CZCC (BW4963, BW4972); May 23, 2007 3<sup>rd</sup> Meeting (BW19196); Jun. 13, 2007 4<sup>th</sup> Meeting (BW19219).

<sup>20</sup> See Broadwater SD V (SD172-176). The communications between NYSDOS and Broadwater regarding which policies of the LISCMP were applicable to the Project is also referenced in footnote 143 of NYSDOS’s Brief: “... since the inception of the project, NYSDOS has offered its views on the project, *impacts on enforceable policies* and the means for ensuring that the proposed activity would be conducted in a manner consistent with the management program.” (Emphasis supplied).

<sup>21</sup> See XXVIII N.Y. Reg. 108 (Nov. 15, 2006) (OCRM concurrence on revisions to Significant Coastal Fish and Wildlife Habitats on North Shore of Long Island in Nassau and Suffolk Counties); XXX N.Y. Reg. 102 (May 14, 2008) (OCRM concurrence on incorporation of Village of Sodus Point LWRP into State’s CMP); XXX N.Y. Reg. 107 (June 18, 2008) (NYSDOS request to OCRM to incorporate Town of East Hampton LWRP into State’s CMP).

<sup>22</sup> Broadwater Br. at 8-11.

furtherance of any of these CZMA goals (including its coastal-dependency). As a result, NYSDOS concedes that the Project satisfies Element 1.

NYSDOS's entire Element 1 argument is based on the Project's location in an alleged "non-industrialized" area of the Sound.<sup>23</sup> NYSDOS relies on, but misreads, language from CZMA § 303(2)(D).<sup>24</sup> That section states a mere preference for locating "new commercial and industrial developments in or adjacent to areas where such development already exists" "to the maximum extent practicable." The legislative history confirms the plain language:

The importance of the phrase "maximum extent practicable" lies in the promotion, where feasible and appropriate of siting development in already developed areas. However, it is not intended to require such siting nor does it alleviate the states' responsibility to give full consideration to the other CZM goals.<sup>25</sup>

Thus, co-location is not a prerequisite to any project, but only one of many factors to be considered in a CZMA analysis. And the "maximum extent practicable" language of Section 303(2)(D) is an express acknowledgement that in certain instances, as here, co-location is infeasible or inappropriate. While NYSDOS's principal objection to the Project is its open-water location and distance from other industrial development, that location serves a litany of "practical" objectives, as recognized by FERC and the Coast Guard, federal agencies with expertise on the subject matter: "The proposed location of the FSRU [] has a number of significant safety and security benefits associated with its remoteness, especially with respect to threat and consequence since it would be remote from population centers."<sup>26</sup>

NYSDOS cites to Weaver's Cove (pages 8, 9, 27 and 39)<sup>27</sup> and Sparrows Point II<sup>28</sup> (pages 2, 11 and 12)<sup>29</sup> in support of its mandatory co-location theory under section 303(2)(D), but both decisions simply describe the proposed locations of the subject projects without any reference to CZMA § 303(2)(D); and neither decision makes any holding regarding mandatory co-location. NYSDOS also offers no explanation why the Project's location in the "open waters" of the Sound is forbidden, but siting Alternatives 1 and 2 in the open waters of the Atlantic Ocean is acceptable.<sup>30</sup>

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<sup>23</sup> NYSDOS Br. at 6-9.

<sup>24</sup> 16 U.S.C. § 1452(2)(D).

<sup>25</sup> H.R. Doc. No. 96-1012, at 40 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4362, 4388.

<sup>26</sup> WSR § 8.2 (BW29529); *see also* Broadwater Energy LLC, 122 FERC ¶ 61,255, at P 52 (2008) ("Approval Order") (BW33040) (discussing significant safety and security benefits of Project's location away from population centers on Long Island); 15 C.F.R. § 930.128(c)(1) (greater weight accorded to defined federal agencies).

<sup>27</sup> NYSDOS Br. at 6, nn. 23, 24. Page 39 of the Weaver's Cove decision does not exist.

<sup>28</sup> Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, L.L.C. From an Objection by the State of Maryland (June 26, 2008) ("Sparrows Point II").

<sup>29</sup> NYSDOS Br. at 6, nn. 23, 25.

<sup>30</sup> NYSDOS also continues to press its "industrial proliferation" theory. NYSDOS Br. at 7. NYSDOS fails to reference a single piece of record evidence (anecdotal or otherwise) to support the existence of this industrial proliferation phenomenon, and the FEIS rejected NYSDOS's theory as speculative: "We also evaluated whether or not implementation of the Project could result in offshore industrial development of the Sound. *We found nothing to validate this concern.* It has been over 30 years since the last energy transfer facility was built in the Sound, and there is little indication that the existence of that facility

NYSDOS also advances the wayward notion that Long Island Sound is the maritime equivalent of a pristine wilderness, going so far as to suggest that the Project’s location in the Sound is analogous to “siting an energy facility in the middle of Yosemite National Park.”<sup>31</sup> Although NYSDOS would have the Secretary believe that the Sound’s designation as an Estuary of National Significance (“ENS”) establishes a protectorate void of any development, the ENS program prohibits neither offshore industrial development nor LNG terminals<sup>32</sup> (the LNG facility approved by the Secretary in Sparrows Point II and the LNG facility at Cove Point are on the Chesapeake Bay).<sup>33</sup> NYSDOS’s reliance on the Long Island Stewardship Act is also curious since the Act is primarily a funding vehicle for governmental land acquisitions, and nothing in the Act prohibits or even regulates commercial or industrial development of the Sound.<sup>34</sup>

Thus, NYSDOS’s “Yosemite-like” vision of the Sound as wholly uncorrupted by commerce or industry – such that the proposed location of the Project “is nowhere near development”<sup>35</sup> – is inconsistent with reality. Current industrial uses in the Sound include “eight power cables, three fiber optic cables, two natural gas pipelines, three active dredge disposal sites, two oil transfer platforms, many ferry services, extensive commercial shipping, and commercial vessel lightering,”<sup>36</sup> in addition to deepwater ports and nuclear- and fossil-fuel fired generating plants.<sup>37</sup> And in light of the existence of the Northport and Riverhead offshore platforms and lightering zones, NYSDOS’s contention that the “open waters of Long Island Sound contain no floating or over-water industrial complexes” is wholly inaccurate.<sup>38</sup> Moreover, LISCMP Recommendation 43 supports “initiatives to complete a system of offshore unloading terminals and a pipeline distribution system to transport petroleum to inland locations.”<sup>39</sup> NYSDOS’s contention that the Project will be located in a “non-industrialized” area necessarily defines “area” to include only the small footprint of the FSRU/YMS, while excluding everything else in the Sound (where significant industrial development already exists).<sup>40</sup>

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increased development in the Sound or on shore. Further, there would be little or no economic benefit to clustering industrial activity in the immediate vicinity of the proposed Project. We have concluded that implementation of the Broadwater Project would not stimulate new types of offshore industrial or commercial developments.” FEIS at ES 9-10 (BW28768-28769) (emphasis supplied); FEIS at 3-133 to 3-135 (BW28980-28992).

<sup>31</sup> NYSDOS Br. at 6.

<sup>32</sup> See 33 U.S.C. § 1330. According to the FEIS § 3.5.7.3 (BW29004), the Project will have no impact on any of the areas of concern identified by the U.S. Environmental Protection Agency (“EPA”) in its ENS reports for Long Island Sound.

<sup>33</sup> The Chesapeake Bay serves as the model for the ENS program. See, e.g., <http://www.epa.gov/nep/about2.htm>.

<sup>34</sup> Long Island Sound Stewardship Act of 2006, Pub. L. No. 109-359, § 10(c), 120 Stat. 2049, 2056 (“Nothing in this Act modifies the authority of Federal, State, or local governments to regulate land use.”).

<sup>35</sup> NYSDOS Br. at 7.

<sup>36</sup> FEIS § 3.5.7.4 (BW29004). Notably, the LISCMP identifies many such uses. LISCMP at 57-60, 89. (NYSDOS SD 4).

<sup>37</sup> FEIS § 3.5.2.1 (BW28977).

<sup>38</sup> NYSDOS Br. at 7.

<sup>39</sup> LISCMP at 66 (NYSDOS SD 4).

<sup>40</sup> The FEIS defines the “area” of the Project to include both the ConocoPhillips and Keyspan oil transfer platforms. FEIS § 3.11.5.8 (BW29172).

In this respect, NYSDOS's Brief demonstrates a striking internal inconsistency: NYSDOS's treatment of "cumulative adverse coastal effects" defines the Project area to include industrial facilities from every corner of the Sound.<sup>41</sup>

The Yosemite analogy also eliminates any doubt that NYSDOS is attempting to effectuate a flat ban on offshore energy development in Long Island Sound in clear violation of the NGA and CZMA.<sup>42</sup> NYSDOS's response to Broadwater's argument regarding a flat ban on offshore energy development is extremely telling:

Broadwater inaccurately categorizes NYSDOS's consistency determination as a broadly sweeping complete ban on offshore energy development. To the contrary, the *NYS Coastal Management Program* specifically plans for energy facility siting and offshore energy development.<sup>43</sup>

Critically, NYSDOS does not argue that the *LISCMP* provides for offshore energy development, only that the *NYSCMP* makes such provisions. In other words, according to NYSDOS, any offshore energy development must take place *outside* of Long Island Sound (in areas subject to the *NYSCMP*, not the *LISCMP*). The CZMA regulations are clear, however, that a state can neither amend a CMP nor interpret it in such a way so as to create a flat prohibition on offshore energy development.<sup>44</sup> NYSDOS attempts to excuse its actions by noting that "the *LISCMP* was submitted to and approved by NOAA."<sup>45</sup> But the version of the *LISCMP* that NOAA approved in 2002 adhered to the requirements of CZMA § 306(d)(8)<sup>46</sup> by including, *inter alia*, Policy 13.4's provisions for siting LNG facilities in the Sound's coastal zone. NYSDOS has now unilaterally (and illegally) amended the *LISCMP* by refusing to enforce Policy 13.4 – without consultation or approval from NOAA pursuant to the ordinary CMP amendment channels of 15 C.F.R. Part 923, Subpart H. Thus, NOAA's approval of an earlier iteration of the *LISCMP* that did not contain the current prohibition on offshore energy development in the Sound does not excuse NYSDOS's conduct.

Finally, NYSDOS's contention that a project cannot further the national interest unless it advances the goal of energy self-sufficiency is baseless.<sup>47</sup> Every LNG project is dependent on international supply. If this single CZMA goal was dispositive, the Secretary could never find an LNG facility in the national interest. The recent decision in Sparrows Point II (at 10) (finding an LNG facility furthered the national interest) demonstrates the lack of merit in NYSDOS's position. NYSDOS also fails to explain why Alternatives 1 and 2 are not subject to this argument.

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<sup>41</sup> NYSDOS Br. at 28-29.

<sup>42</sup> See Broadwater Br. at 4-7.

<sup>43</sup> NYSDOS Br. at 8 (emphasis supplied).

<sup>44</sup> Broadwater Br. at 4-7.

<sup>45</sup> NYSDOS Br. at 9.

<sup>46</sup> 16 U.S.C. § 1455(d)(8).

<sup>47</sup> NYSDOS Br. at 9.

B. Element 2 – The National Interests Furthered by the Broadwater Project Outweigh Any Putative Coastal Effects

Broadwater’s Element 2 analysis is supported by copious and probative citations to the underlying evidentiary record,<sup>48</sup> including references to the conclusions of federal agencies commenting within the subject area of their technical expertise.<sup>49</sup> Substantially all of NYSDOS’s coastal effects arguments, however, are either unsupported by citations to the evidentiary record or seriously misconstrue the substantive content of various record documents.<sup>50</sup>

i. *Commercial and Recreational Fishing and Navigation*

NYSDOS’s discussion of the Project’s alleged impact on commercial and recreational fishing and navigation merely repeats the unsubstantiated Objection, without refuting any of the particular arguments posited by Broadwater’s Brief. NYSDOS’s Brief also exaggerates the Project’s impact on existing uses in the Sound.

NYSDOS asserts that the SSZ around the FSRU “will impede access and transit by the 200 existing water-dependent uses on the Sound that are vital to the economic health of the Region.”<sup>51</sup> As the evidentiary basis for this contention – which serves as the crux of NYSDOS’s entire use conflicts argument – NYSDOS cites pages 187-88 of the non-NOAA-approved Volume 2.<sup>52</sup> But those pages merely describe the *existence* of “200 working coast uses located along the Long Island Sound shoreline,” and the document has nothing to do with Broadwater or the Project’s effect on other water-dependent users of the Sound.<sup>53</sup> In fact, the text of Volume 2 contradicts NYSDOS’s position:

Today, there are nearly 200 working coast uses along the Long Island Sound shoreline. [] Most of these uses and activities are clustered in sheltered bays and harbors that have historically been developed with water-dependent commercial and industrial uses. These sheltered bays and harbors, or maritime centers, are essential for waterborne commerce and recreation, and are important components of the state’s transportation system. The balance of working coast uses is dispersed along the Long Island Sound shore.<sup>54</sup>

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<sup>48</sup> Broadwater Br. at 11-34.

<sup>49</sup> See 15 C.F.R. § 930.128(c)(1).

<sup>50</sup> NYSDOS argues that the Secretary’s decision in Chevron immunizes the substantive conclusions in the Objection from challenge because the Objection “is accorded ‘an irrebutable presumption of substantive correctness.’” NYSDOS Br. at 5 (quoting Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc. from an Objection by the California Coastal Commission (Oct. 29, 1990) at 6-7 (“Chevron”). NYSDOS completely misconstrues the context of this quote. The Secretary in Chevron was making a matter-of-fact statement that the standard under which a state agency evaluates a project’s consistency with a CMP is completely different from the standard by which the Secretary evaluates a project on appeal. The Secretary in Chevron was in no way holding that every finding in a state’s objection is presumed to be correct, only that the ultimate conclusion of the state vis-à-vis a project’s consistency with the state CMP is not a proper subject of dispute (and ultimately irrelevant to the Secretary’s review). The particular coastal effects findings contained in a state objection are subjected to searching analysis in almost every secretarial appeal. See, e.g., Sparrows Point II; Weaver’s Cove; Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Islander East Pipeline Company, L.L.C. (May 5, 2004) (“Islander East”).

<sup>51</sup> NYSDOS Br. at 10-11.

<sup>52</sup> NYSDOS Br. at 11, n. 44.

<sup>53</sup> Volume 2 at 187-188 (BW38139-38140).

<sup>54</sup> Id.

Thus, contrary to NYSDOS's unsupported position, the location of the Project nine miles offshore minimizes conflicts with the 200 existing water-dependent uses of the Sound, which are overwhelmingly concentrated along the shore.

NYSDOS's contention that the Project will "exacerbate on-water use conflicts in the vicinity of major commercial vessel thoroughfares" also lacks evidentiary support.<sup>55</sup> The FEIS, like Broadwater, fully analyzed potential conflicts between the Project and existing navigation in the Sound and concluded, among other things, that the FSRU and surrounding SSZ "would not affect ferry traffic in the Sound because there are no established ferry routes through or near the area" and the FSRU "would not be located directly between larger ports in the area and would not be along established direct routes of travel between those ports."<sup>56</sup> The FEIS ultimately found that:

Because the FSRU and its safety and security zone would be in an area outside of the generally used transit lanes for commercial shipping and would be in the widest portion of the Sound (about 20 miles wide in that area), there would be sufficient room to accommodate future increases in commercial vessel traffic without conflict with the FSRU and its safety and security zone.<sup>57</sup>

One of NYSDOS's most misleading statements is the assertion that the "carrier exclusion zones would be present in Long Island Sound or Block Island Sound for 6 out of every 7 days and would last up to 40 hours for each LNG delivery."<sup>58</sup> This text gives the false impression that particular locations within the Sound will be affected by LNG carrier transits for 40 hours at a time. In fact, the SSZs around transiting LNG carriers would not affect any particular location in the Sound for more than fifteen consecutive minutes during each of the 2 or 3 weekly carrier transits;<sup>59</sup> and the carriers will be docked at the FSRU for approximately 25 of the 30 hours spent in the Sound (during which time the carriers will have *no impact* on other users of the Sound).<sup>60</sup>

Notwithstanding the FEIS's conclusion that "construction and operation" of the Project "would result in negligible adverse impacts" to "the stocks of fish and lobsters targeted by commercial fishermen" in the Sound,<sup>61</sup> NYSDOS quotes the FEIS in an attempt to support its contention that the Project "could affect the abundance of

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<sup>55</sup> NYSDOS cites only its own Objection for support. NYSDOS Br. at 10.

<sup>56</sup> FEIS § 3.7.1.4 (BW29045).

<sup>57</sup> Id.

<sup>58</sup> NYSDOS Br. at 1. NYSDOS incorrectly characterizes the SSZs as "exclusion zones" throughout its Brief. Exclusion zones preclude all other vessels from using an area, whereas the SSZs around the carriers "would not be an absolute exclusion zone that would preclude all other vessel movements. Other vessels may be allowed to transit through the [SSZs] with the permission of the [COTP]." FEIS § 3.10.4.5 (BW29141).

<sup>59</sup> See July 24, 2007 Fifth Technical Data Meeting (BW19240-19242). A maximum of 118 carriers could visit the FSRU in a given year, which equates to 2.25 vessels a week; and any move to larger carriers (as is Broadwater's goal) would reduce this figure further. There will likely be 60 to 118 carrier visits to the FSRU per year.

<sup>60</sup> WSR § 3.1.4 (BW7645) ("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 5 and 6 hours. The remainder of the time would be spent berthing, deberthing and conducting cargo operations, approximately 25 to 30 hours.")

<sup>61</sup> FEIS §§ 3.3.3.2, 3.6.8.1 (BW28948, BW29015).

lobster within the footprint [of the FSRU and pipeline], especially during active construction.”<sup>62</sup> The next two sentences from the FEIS – omitted by NYSDOS – provide the more accurate picture of the Project’s impact on the Sound’s lobster populations:

In general, impacts to lobsters primarily would occur only during active construction, although a negligible short-term impact to prey availability could occur along the proposed pipeline corridor (which constitutes less than 0.1 percent of the seafloor habitat in Long Island Sound). In addition, the proposed FSRU and pipeline operation could enhance the local lobster population by eliminating fishing pressure within the safety and security zone proposed by the Coast Guard.<sup>63</sup>

While NYSDOS contends that the Project “will result in the loss of a limited fishing area that is critical to those commercial harvesters who work the territory,” NYSDOS fails to substantiate this assertion with a single citation to the record.<sup>64</sup> Nor can NYSDOS explain how the partial displacement of six trawlers<sup>65</sup> and approximately nine lobstermen<sup>66</sup> – all of whom will either be compensated for lost revenue or continue to ply their trade in other parts of the Sound<sup>67</sup> – presents an existential threat to the Sound’s commercial fishing/lobstering industry.

*ii. Impingement and Entrainment*

Ichthyoplankton are highly fecund with extreme rates of natural mortality. 99.9% of young spawned by a marine female fish typically die before reaching adulthood. As a result, of the 124 million eggs and larvae entrained by elements of the Project each year, only 230,000 (0.2%) would be expected to survive natural mortality to their first birthday, and only 140,000 (0.1%) would be expected to survive to the age of maturity.<sup>68</sup> And inasmuch as the Project’s average daily seawater intake represents only 0.00016% of the Sound’s water volume, the Project’s impact on the overall Sound fishery will be biologically insignificant and far outweighed by the benefits of the Project to the national interest.<sup>69</sup> Although NYSDOS finds this position “inexplicable,” a cogent and detailed scientific explanation for this conclusion is included in the FEIS:

Because the estimated values represent such a small percentage of the standing crop of central Long Island Sound, these losses are not expected to affect the overall finfish, lobster, or plankton population within Long Island Sound. It is important to realize that, due to the high natural mortality rates in the first year of ichthyoplankton (greater than 99 percent), an incremental loss of 0.1 percent would not significantly impact the health of the adult fish population (EPA 2006d).<sup>70</sup>

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<sup>62</sup> NYSDOS Br. at 11 (citing FEIS § 3.3.3.2 [BW28948]).

<sup>63</sup> FEIS § 3.3.3.2 (BW28948).

<sup>64</sup> NYSDOS Br. at 11.

<sup>65</sup> WSR § 3.1.2.3.1 (BW7642); FEIS § 3.7.1.3 (BW29041).

<sup>66</sup> FEIS § 3.6.8.1 (BW29016).

<sup>67</sup> See April 2, 2008 Culp Letter (BW33243-33244); Approval Order at P 59, App. B at P 29 (BW33043, BW33059).

<sup>68</sup> Broadwater Br. at 20; FEIS § 3.3.2.2 (BW28938).

<sup>69</sup> See, e.g., correspondence between Broadwater and NYSDEC (April 8, 2008) (BW33400-33431).

<sup>70</sup> FEIS § 3.3.2.2 (BW28938).

The best evidence of the veracity of the FEIS's conclusion is the 30 years of monitoring data at the Millstone Station (which withdraws approximately 100 times more water than the Project, in an area of much higher ichthyoplankton density) that has shown no downward trend in the long-term abundance of fish or lobster in the Sound.<sup>71</sup>

Instead of attempting to refute these scientifically verified conclusions, NYSDOS continues to base its arguments on misleading expressions of raw data. When divorced from any biological context, NYSDOS's repeated estimate of approximately 274 million entrained ichthyoplankton (a figure more than double the FEIS's "most valid estimate" of 131.5 million)<sup>72</sup> is the equivalent of expressing the impacts of coastal dredging in terms of trillions of grains of disturbed sand; the raw number may elicit a "sticker shock," but is otherwise meaningless. This is why state and federal regulators routinely require that entrainment losses at electric generating facilities be expressed in terms of Age 1 or adult equivalents, or in comparison to the standing crop of eggs and larvae in the source water body. For instance, measurement of Age 1 or adult equivalent results is the method used by the Coast Guard and NOAA for evaluating the impacts of LNG facilities under the Deepwater Port Act.<sup>73</sup> To put NYSDOS's 274 million figure in perspective, the KeySpan Northport Generating Station (which had its State Pollutant Discharge Elimination System permit renewed by NYSDEC in January 2006) entrains at least 3.2 *billion* Long Island Sound ichthyoplankton on an annual basis (in a much more sensitive nearshore environment).<sup>74</sup>

NYSDOS also references the January 23, 2007 statement by the National Marine Fisheries Service ("NMFS") that ichthyoplankton entrainment by the Project "is likely to be lethal and have consequences for both aquatic resources on both Connecticut and New York sides of LIS."<sup>75</sup> Given the fragility of ichthyoplankton, there is no dispute that entrainment "is likely to be lethal" for individual organisms (as opposed to populations). But NMFS has more recently (February 2008) forwarded recommendations to FERC regarding best available technologies and

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<sup>71</sup> Request of Broadwater Energy LLC and Broadwater Pipeline LLC for Leave to File Supplemental Comments on the Draft Environmental Impact Statement, at 52-56 (BW16125-16129).

<sup>72</sup> FEIS § 3.3.2.2 (BW28937).

<sup>73</sup> See U.S. Coast Guard and U.S. Maritime Administration, Final Environmental Impact Statement for the Gulf Landing LLC Deepwater Port License Application, Appendix G (Broadwater SD VI [SD177-272]): Ichthyoplankton Assessment Model Methodology and Results (Docket No. USCG-2004-16860); Response to NOIA #2 (Apr. 8, 2008) (BW33385-33431).

<sup>74</sup> See Northport Generating Station Biological Fact Sheet – Cooling Water Intake Structures, at 2 (Broadwater SD VII [SD274]); Northport Generating Station State Pollutant Discharge Elimination System Discharge Permit (Jan. 4, 2006) (Broadwater SD VIII [SD279-306]) (requiring a 60% reduction in entrainment, which is calculated using the facility's full-flow as a baseline, as opposed to its historical annual average of 8.4 billion entrained ichthyoplankton). Notwithstanding the combined entrainment of billions of Sound ichthyoplankton by the Northport and Glenwood power stations, the continued operation of those facilities is characterized as an "appropriate use and development of energy and mineral resources in the LISCOMP (at 89). (NYSDOS SD 4).

<sup>75</sup> NYSDOS Br. at 16 (citing NMFS comments on Draft Environmental Impact Statement (Jan. 23, 2007) at 2 (BW14584)).

practices at the FSRU “to reduce impingement and entrainment associated with water intakes,” all of which will be incorporated into the Project.<sup>76</sup> Broadwater responded to other recommendations for protected species issued by NMFS in its February 2008 letter by drafting a Vessel Strike Avoidance Plan, which was subsequently accepted by NOAA.<sup>77</sup>

*iii. Stratford Shoal*

NYSDOS contends that construction of the subsea pipeline in the Stratford Shoal area may cause “significant adverse effects” to benthic habitats.<sup>78</sup> FERC fully examined this issue, however, and never classified the potential impacts to the Stratford Shoal as significant:

The communities of northern star coral and dead man’s fingers located along the proposed pipeline route across Stratford Shoal would be impacted by construction of the proposed pipeline. However, impacts would be expected to be minimal because benthic disturbance to the Stratford Shoal would occur at one of the narrowest point of the Stratford Shoal and would extend for less than 1 mile. In addition, because northern star coral is plentiful within the Sound, it would be expected that adjacent communities not impacted by construction would aid in reestablishing populations in the disturbed area through natural recruitment.<sup>79</sup>

NYSDOS’s challenge to the FEIS’s findings is entitled to little weight because it is based on a series of manifestly inapposite materials. For instance, NYSDOS relies on a NOAA report entitled “The State of Coral Reef Ecosystems of the United States and Pacific Freely Associated State: 2008” as evidence of “conditions of and increasing threats to U.S. coral reef ecosystems.”<sup>80</sup> This document is not part of the decision record and, much more importantly, has absolutely nothing to do with the Stratford Shoal, which is *not* a coral reef.<sup>81</sup> The NOAA report analyzes coral reefs in 15 major tropical or subtropical areas, none of which are applicable or comparable to structures or communities found in Long Island Sound or on Stratford Shoal.

NYSDOS then disputes the FEIS’s conclusions with respect to benthic recovery rates in the Stratford Shoal by arguing that post-disturbance “regeneration and recovery might take *decades to centuries* for a damaged reef.”<sup>82</sup> Because the Stratford Shoal is not a coral reef, an attempted prediction of recovery rates in the Stratford Shoal based on irrelevant coral reef data cannot be credited.

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<sup>76</sup> February 19, 2008 letter from Patricia A. Kurkul, NMFS, to Kimberly D. Bose, FERC at 3-5 (BW32866) (“The FSRU should be located distant from sensitive aquatic biological resources and habitats, which are in the nearshore, shallow water areas. For this reason, we recommend that the FSRU be placed in waters no shallower than 80 feet. This conservation recommendation is necessary to avoid and minimize impacts in highly productive or otherwise sensitive ecological areas.”).

<sup>77</sup> NMFS/NOAA Response Letter (BW32900-32901); Vessel Strike Avoidance and Reporting Plan Dec. 2007 (BW28700-28703).

<sup>78</sup> NYSDOS Br. at 17.

<sup>79</sup> FEIS § 3.3.1.2 (BW28917); see also April 2, 2008 Culp Letter (BW33247-33248).

<sup>80</sup> NYSDOS Br. at 18.

<sup>81</sup> FEIS § 3.3.1.1 (BW28914).

<sup>82</sup> NYSDOS Br. at 19 (emphasis original).

Finally, the record contradicts NYSDOS's assertion that "the coral and sponge communities" in the Stratford Shoal comprise "rare ecological communities."<sup>83</sup> In May and June 2007, EPA conducted a benthic habitat survey in the general vicinity of Stratford Shoal in conjunction with CTDEP and the University of Connecticut (EPA 2007a).<sup>84</sup>

... the report identified that finger sponge and northern star coral were observed on the crest of Stratford Shoal in the vicinity of the proposed Broadwater pipeline route. Although the distribution and relative abundance of these species were not reported, it is expected that the communities consist of scattering of individuals based on the existing information on these species. There is no evidence to suggest that these scattered individuals would be considered a "special aquatic site," and no nearshore coral reef habitat has been identified north of Florida since the water temperatures are too cold for the coral species that comprise coral reefs. Grace (2006) indicates that northern star coral are very hardy and plentiful in Long Island Sound.<sup>85</sup>

*iv. Visual/Aesthetic Impacts*

NYSDOS's visual impact arguments stem primarily from its contention that the Project is "fundamentally different from other existing and previously permitted uses" of the Sound.<sup>86</sup> Although NYSDOS cites to the FEIS in support of this contention, the FEIS actually states that the Project "would differ from *most* existing industrial or commercial uses" of the Sound;<sup>87</sup> and the next sentence of the FEIS (omitted from NYSDOS's block quote) notes that the only difference between the Project and the Sound's two existing offshore energy facilities is that the Project "would be farther offshore than the two petrochemical transfer stations currently in operation."<sup>88</sup>

NYSDOS argues that "visual quality is a major contributor to the character of the Long Island Sound region and its communities, and the *primary basis* for public appreciation of the Sound's landscape."<sup>89</sup> But NYSDOS has not furnished a single piece of evidence to support its contention that the minor visual effect resulting from the Project's location nine miles offshore would detract from the "public appreciation of the Sound's landscape." In reality, all scientific analyses in the record regarding the effects of analogous offshore industrial facilities demonstrate zero correlation between aesthetic enjoyment of coastal resources and the visibility of an offshore energy facility.<sup>90</sup> While NYSDOS claims that "Broadwater does not provide adequate evidence that public enjoyment of the Sound will not be diminished,"<sup>91</sup> record-based public behavior in the Sound is the best evidence of this fact. From the Town of

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<sup>83</sup> NYSDOS Br. at 19.

<sup>84</sup> FEIS § 3.3.1.1 (BW28913).

<sup>85</sup> FEIS § 3.3.1.1 (BW28914).

<sup>86</sup> NYSDOS Br. at 21.

<sup>87</sup> FEIS § 3.5.2.2 (BW28981) (emphasis supplied).

<sup>88</sup> Id.; see also FEIS § 3.5.6.3 (BW28994) (noting that the ConocoPhillips "platform is 1.2 miles off the coast of Riverhead, New York; the other [KeySpan] platform is approximately 1.8 miles north of Northport, New York.").

<sup>89</sup> NYSDOS Br. at 21 (emphasis original).

<sup>90</sup> Broadwater Br. at 17.

<sup>91</sup> NYSDOS Br. at 24.

Riverhead's Iron Pier Beach, the ConocoPhillips Northville terminal is clearly visible in the near middleground.<sup>92</sup> Based on the Town's ongoing investment in this 480-foot beach, the presence of the highly visible offshore industrial platform does not adversely affect the public's enjoyment and appreciation of the qualities of the Sound at this location.<sup>93</sup> In comparison, the Broadwater Project would present a far smaller visual profile from any onshore location than the ConocoPhillips terminal from Iron Pier Beach. While NYSDOS quotes the FEIS's conclusion that the Project would result in "a moderate, long-term impact to visual resources in a limited portion of Long Island Sound and along the associated shorelines,"<sup>94</sup> NYSDOS omits the FEIS's next sentence: "This impact is not expected to change the public value of the viewshed or alter the value of shorefront property or recreation."<sup>95</sup>

NYSDOS maintains the curious position that the Broadwater Project (located nine miles out to sea) will have a greater impact on open space perceptions than the Sound's two existing offshore industrial platforms (which are both located less than two miles from shore).<sup>96</sup> NYSDOS provides absolutely no record evidence to support this argument, which is largely comprised of inscrutable jargon:

Fragmentation of open space is not a function of the perception of that open space, but rather is separate and distinct from the visual impacts of an action (which are, in part, related to perception) and relates the physical disruption and division of an open space into smaller, uninterrupted areas.<sup>97</sup>

NYSDOS also relies on the FEIS in support of its contention that the FSRU would be visible "from approximately 44 miles of North Shore coastline (and 92 miles of Connecticut shoreline), and visible to all waterborne vessels within 25 miles in all directions."<sup>98</sup> The FEIS actually states, however, that the FSRU could potentially be visible from a series of locations "*distributed* along approximately 44 miles of Long Island coastline and 92 miles of Connecticut coastline."<sup>99</sup> NYSDOS once again neglects to mention the very next sentence of the FEIS, which actually contradicts NYSDOS's argument:

At many locations in those areas, the viewers are screened by vegetation, topography, and man-made structures; from these locations, the proposed location of the FSRU is not visible.<sup>100</sup>

While NYSDOS denies that it has created "a broadly sweeping complete ban on offshore energy development,"<sup>101</sup> NYSDOS cannot explain how a prohibition on any "new, permanent, fixed, above-water industrial

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<sup>92</sup> Broadwater Visual Resource Assessment at 31 (BW4136); FEIS § 3.5.6.3 (BW28994).

<sup>93</sup> See <http://www.riverheadli.com/2008.adopted.budget.pdf>; <http://www.riverheadli.com/beaches.html>.

<sup>94</sup> NYSDOS Br. at 23 (quoting FEIS ES-9 [BW28768]).

<sup>95</sup> FEIS ES-9 (BW28768).

<sup>96</sup> FEIS § 3.5.6.3 (BW28994).

<sup>97</sup> NYSDOS Br. at 23.

<sup>98</sup> Id.

<sup>99</sup> FEIS § 3.5.6.3 (BW28994).

<sup>100</sup> Id.

structure”<sup>102</sup> in the Sound can be interpreted in any other manner. NYSDOS’s Brief reiterates its position that any commercial or industrial development in the Sound cannot “create new, adverse visual impacts.”<sup>103</sup> Inasmuch as construction of any major energy facility in the Long Island Sound coastal zone will result in some level of open space reduction (a “new, adverse visual impact”), NYSDOS’s zero tolerance policy is a *de facto* ban. NYSDOS responds that the LISCMP provides “delineated special management areas, including a series of maritime centers and waterfront redevelopment areas, which are identified as suitable locations for new, water-dependent commercial and industrial uses.”<sup>104</sup> However, NYSDOS’s argument that industrial energy development in the Sound can only take place in these maritime centers ignores the actual text of LISCMP Policy 10.3, which “allow[s] for development of new water-dependent uses *outside* of maritime centers,” and also states that:

New water-dependent uses may be appropriate outside maritime centers if the use: (1) should not be located in a maritime center due to the lack of a suitable site; or (2) has unique locational requirements that necessitate its location outside maritime centers; or (3) would adversely impact the functioning or character of the maritime center if located within the maritime center...<sup>105</sup>

NYSDOS has not identified a “suitable” maritime center for operation of an LNG terminal in Long Island Sound, and the Project clearly has “unique locational requirements that necessitate its location outside” any of the existing maritime centers.<sup>106</sup>

Finally, there is no merit to the argument that the conclusions in Broadwater’s Visual Resource Assessment (“VRA”) “were speculative and unsupportable without a public perception survey.”<sup>107</sup> First, NYSDOS is careful not to assert that a “public perception survey” is required. Indeed, the NYSDEC Program Policy – Assessing and Mitigating Visual Impacts (“DEC Visual Policy”) does not require or even recommend use of a public perception survey to analyze aesthetic significance. With respect to suitable offers of proof, the DEC Visual Policy states:

[A]n applicant must demonstrate through evidence provided by others, *e.g.*, recognized architectural review boards, comparative studies that are clearly analogous, or similar techniques, that the public’s enjoyment and appreciation of the qualities of the aesthetic resource are not compromised.<sup>108</sup>

As noted above, Broadwater provided NYSDOS with empiric evidence of the continued enjoyment of Iron Pier Beach and a document entitled “Literature Search – Off-shore Facilities’ Effect on Aesthetic Enjoyment” as proof that distant

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<sup>101</sup> NYSDOS Br. at 8.

<sup>102</sup> Objection at 26 (BW33760).

<sup>103</sup> NYSDOS Br. at 21.

<sup>104</sup> NYSDOS Br. at 22.

<sup>105</sup> 19 NYCRR § 600.6(j)(3)(i).

<sup>106</sup> See, e.g., WSR § 8.2 (BW29529); Approval Order at P 52 (BW33040).

<sup>107</sup> NYSDOS Br. at 24.

<sup>108</sup> NYSDEC Visual Policy (DEP-00-2) at 8.

off-shore industrial facilities do not compromise public enjoyment of the scenic quality of coastal areas.<sup>109</sup> This document provides a summary of comparative studies performed by the Minerals Management Service, NOAA's Coastal Resource Economics Division, and articles from primary literature concerning public perception of offshore energy facilities and the effect of such development on enjoyment of coastal aesthetics.<sup>110</sup> The Iron Pier Beach experience and the studies and resulting data presented in this document comport with generally accepted industry methodology and the specific requirements of the DEC Visual Policy<sup>111</sup> with respect to Broadwater's analysis of potential impacts to aesthetic enjoyment in coastal areas.<sup>112</sup>

v. *Public Trust Doctrine*

NYSDOS argues that the SSZs around the FSRU and transiting LNG carriers would violate the Public Trust Doctrine.<sup>113</sup> However, the Coast Guard's creation of the SSZs around the FSRU and transiting LNG carriers is entirely consistent with the public trust doctrine because the Project clearly serves the public interest by providing a new supply of needed and affordable natural gas directly to the New York City greater metropolitan area, Long Island, Southern Connecticut, and Upstate New York. The LIPA Report concludes that the Project will save regional consumers at least \$20.7 billion in reduced energy costs and other tangible benefits over just the first ten years of the Project's operational life.<sup>114</sup> The FEIS concluded that "implementation of the proposed Project with our recommended measures would meet the energy needs of the region with minimal impacts and would therefore be in the public interest."<sup>115</sup> FERC found "that the public benefits from [the Broadwater Project] outweigh any adverse effects and approval of the project is required by public convenience and necessity."<sup>116</sup>

Moreover, the Coast Guard has established SSZs in Long Island Sound and other ENSs on many previous occasions without running afoul of the Public Trust Doctrine. See, e.g., 33 C.F.R. §§ 165.155 (SSZ around Northville Industries Offshore Platform one mile north of Riverhead, New York); 165.154 (SSZ around Dominion Millstone

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<sup>109</sup> NYSDOS Information Exchange (April 2, 2008) (BW33462-33471).

<sup>110</sup> Id.

<sup>111</sup> VRA § 1.0 (BW4106).

<sup>112</sup> NYSDOS's remaining criticisms of the VRA are simply inaccurate. NYSDOS states that the VRA contained "no characterization of landscape users other than residential." NYSDOS Br. at 24, n. 106. In reality, section 3.5 of the VRA analyzes all user groups (*e.g.*, land-based recreation, water-based recreation, local residents, travelers, commercial mariners). (BW4137-4139).

<sup>113</sup> NYSDOS Br. at 25-27. See Broadwater Br. at 26 (discussion of public trust doctrine legal standard).

<sup>114</sup> LIPA Report at 47 (BW31146). The LIPA Report also discusses the potential environmental benefits of the Project (resulting from increased use of natural gas), including regional reductions in emissions of CO<sub>2</sub>, SO<sub>2</sub>, NO<sub>x</sub>, volatile organic compounds and particulate matter. LIPA Report at 48 (BW32635).

<sup>115</sup> FEIS § 3.5.7.4 (BW29004).

<sup>116</sup> Approval Order at P 88 (BW33049).

Nuclear Power Plant); 165.110(b)(1) (Boston Harbor); 165.500 (Chesapeake Bay). Likewise, the public trust doctrine has not prevented placement of numerous cables, pipelines and other structures in the Sound.

*vi. Cumulative Impacts*

The FEIS addressed the possibility of cumulative impacts and found that the “impacts associated with the proposed Broadwater Project would be relatively minor,” and concludes that “[w]ith Broadwater’s proposed construction and operation methods, and strict adherence to our recommendations, federal and state regulations, and permitting requirements, impacts associated with the Broadwater Project would be minimized, and would not constitute a significant impact in combination with other past, present, or reasonably foreseeable projects.”<sup>117</sup>

“Cumulative adverse coastal effects have been defined [] as ‘the effects of an objected-to activity when added to the baseline of other past, present, and reasonably foreseeable future activities in the area of, and adjacent to, the coastal zone in which the objected-to activity is likely to contribute to adverse effect on the natural resources of the coastal zone.’” Sparrows Point II at 39. Several of the “cumulative effects” discussed in NYSDOS’s Brief do not fit this definition. For instance, NYSDOS’s discussion of whether the FSRU satisfies the definitions of “permanent” and “fixed,”<sup>118</sup> has nothing to do with the effects of any other activities in the area. Likewise, NYSDOS reiterates its earlier use conflicts arguments without ever addressing how those alleged coastal effects combine with the effects of other activities to create any cumulative effects.<sup>119</sup> While NYSDOS discusses the cumulative effects of impingement and entrainment by at least referencing other activities in the Sound coastal zone, NYSDOS cites to no record evidence (because none exists) establishing that ichthyoplankton impingement or entrainment resulting from the Project is likely to contribute to a biologically significant adverse coastal effect on the fishery resources of Long Island Sound.<sup>120</sup>

C. Element 3 – There Are No Reasonable Alternatives to the Broadwater Project Consistent With the Enforceable Policies of the Applicable Coastal Management Program

*i. NYSDOS Has Failed To Carry Its Initial Burden and Violated 15 C.F.R. Part 930 Because the Objection Does Not State That Alternatives 1 and 2 Are Consistent with the LISCMP*

NYSDOS attempts to defend its violation of 15 C.F.R. § 930.63 – proposing alternatives purporting to meet the NYSCMP instead of the LISCMP<sup>121</sup> – by arguing that the LISCMP is only a constituent part of the NYSCMP. In reality, the LISCMP is a coastal management program of equal dignity with the NYSCMP; it contains each of the

<sup>117</sup> FEIS § 3.11.5.9 (BW29173).

<sup>118</sup> NYSDOS Br. at 27-28.

<sup>119</sup> NYSDOS Br. at 29-30.

<sup>120</sup> NYSDOS Br. at 28-29.

<sup>121</sup> Broadwater Br. at 35-37.

program elements required under 15 C.F.R. Part 923 for a stand-alone coastal management program (*e.g.*, coordination with existing local laws, delineation of geographic boundaries). While NYSDOS describes the LISCMP as establishing only a “special management area” under the NYSCMP, the LISCMP itself delineates its own “special coastal areas” in Chapter 5. And Chapter 1 expressly states that the LISCMP “*replaces*” the NYSCMP “for the Sound shorelines of Westchester County, New York City to the Throgs Neck Bridge, Nassau County, and Suffolk County.”<sup>122</sup>

Even if NYSDOS could somehow overcome its violation of Section 930.63, its proposed alternatives fail on several other grounds.

*ii. The Two Alternatives Identified by NYSDOS, Which Have Not Been Described With Sufficient Specificity, Are Neither Available Nor Reasonable*

a.) NYSDOS Has Not Satisfied Its Threshold “Specificity” Burden

NYSDOS has failed to provide the most basic technical information in support of its two proposed Alternatives; the most glaring shortcoming is the failure to provide a proposed route for the critical subsea and overland pipeline elements for both Alternatives. An alternative LNG project design lacking a pipeline route is exactly the sort of “vague description” that the Secretary has previously rejected as inadequate. Islander East at 37. The “approximate” coordinates given by NYSDOS<sup>123</sup> for its Alternatives coupled with the inexact pipeline destinations (*e.g.*, a proposed interconnection with the Transco Leidy “about 1 to 2 miles offshore” for Alternative 1,<sup>124</sup> Alternative 2 coming ashore at an indeterminate point “offshore Fire Island”<sup>125</sup>) make it impossible to even extrapolate a proposed pipeline route for either Alternative.

NYSDOS responds that “[t]o the extent that Broadwater seeks greater specificity, it is improperly requesting that NYSDOS ‘design’ its alternatives.”<sup>126</sup> Providing a proposed pipeline route is hardly “designing” an Alternative, and NYSDOS’s initial “specificity” burden requires that it at least provide enough information on its Alternatives to allow Broadwater “to evaluate whether the alternative is reasonable and available.” Islander East at 37.

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<sup>122</sup> LISCMP at 1 (NYSDOS SD 4) (emphasis supplied).

<sup>123</sup> Objection at 62-63, 70 (BW33796-33797, 33804).

<sup>124</sup> Objection at 63 (BW33797).

<sup>125</sup> Objection at 70 (BW33804).

<sup>126</sup> NYSDOS Br. at 31. NYSDOS’s suggestion (at page 32 of its Brief) that it previously proposed its Alternatives to Broadwater is false. As shown in Figure 1 (Broadwater SD IX [SD307]), the three Atlantic Ocean locations discussed in a report by NYSDOS’s consultant (PL1, PL2 and PL3) are at different locations than Alternatives 1 and 2. The coordinates given in the Battelle Report for PL1, PL2 and PL3 are as follows: PL1=W 73° 39.5’, N 40° 24.0’, PL2=W 73° 30.0’, N 40° 21.5’, and PL3=W 73° 18.7’, N 40° 20.0’. Battelle Report April 2007 (BW41958). Contrast with the coordinates given in the Objection for Alternatives 1 and 2: W 73° 37’ 00”, N 40° 23’ 00” and W 73° 10’ 05”, N 40° 20’ 00”, respectively. Objection at 62-63, 70 (BW33796-33797, BW33804).

“Reasonableness” in the context of this CZMA appeal is a direct function of the adverse environmental effects and costs of NYSDOS’s proposed Alternatives (Yeamans Hall Club at 6),<sup>127</sup> and Broadwater’s analysis of these two parameters is prejudiced by the absence of a pipeline route. NYSDOS’s failure to provide enough information on its Alternatives to allow for a complete analysis of the “reasonableness” or “availability” of those Alternatives means that NYSDOS has failed to carry its threshold “specificity” burden.

b.) NYSDOS’s Proposed Alternatives Are Unreasonable

To determine if NYSDOS’s proposed Alternatives are “reasonable,” the Secretary “must weigh the increased costs of the alternative against its environmental advantages.” Yeamans Hall Club at 6. Thus, the “reasonableness” test presupposes that any alternatives proposed by a state agency have fewer adverse coastal effects than a project as originally proposed. See Millennium Pipeline at 24.<sup>128</sup> Broadwater’s Brief demonstrated that NYSDOS’s Alternatives are inherently unreasonable because they would result in *greater* adverse coastal effects than the Project while at the same time being more costly in economic terms.<sup>129</sup> Thus, contrary to NYSDOS’s Brief, Broadwater has never argued that an alternative can be rendered unreasonable by “increased cost alone.”<sup>130</sup>

NYSDOS argues in perfunctory fashion that the coastal effects of its Alternatives do not render them unreasonable. Not only did NYSDOS mischaracterize and downplay Alternative 2’s adverse coastal effects as occurring “for the most part in previously disturbed corridors,”<sup>131</sup> but NYSDOS completely ignores the serious coastal effects of constructing a pipeline in Great South Bay, a fragile and ecologically important area with no existing mapped submarine utilities (NYSDEC has described Great South Bay as “irreplaceable”).<sup>132</sup> Nor does NYSDOS address the potential damage to benthic habitats resulting from its Alternatives.

While the Objection fails to specify the difference in costs between the Project and Alternatives 1 and 2, pipeline construction costs alone for Alternative 1 will exceed the Project by 20% (\$144 million versus \$120 million) and the Alternative 2 pipeline (cost of \$325 million) will be 171% more expensive than the Project.<sup>133</sup> NYSDOS

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<sup>127</sup> Decision and Findings in the Consistency Appeal of Yeamans Hall Club From an Objection by the South Carolina Coastal Council (Aug. 1, 1992) (“Yeamans Hall Club”).

<sup>128</sup> Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Millennium Pipeline Co., LP From an Objection by the State of New York (Dec. 12, 2003) (“Millennium Pipeline”).

<sup>129</sup> Broadwater Br. at 46-50; see also Response to February 16, 2007 NYSDOS Information Request 2-J (BW17079-17097).

<sup>130</sup> NYSDOS Br. at 41.

<sup>131</sup> Id.

<sup>132</sup> Broadwater SD IV at 1 (SD 161); Broadwater June 20, 2007 Response to NYSDOS, Additional Alternatives Analysis (“Broadwater Additional Alternatives Analysis”) (BW18215).

<sup>133</sup> Broadwater SD III (SD124-160). NYSDOS’s Objection also fails to specify costs for any of the proposed design changes.

disputes these figures (which were authored by industry experts Project Consulting Services, Inc.) by arguing, *inter alia*, that Broadwater’s projection of \$69 million to construct the 13-mile onshore pipeline element of Alternative 2 does not comport with an industry average of \$2 million per mile.<sup>134</sup> A mere industry average, however, should be accorded little weight because it ignores site-specific and complex construction elements, including horizontal directional drilling through the Fire Island National Seashore and onshore construction traversing densely populated central Long Island.<sup>135</sup>

Broadwater’s conclusions regarding the unreasonableness of NYSDOS’s Alternatives is confirmed by the FEIS, which noted that the adverse environmental effects of an LNG terminal in “the Atlantic Ocean would be greater than those of the proposed Project due to the need to construct a substantially longer pipeline to connect the terminal to the existing pipeline transmission system. In addition, operational difficulties would be greater for an FSRU in [the Atlantic Ocean] as compared to the proposed location [in Long Island Sound] due to the more frequent occurrence of severe wind and sea conditions.”<sup>136</sup> NYSDOS’s only response is to claim that “FERC has not fully evaluated the alternatives proposed by NYSDOS primarily because those alternatives would involve a transfer of its jurisdiction to the US Coast Guard under the Deepwater Port Act to review these Atlantic LNG facilities.”<sup>137</sup> NYSDOS offers nothing to substantiate this baseless and unnecessary attack on the integrity of FERC’s staff.

NYSDOS’s contention that the location of its proposed Alternatives would not present a “navigational safety risk”<sup>138</sup> is properly contradicted by the FEIS: “An SRV or FSRU constructed south of Long Beach could result in increased likelihood of vessel conflicts and greater probability of vessel collisions and allisions.”<sup>139</sup>

c.) NYSDOS’s Proposed Alternatives Are Unavailable

Apparently cognizant that neither of its proposed Alternatives are “available” because they cannot satisfy the Project’s primary and essential purpose of “storing and regasifying [] LNG at an average sendout rate of 1.0 Bcf/d,”<sup>140</sup> NYSDOS argues that its Alternatives do “not have to meet the exact specifications” of the Project, but must only

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<sup>134</sup> NYSDOS Br. at 42.

<sup>135</sup> Broadwater Br. at 47-50; Objection at 70-73 (BW33804-33807).

<sup>136</sup> FEIS § 4.4.2.1 (BW29212); see also April 12, 2007 Meeting with NYSDOS (BW19133-19137); Broadwater Additional Alternatives Analysis (BW18207-18210).

<sup>137</sup> NYSDOS Br. at 33.

<sup>138</sup> NYSDOS Br. at 39.

<sup>139</sup> FEIS § 4.4.1.3 (BW29209); see also Broadwater Br. at 49, n. 206. Figure 1 also shows the proximity between Alternatives 1 and 2 and the major nautical traffic lanes leading into the Port of New York and New Jersey. Broadwater SD IX (SD307).

<sup>140</sup> FEIS § 4.0 (BW29174).

satisfy the “primary purpose” of the Project.<sup>141</sup> The Secretary has very recently held, however, that to be “available,” “an alternative must meet essentially the same energy needs as the proposed project.” Islander East at 40 (holding that an alternative that could deliver only 70% of a project’s designed capacity was not “available”).

To satisfy the objective of a 1.0 Bcf/d natural gas sendout rate, the Project was designed to accept the entire worldwide fleet of LNG carriers, which can only be accomplished in the relatively benign metocean environment of the Sound.<sup>142</sup> The prevailing metocean conditions at the Atlantic Ocean locations of Alternatives 1 and 2 would significantly reduce the capability of LNG carriers to offload effectively and would also expose the carriers to sloshing damage.<sup>143</sup> The critical interplay between metocean conditions and operational reliability (and, by extension, “availability”) was well summarized by the FEIS.<sup>144</sup>

Nonetheless, NYSDOS argues that Broadwater’s metocean/wave height data for Alternatives 1 and 2 is either inaccurate or overly pessimistic. NYSDOS claims that Broadwater’s analysis of Alternative 1 should have used data from the USACE Hydraulic Laboratory Wave Information Studies Hindcast Wave Data 124 (WIS 124), “which is located 2 kilometers from Alternative 1,” as opposed to “a wave conditions data set for NOAA buoys located 33 miles south of Islip, Long Island.”<sup>145</sup> NYSDOS is mistaken. Broadwater’s analysis of Alternative 1 used the same WIS 124 buoy data as NYSDOS’s consultants.<sup>146</sup> NYSDOS then argues that Broadwater “used several incomparable data sets to evaluate Alternatives 1 and 2 for wave height frequencies,” such that “Broadwater has chosen the worst-case scenario.”<sup>147</sup> Contrary to NYSDOS’s contentions, Broadwater used data that is most representative of water depth, location and metocean conditions for the Alternatives.<sup>148</sup> Using the most site-specific data and planning for a reasonable “worst-case scenario” are best engineering practices when designing a 30-year project because recent or even possible extreme events must be planned for to safeguard human safety and equipment against catastrophic failure.<sup>149</sup>

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<sup>141</sup> NYSDOS Br. at 31. NYSDOS even suggests that their Alternatives could potentially be made “available” if Broadwater reduced its delivery capacity from 1 Bcf/d to 800 million cf/d. Objection at 66 (BW33800).

<sup>142</sup> Broadwater’s Response to NYSDOS’s February 16, 2007 Information Request (BW17079-17085).

<sup>143</sup> Broadwater’s Responses to NYSDOS Information Requests (BW24119-24122).

<sup>144</sup> FEIS § 4.4.2.1 (BW29211).

<sup>145</sup> NYSDOS Br. at 38.

<sup>146</sup> Moffat & Nichol Report at 7 (Broadwater SD I [SD8]) (“The hindcast wave data at WIS 124 was used for Alternative Site 1 in this study.”). Figure 1 (SD IX [SD307]) also shows relative locations of Alternatives 1 and 2 and wave data buoys.

<sup>147</sup> NYSDOS Br. at 39.

<sup>148</sup> See Figure 1 (SD307).

<sup>149</sup> See, e.g., USACE Coastal Engineering Manual (cited in NYSDOS’s Brief at page 28, n. 127) Chapter 2, Part V at 2-6 (Broadwater SD X [SD317]): “In selection of design water levels and waves for a project, critical conditions must be

NYSDOS next argues that inoperability resulting from metocean conditions notwithstanding, Alternatives 1 and 2 would be generally reliable, if not quite as reliable as the Broadwater Project's 99% uptime.<sup>150</sup> NYSDOS concedes that Alternative 1 "would be unable to conduct berthing and deberthing operations for at least one day 7% of the time and for at least 8 days less than 1% of the time."<sup>151</sup> This admission, in and of itself, demonstrates the unavailability of NYSDOS's Alternatives, inasmuch as they would be out of commission for 24 consecutive hours 7% of the time, and out of commission for 8 consecutive days approximately 2-3 times per year (primarily during peak-demand winter months).

Cognizant that its proposed Alternatives could not achieve the Project's reliability objectives because of metocean conditions, NYSDOS argues that "Broadwater has not supplied sufficient information justifying such a high reliability (98%) is necessary [sic]."<sup>152</sup> But Broadwater's Brief explained (with copious citations to the record) precisely why a "99% uptime for the FSRU is essential to the Project's status as a baseload facility."<sup>153</sup>

Finally, NYSDOS disputes the existence of an industry standard limiting safe LNG operations to metocean conditions of 2-meter wave heights or less; instead arguing that its Alternatives could safely operate in the 3-meter wave conditions common in the Atlantic Ocean.<sup>154</sup> The 2-meter wave height limitation relates to at least three separate issues: sloshing, tug operations, and ship-to-ship LNG transfers. NYSDOS offers no scientific or engineering analysis refuting the volumes of record evidence (including the conclusions in the FEIS)<sup>155</sup> confirming the 2-meter industry standard. Instead, NYSDOS's argument is anecdotal, relying exclusively on the existence of two proposed LNG

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considered. These represent critical threshold combinations of tide level, surge (or setup) level, wave conditions and local runoff, which, if surpassed, would endanger the project and/or make the project nonfunctional during their occurrence."

<sup>150</sup> RR 11 §§ 11.4.2.3, 11.8.2, App. A (BW2595-2596, BW2614-2617, BW2619-2625); April 12, 2007 Meeting with NYSDOS (BW19133-19137); May 2, 2007 2<sup>nd</sup> Meeting (BW19152-19153, 19164-19165); Broadwater Response to NYSDOS Information Requests (BW24089-24096).

<sup>151</sup> NYSDOS Br. at 38.

<sup>152</sup> NYSDOS Br. at 45.

<sup>153</sup> Broadwater Br. at 44-46; see also January 2008 Response to Comments ¶ 209 (BW31064) ("Natural gas prices in the region have shown pronounced spikes during the winter months due to an inability to meet simultaneous demands for natural gas for electrical generation and commercial/consumer heating needs. [] As noted in the LIPA Report, the significant economic benefits of the Broadwater Project are driven, at least in part, by the effect an additional natural gas supply in winter months at the doorstep of Long Island will have on the regional market. [LIPA Report at iv-v (BW32572-32573)]. This economic benefit derives from Broadwater's ability to *reliably* serve the regional market during the winter heating season, thereby eliminating the historically observed price volatility of natural gas. Reliability of supply through the ability of LNG carriers to dependably deliver their cargoes is a key consideration to achieving Broadwater's objectives and forecasted economic benefits to the public. The period of highest economic benefit to the region as a whole from Broadwater corresponds to the time of year when metocean conditions in the Atlantic Ocean south of Long Island exceed the operational thresholds for Broadwater. An inability to serve the regional markets during this peak demand period will eviscerate the assessed economic benefit to New York State energy consumers from the [Project] and, thus, be inconsistent with key purposes, objectives and needs of the Project.").

<sup>154</sup> NYSDOS Br. at 45.

<sup>155</sup> FEIS § 4.4.2.1 (BW29211).

facilities in the Atlantic Ocean: Safe Harbor Energy (“Safe Harbor”) and BlueOcean Energy (“BlueOcean”). As an initial matter, Safe Harbor involves the construction of an artificial island in the Atlantic Ocean (the titular “safe harbor”) in order to create the benign metocean conditions necessary for LNG operations where they would not otherwise exist.<sup>156</sup> The need to construct this extraordinary artificial island *confirms* that LNG operations cannot be safely conducted in the Atlantic Ocean absent extreme (and potentially environmentally damaging) measures, as concluded by the Safe Harbor Report’s discussion of attempting to operate an FSRU in the Atlantic Ocean:

Other inherent disadvantages with FSRU technology include [] potential for storage tank sloshing during severe weather conditions (which could curtail operations and gas flow)... FSRU terminals also would have an inherent safety risk related to the relative motion between the FSRU and the berthed tanker during unloading. The unloading system would have to be designed to relieve stresses during operation over a range of sea conditions, and protect against spills of cryogenic liquids (LNG). Also, special safety procedures and training would have to be developed. Heavy seas and severe weather, such as those that occur in the Atlantic Ocean off the coast of New York, could adversely affect the operations and reliability of an FSRU.

These adverse weather periods would cause the FSRU to shut down and if severe enough possibly disconnect and move away from the area. Under adverse weather conditions, an arriving LNG carrier may have to depart the facility prior to delivering its full cargo load and would need to reestablish itself once the weather conditions subside.<sup>157</sup>

The majority of the world-wide LNG carrier fleet has not been designed to withstand the effects of sloshing, which occurs when partially filled LNG tanks are exposed to significant wave conditions and can result in substantial damage to LNG carrier tanks.<sup>158</sup> The proponents of BlueOcean intend to combat sloshing through a fleet of specially-constructed LNG carriers:

Ships calling at the facility will be purpose-built with specially constructed tanks able to withstand harsh offshore conditions and partial fill states without sloshing. ExxonMobil is looking at the potential for accommodating a wider ranger of ships that aren’t specially strengthened, but the weather restrictions for berthing at the terminal are likely to be different for these tankers than for the purpose-built vessels.<sup>159</sup>

Unlike BlueOcean, the Broadwater Project is intended to accept deliveries from the entire worldwide fleet of LNG carriers.<sup>160</sup> Moreover, BlueOcean’s purpose-built carrier concept does not address other factors prohibiting LNG operations in waves higher than 2-meters, such as tug operability or ship-to-ship LNG transfers. And while NYSDOS claims that BlueOcean will operate in 3-meter waves, neither the BlueOcean presentation documents nor the project’s

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<sup>156</sup> See Environmental Report in support of the Safe Harbor Energy Project Deepwater Port License Application (May 2007): Topic Report Nine – Alternatives at 9-1 (“Safe Harbor Report”) (Broadwater SD XI [BW356]).

<sup>157</sup> Safe Harbor Report at 9-12 - 9-13 (SD370-371). The environmental impacts of this artificial island are undefined since the EIS is incomplete.

<sup>158</sup> See Broadwater Br. at 43; May 2, 2007 2<sup>nd</sup> Meeting (BW19161-19162). See generally Det Norske Veritas, “Sloshing Analysis of LNG Membrane Tanks” (June 2006) (Broadwater SD XII [SD437-485]).

<sup>159</sup> “ExxonMobil Shifts Import Focus To US Northeast” (www.poten.com/lngoptions/022008.pdf) (Broadwater SD XIII [SD487]).

<sup>160</sup> Broadwater’s Response to NYSDOS’s February 16, 2007 Information Request (BW17079-17085).

website discuss specific operational criteria such as wave height thresholds.<sup>161</sup> BlueOcean is still in the most preliminary stages of project planning and its proponents have never reported reliability estimates or even established a project design, as confirmed by recent media reports: “A lot more study work is required, and it will take at least a year before the company is even ready to file its permit applications.”<sup>162</sup>

NYSDOS’s reliance on the nascent BlueOcean project notwithstanding, the industry standard prohibiting LNG operations in waves higher than 2-meters is well-established. The problematic nature of operating the support tugs necessary to ensure safe LNG operations in waves higher than 2-meters is well-documented<sup>163</sup> and relates to numerous criteria that have 2-meter design/operation thresholds: *e.g.*, the limitations of pushing, working loads on the bollard and fairlead lines, breaking strength of the tow lines, and safety concerns related to operator limitations and error.<sup>164</sup> The prohibition on ship-to-ship transfer of LNG in wave heights higher than 2 meters is also well-documented:

A key issue for FSRU operation is differential movement between the FSRU terminal and LNG vessel during offloading operations. While offloading through a loading arm or some other special system for transfer of LNG between the LNG vessel and the FSRU terminal, the stresses on the transfer system can be significant. As a result, heavy seas and severe weather conditions can adversely affect the operations and reliability of the FSRU....

Normal and severe weather condition, specifically wind and wave conditions, in Massachusetts Bay have the potential to limit or interrupt terminal access to all of the terminal types under consideration. Reasonable alternatives are those that have the greatest ability to continue operations and accept LNG deliveries under all but the most severe weather conditions. [] The FSRU port design would incur the greatest amount of downtime. The side-by-side unloading of LNG carriers at FSRU ports should be limited to a maximum wave height of 6.5 ft (2.0m), which are commonly exceeded in the Project area especially between January and April when demand for natural gas is the greatest.<sup>165</sup>

Thus, an industry standard limiting safe LNG operations to metocean conditions of 2-meter wave heights or less does exist, and NYSDOS has not provided any supportive technical information to demonstrate otherwise.

#### **IV. CONCLUSION**

Based on the foregoing, the Secretary should override NYSDOS’s Objection to the Project.

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<sup>161</sup> NYSDOS Br. at 40; BlueOcean presentation to NYSDOS (Dec. 18, 2007) (BW37937-45); <http://www.blueoceanenergy.com>.

<sup>162</sup> “ExxonMobil Shifts Import Focus To US Northeast” ([www.poten.com/lngoptions/022008.pdf](http://www.poten.com/lngoptions/022008.pdf)) (Broadwater SD XIII [SD486]).

<sup>163</sup> Buchner, Dierx & Walls, “The Behavior of Tugs in Waves Assisting LNG Carriers During Berthing Along Offshore LNG Terminals” (2005) (Broadwater SD XIV [SD489-497]) (“So far this type of assisting tug has mainly been used in sheltered conditions in harbours or other more shielded conditions around terminals. [] Experience with tugs assisting crude carriers during lightering operations has shown that waves may hamper these tug operations significantly. [] The test with the tug in unshielded conditions and bow quartering waves of [3 meters] had to be aborted because the model tug was damaging the LNG carrier model with a steel part of the model fender.”) (SD489, 493).

<sup>164</sup> See Marin, “Operational and Training Guidelines” (June 12, 2007) (Broadwater SD XV [SD498-514] ); LIPA Report at 74 (BW32661) (tugs servicing the FSRU “cannot operate reliably when waves are greater than 2 meters (6.6 feet).”).

<sup>165</sup> Excelerate Northeast Gateway Energy Bridge FEIS/FEIR at 2-24, 2-27 (Broadwater SD XVI [SD516, 517]); see also Excelerate Energy, “LNG Ship-to-Ship Transfer” (January 25, 2007), at slide 13 (“As Sea [ship-to-ship] operations for LNG require *slight* sea conditions ( $\leq 1.5$  meter Hs).”) (emphasis original) (Broadwater SD XVII [SD530]).

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Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief on Appeal of Broadwater Energy LLC and Broadwater Pipeline LLC under the Coastal Zone Management Act was served this 4<sup>th</sup> day of September 2008, by first-class mail unless otherwise indicated, on the following persons at the addresses listed below.

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