

DECISION AND FINDINGS
BY THE
U.S. SECRETARY OF COMMERCE
IN THE
CONSISTENCY APPEAL OF
BROADWATER ENERGY LLC AND BROADWATER PIPELINE LLC
FROM AN OBJECTION BY THE
STATE OF NEW YORK
APRIL 13, 2009

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I. INTRODUCTION

Broadwater Energy LLC and Broadwater Pipeline LLC (collectively, Broadwater) seek authorization from the Federal Energy Regulatory Commission (FERC) to construct and operate a liquefied natural gas (LNG) project in the New York waters of Long Island Sound (the Project).¹ The Project would include a closed-loop floating storage and regasification unit (terminal) located in 90 feet of water near the middle of the Sound, approximately nine miles from the nearest shore of Long Island and ten miles from the nearest Connecticut shore.² LNG would be delivered to the terminal by LNG tankers along two established routes for commercial vessels.³ At the terminal, LNG would be offloaded, stored, regasified, and transported via a 21.7-mile long, 30-inch-diameter subsea lateral pipeline that would tie into the existing Iroquois Gas Transmission System pipeline.⁴

The Project would help meet a growing demand for natural gas in the New York City, southern Connecticut, and Long Island regions. Regional energy consumption is expected to rise substantially through 2025.⁵ Traditional sources of natural gas from Canada and the Gulf Coast are expected to decline during this period and must be offset from other sources.⁶ Moreover, regional price spikes and volatility are expected to result from decreased supply, increased demand, and inadequate infrastructure.⁷ The Project would provide significant volumes of natural gas to the region, reducing energy costs and increasing reliability.⁸

The State of New York (New York) reviewed the Project pursuant to Section 307(c)(3)(A) of the Coastal Zone Management Act of 1972 (CZMA)⁹ and implementing regulations of the Department of Commerce (Department) set forth at 15 C.F.R. Part 930,

¹ Broadwater also seeks a permit from U.S. Army Corps of Engineers that is necessary to construct and operate the Project.

² Broadwater Energy LLC, 122 FERC ¶ 61,255, 3 ¶ 5 (March 20, 2008) (hereinafter Approval Order).

³ FERC, Final Environmental Impact Statement: Broadwater LNG Project, ES-2, § 1.1.6, at 1-20, and § 3.7.1.1, at 3-175 (Jan. 2008) (hereinafter FEIS).

⁴ Approval Order, at 1 ¶ 1.

⁵ Response to Comments on Broadwater's Petitions and Applications for Easements over New York State Lands (Jan. 2008), Resource Report No. 1, App. A, Energy and Environment Analysts, Inc., Regional Market Growth and the Need for LNG Imports into the Northeast U.S. and Eastern Canada 1-4 (Oct. 13, 2005); see also Energy Information Administration, Annual Energy Outlook 2007: With Projections to 2030, 94 (Feb. 2007); FEIS § 1.1.2.2, at 1-4 to 1-8.

⁶ FEIS, at ES-1.

⁷ FEIS § 1.1.6, at 1-20.

⁸ FEIS § 1.1.4, at 1-13 to 1-14; Response to Comments on Broadwater's Petitions and Applications for Easements over New York State Lands (Jan. 2008), Resource Report 1, App. A, Energy and Environment Analysts, Inc., Regional Market Growth and the Need for LNG Imports into the Northeast U.S. and Eastern Canada 20-36 (Oct. 13, 2005).

⁹ 16 U.S.C. §§ 1451-1465.

Subpart D.¹⁰ New York objected to the Project, finding that the Project is inconsistent with enforceable policies of the Long Island Sound Coastal Management Program (Long Island Program).¹¹ Broadwater filed a timely notice of appeal, requesting an override of New York's objection, as provided in the CZMA.¹²

New York's objection to the Project operates as a bar under the CZMA to the issuance of certain licenses or permits by federal agencies, unless overridden on appeal. Under the CZMA, states are charged with evaluating whether activities are consistent with their coastal management programs. On appeal, the Secretary must sustain the state's objection unless:

1. The Project is consistent with the objectives of the CZMA, meaning that:
 - The Project furthers the national interest, as defined in the CZMA, in a significant or substantial manner;
 - The national interest furthered by the Project outweighs the Project's adverse coastal effects; and
 - There is no reasonable alternative available consistent with the state's coastal management program;¹³ or
2. The Project is necessary in the interest of national security.¹⁴

In this appeal, Broadwater bears the burden of establishing that its proposed Project is either consistent with the objectives of the CZMA or necessary in the interest of national security. Broadwater has failed to meet this burden. The record does not establish that the national interest furthered by the Project outweighs the Project's adverse coastal effects. Separately, the record does not establish that the Project is necessary in the interest of national security. New York's objection is therefore sustained.¹⁵

¹⁰ Letter from Lorraine Cortés-Vázquez, Secretary of State, State of New York, to Jimmy Culp, Broadwater 1-2, 5 (April 10, 2008) (hereinafter Objection).

¹¹ *Id.* at 15-16.

¹² Appeal of Broadwater Energy LLC and Broadwater Pipeline LLC Under the Coastal Zone Management Act (June 6, 2006).

¹³ 15 C.F.R. § 930.121.

¹⁴ 16 U.S.C. § 1456(c)(3)(A) ("No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.").

¹⁵ This decision does not prevent Broadwater from adopting any project alternative determined by New York to be consistent with the state's coastal management program.

II. STATUTORY FRAMEWORK

The CZMA provides states with federally approved coastal management programs the opportunity to review a proposed project requiring federal licenses or permits if the project would affect any land or water use or natural resource of the state's coastal zone. A timely objection raised by a state precludes federal agencies from issuing licenses or permits for the project, unless the Secretary of Commerce finds that the activity is either:

- “consistent with the objectives of [the CZMA];” or
- “necessary in the interest of national security.”¹⁶

A finding that a project satisfies either ground results in an override of a state's objection. A license or permit applicant may appeal a state's objection and request that the objection be overridden.

III. THRESHOLD ISSUES

Two challenges by Broadwater to the sufficiency of New York's objection must be considered before addressing the merits of the appeal. Broadwater argues that New York's objection should be dismissed because it is not in compliance with Section 307 of the CZMA. Specifically, Broadwater argues that New York's objection is defective because: (a) certain coastal effects identified by the state relate to a separate federal agency activity and cannot serve as a basis for the state's objection; and (b) the objection is based on materials that are not enforceable policies of the state's coastal management program.

For the reasons set forth below, Broadwater's threshold challenges are unpersuasive. New York's objection is sufficient to withstand dismissal on procedural grounds.

A. New York's Objection Properly Considered All Coastal Effects Resulting from the Project.

Broadwater argues that New York's objection is defective because it is predicated in part on coastal effects that are not part of the Project.¹⁷ New York based its objection in part on fishing and navigational effects resulting from the U.S. Coast Guard's expected future creation of safety and security zones.¹⁸

¹⁶ 16 U.S.C. § 1456(c)(3)(A) (“No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.”).

¹⁷ Broadwater Initial Brief, at 3-4.

¹⁸ Objection, at 42-49.

As noted in FERC's Approval Order, safety and security zones would need to be established around both the terminal and transiting LNG tankers in order to render the Sound suitable for this type of activity.¹⁹ These safety and security zones would be created by subsequent Coast Guard rulemaking.²⁰ Broadwater contends that this rulemaking would require a separate consistency review as a "federal agency activity," and that review of any coastal effects associated with the creation of safety and security zones should occur in the context of that later consistency review, not its present application to FERC.²¹

When reviewing activities for consistency, consideration is given to all coastal effects resulting from the proposed activity. The term "coastal effect" is defined as "any reasonably foreseeable effect on any coastal use or resource resulting from a federal agency activity or federal license or permit activity."²² Effects include both direct effects and indirect effects that are later in time or farther removed in distance, but are still reasonably foreseeable. In prior decisions, effects resulting from the creation of safety and security zones have been considered reasonably foreseeable coastal effects resulting from the proposed construction and operation of LNG facilities.²³

Given these requirements, Broadwater's argument is without merit. Effects on fishing and navigation resulting from the creation of safety and security zones are foreseeable effects that would result from the Project. While they would be established later in time, these safety and security zones are an inseparable component of the Project because the Project could not go forward without them. Indeed, FERC acknowledged the integral nature of these zones, both through its Environmental Impact Statement (EIS), which examined the effects of safety and security zones,²⁴ and through its Approval Order, which conditioned its approval on Broadwater's compliance with all risk mitigation measures (including safety and security zones) set forth in the Coast Guard's Waterways

¹⁹ Approval Order, at 19 ¶ 49, App. B, at 50 ¶ 86; see also U.S. Coast Guard Captain of the Port Long Island Sound, Waterways Suitability Report for the Proposed Broadwater Liquefied Natural Gas Facility § 8.4.2, at 168, and § 4.6.1, at 128-30 (Sept. 21, 2006) (hereinafter Waterways Suitability Report).

²⁰ 33 C.F.R. § 165.7(a).

²¹ Section 307 of the CZMA establishes separate federal consistency review processes for federal agency activities and federal license or permit activities. 16 U.S.C. § 1456(c)(2), (c)(3)(A). Federal agency activities are subject to the requirements of the Department's implementing regulations in 15 C.F.R. Part 930, Subpart C. Federal license or permit activities, including legally required authorizations from federal agencies, are subject to the process established in Subpart D of the Department's regulations. While federal agency activities are subject to state review, objections are not subject to appeal to the Department of Commerce.

²² 15 C.F.R. § 930.11(g).

²³ Decision and Findings by the U.S. Secretary of Commerce in the Consolidated Consistency Appeals of Weaver's Cove Energy, LLC and Mill River Pipeline, LLC, at 18-19 (June 26, 2008) (hereinafter Weaver's Cove); Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC, at 37-39 (June 26, 2008) (hereinafter AES).

²⁴ FEIS § 3.7.1.4, at 3-195 to 3-211.

Suitability Report.²⁵ While the effects of any safety and security zones would undoubtedly be considered in any subsequent consistency review associated with the Coast Guard's establishment of such zones, that later review does not preclude New York's consideration of these same effects in the consistency review resulting from the FERC authorization process.

B. New York's Objection Is Properly Based on the Enforceable Policies of its Federally Approved Coastal Management Program.

Broadwater also argues that New York's objection is defective because it is based on materials that have not been approved as enforceable policies of the Long Island Program.²⁶ Specifically, Broadwater claims that the objection relied on the Long Island North Shore Heritage Area Management Plan, the Town of Riverhead's Comprehensive Plan, and a document called Volume 2 of the Long Island Program (which has never been approved as part of the official Long Island Program).²⁷ According to Broadwater, this amounts to a de facto amendment of the Long Island Program by New York without approval from the National Oceanic and Atmospheric Administration (NOAA). According to Broadwater, absent NOAA's approval, these policies are not part of the Long Island Program and are not enforceable policies that may serve as a basis for any objection.²⁸

This argument is without merit. The record establishes that New York's objection is based on policies contained in the state's federally approved Long Island Program. Although New York drew upon information contained in auxiliary materials, including several regional and local land use plans (not limited to those singled out by Broadwater), its reliance on those materials is limited to providing explanatory and historical information regarding the community character of the Sound, as well as providing information regarding how the Long Island Program policies have been implemented and enforced by state agencies and local communities. The state did not actually rely on the

²⁵ Approval Order, at 31 ¶ 90(h), App. B, at 50 ¶ 86. This condition also demonstrates that the safety and security zone effects were directly relevant to FERC's decision. Hence, even under Broadwater's more narrow view of the scope of the state's consistency review, consideration of those effects was appropriate.

²⁶ Broadwater Initial Brief, at 4-7. Broadwater also appears to argue that New York's objection inappropriately failed to address two policies in the Long Island Program regarding the siting of energy facilities (Policies 13.3 and 13.4), and that the state's application of the Long Island Program in this way amounts to a de facto ban on the siting of energy facilities in the Sound. See id. at 6-7. This decision does not address the state's overall application of its Program. Rather, the decision considers whether the state has based its objection upon at least one enforceable policy.

²⁷ Broadwater Initial Brief, at 5.

²⁸ 16 U.S.C. § 1455(e)(3)(A) (“[A] coastal state may not implement any amendment, modification, or other change as part of its approved management program unless the amendment, modification, or other change is approved by the Secretary under this subsection.”); 15 C.F.R. § 930.11(h) (“‘The term ‘enforceable policy’ means State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone,’ 16 USC § 1453(6a), and which are incorporated in a management program as approved by OCRM either as part of program approval or as a program change under 15 CFR Part 923, Subpart H.”).

policy directives contained within those materials to supplement or supplant the policy directives of the Long Island Program itself. Instead, those supportive materials simply provided context for the enforceable policies relied on by the state to support its objection. Indeed, Broadwater referenced at least one of the materials in its original consistency certification.²⁹

IV. THE PROJECT IS NOT CONSISTENT WITH THE OBJECTIVES OF THE CZMA

Pursuant to the CZMA, a state's objection must be sustained unless the activity at issue is consistent with the objectives of the CZMA or otherwise necessary in the interest of national security.³⁰ These grounds are independent and an affirmative finding on either is sufficient to override.³¹ For the reasons set forth below, the record establishes that the Project is not consistent with the objectives of the CZMA.

A project is consistent with the objectives of the CZMA if it satisfies all three regulatory elements required for such a finding: (1) the activity furthers the national interest, as set forth in CZMA Sections 302 or 303, in a significant or substantial manner (Element 1); (2) the national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively (Element 2); and (3) there is no reasonable alternative available that would permit the activity to be conducted in a manner consistent with the enforceable policies of the state's coastal management program (Element 3).³² An appellant must meet all three of these elements to demonstrate that a project is consistent with the objectives of the CZMA. As described in detail below, the Project meets Element 1, but fails to satisfy Element 2.³³

A. Element 1: The Project Furthers the National Interest, as Set Forth in Sections 302 or 303 of the CZMA, in a Significant or Substantial Manner.

To satisfy Element 1, Broadwater must demonstrate that its Project furthers the national interest, as articulated in Sections 302 or 303 of the CZMA, in a significant or substantial manner.³⁴ Broadwater asserts that the Project would promote three national interests set forth in Section 303 of the CZMA in a significant and substantial manner, specifically:

²⁹ Broadwater Long Island Sound Project: Coastal Zone Consistency Certification 160-61 (April 2006) (hereinafter Broadwater Coastal Zone Consistency Certification).

³⁰ 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.120.

³¹ Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of the Foothill/Eastern Transportation Corridor Agency, at 12 (Dec. 18, 2008) (hereinafter TCA).

³² 15 C.F.R. § 930.121(a)-(c).

³³ As Broadwater has failed to satisfy Element 2, it is unnecessary to reach Element 3, which considers whether there is a reasonable alternative that allows the Project to proceed in a manner that is consistent with the state's coastal management program.

³⁴ 15 C.F.R. § 930.121(a).

1. “priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to ... energy ... and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists;”³⁵
2. “develop[ing] ... the resources of the Nation’s coastal zone,”³⁶ and
3. “preserv[ing], protect[ing], develop[ing], and, where possible ... restor[ing] or enhanc[ing] the resources of the Nation’s coastal zone for this and succeeding generations.”³⁷

Stated broadly, Congress has defined the national interest in coastal zone management to include both protection and development of coastal resources.³⁸ A wide variety of activities have been found to meet the competing goals of resource protection and development, and past Secretarial decisions have held that the siting of coastal-dependent energy facilities furthers the national interest sufficiently for CZMA purposes.³⁹ Additionally, in interpretive guidance in the preamble to the 2000 CZMA regulatory amendments, NOAA identified the siting of coastal-dependent energy facilities as an example of activities that further the national interest in a significant or substantial manner.⁴⁰

In light of past precedent and the project-specific findings below, the record establishes that the Project would further the national interest set forth in Sections 302 and 303 of the CZMA in a significant and substantial manner.

1. The Project Is a Major Coastal-Dependent Energy Facility.

The Project would constitute a major coastal-dependent energy facility.

The Project is “major” in scope. Broadwater estimates that the \$1 billion project would

³⁵ 16 U.S.C. §1452(2)(D).

³⁶ 16 U.S.C. § 1452(1).

³⁷ Id.

³⁸ Decision and Findings in the Consistency Appeal of the Virginia Elec. and Power Co., at 19 (May 19, 1994) (hereinafter VEPCO).

³⁹ Id. at 19-21; AES, at 11-12; Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Islander East Pipeline Co., LLC, at 3-4, 8-10 (May 5, 2004) (hereinafter Islander East), remanded on other grounds, Connecticut v. U.S. Dep’t of Commerce, No. 3:04 -CV-1271 (SRU), 2007 WL 2349894 (D. Conn. Aug. 15, 2007); Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S., Inc., at 11 (June 20, 1995) (hereinafter Mobil Pensacola).

⁴⁰ See Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000); see also Connecticut v. Dep’t of Commerce, 2007 WL 2349894, at *8 (“According to the NOAA regulations, the siting of coastal dependent energy facilities inherently has economic consequences beyond the immediate locality where the facility is located, that is, involves a significant national interest.”). The 2006 amendments to the CZMA regulations do not alter this conclusion. See 71 Fed. Reg. 788 (Jan. 5, 2006).

provide substantial volumes of natural gas to the New York, southern Connecticut, and Long Island regions, with an average daily delivery of 1.0 billion cubic feet per day for 30 years.⁴¹ Past decisions have found projects of significantly lesser magnitude to meet the national interest in the siting of major energy facilities.⁴²

Moreover, the Project is “coastal dependent” because the terminal would be located in Long Island Sound and kept in place by way of a yoke mooring system embedded in the seafloor of the Sound.⁴³ The Project would require that LNG be delivered via tankers that would dock and unload at the terminal prior to LNG regasification and transport through the pipeline.⁴⁴ The pipeline is also coastal dependent because it must traverse the coastal zone from the terminal along the Sound floor to the Iroquois Gas Transmission System pipeline connection.⁴⁵

The Project is also an “energy facility” under the CZMA. The CZMA defines “energy facilities” as “any equipment or facility which is or will be used primarily: (A) in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of any energy resource; or (B) the manufacture, production or assembly of equipment, machinery, products, or devices which are involved in any activity described in subparagraph (A).”⁴⁶ The Project clearly satisfies this definition.

New York does not dispute that the Project would constitute a major coastal-dependent energy facility. Rather, the state argues that Broadwater’s proposal fails to further the national interest because the Project would not be located in an area where similar industrial activity already exists.⁴⁷ The CZMA articulates a national goal of locating proposed facilities “to the maximum extent practicable ... in or adjacent to areas where such development already exists.”⁴⁸ The Secretary has emphasized the goal of co-location in prior decisions in consistency appeals.⁴⁹ Here, the Project would not be

⁴¹ Approval Order, at 1 ¶ 1.

⁴² See Weaver’s Cove, at 8 (finding that an LNG facility designed to produce 800 million cubic feet per day of natural gas and costing \$550 million was a “major” facility); Islander East, at 1, 8 (finding that natural gas pipeline designed to transport 260,000 dekatherms of natural gas per day and costing \$180 million was a “major” facility).

⁴³ Approval Order, at 3 ¶ 4.

⁴⁴ AES, at 11 (finding a similar facility to be “coastal dependent”). The inquiry into whether a project is “coastal dependent” has, in past decisions, focused on whether “location in or near the coastal zone is required to achieve the primary goal of the project in question.” Islander East, at 9.

⁴⁵ Id.; AES, at 11.

⁴⁶ 16 U.S.C. § 1453(6).

⁴⁷ New York Initial Brief, at 6-9. New York also argues that the Project fails to meet the national objective of energy independence because the natural gas supplied to the terminal would be imported from foreign countries. Id. at 9. Under the CZMA, however, energy independence is not a “national interest” under either Section 302 or 303 and, thus, is not a factor that can be considered in this appeal.

⁴⁸ 16 U.S.C. § 1452(2)(D).

⁴⁹ See Weaver’s Cove, at 9; AES, at 12, 41.

located in or adjacent to an area in which development already exists. Rather, the Project would be located in the center of the Sound, an area devoid of any development.

While the terminal would not be located in an area where similar development exists, the record establishes that efforts to locate the Project in areas of similar development were carefully considered, and that the Project's proposed location is – to the maximum extent practicable – in an area where similar development exists. In developing its Environmental Impact Statement pursuant to the National Environmental Policy Act (NEPA),⁵⁰ FERC examined several alternatives, including locations where industrial activity is already present. In particular, FERC considered alternatives along the Long Island Sound shoreline at Northport and Port Jefferson, where development exists.⁵¹ These alternatives were not deemed feasible, as they lacked sufficient available land for construction and operation of the terminal.⁵² Moreover, because these ports experience high volumes of marine traffic, construction and operation of a terminal at these locations would result in more significant adverse effects on marine traffic than the proposed location in the center of the Sound.⁵³ In the end, after careful consideration of all proposals, FERC determined that none of the alternatives considered was preferable to the proposed location of the Broadwater Project.⁵⁴

New York's objection to the Project impliedly concedes this reality. Notwithstanding its criticism of the Project's proposed location, the state has failed to identify a single alternative that would site the Project where similar development exists and that would be consistent with the enforceable policies of the Long Island Program. To the contrary, its two recommended alternatives would locate the Project offshore of Long Island – 13 and 22 miles respectively – far removed from similar development.⁵⁵

2. The Project Would Develop the Resources of the Coastal Zone.

The Project would develop the coastal zone by making possible the importation of additional natural gas via LNG tankers to meet growing regional demand. Development, as articulated in the national policies of the CZMA, has been understood in past decisions to encompass a wide variety of activities, such as construction of LNG terminals, construction of a natural gas pipeline, construction of a pipeline to transport drinking water, commercial development, and oil and gas exploration, development, and production activities.⁵⁶ In this instance, constructing the terminal and a natural gas

⁵⁰ 42 U.S.C. §§ 4321-4370f.

⁵¹ FEIS § 4.4.1.1, at 4-31.

⁵² Id.

⁵³ Id.; FEIS § 4.4.1.5, at 4-38.

⁵⁴ FEIS § 4.4.1.1, at 4-31, and § 4.4.1.5, at 4-38.

⁵⁵ Objection, at 62-63, 70.

⁵⁶ AES, at 13 (finding that construction of an LNG terminal would further the national interest in developing the coastal zone); Weaver's Cove, at 9-10 (finding that construction of an LNG terminal would further the national interest in developing the coastal zone); Islander East, at 6-8 (finding that construction of a proposed natural gas pipeline would further the national interest in developing the coastal zone);

pipeline constitute activities that would develop the coastal zone to facilitate the importation of natural gas to meet anticipated regional energy needs.⁵⁷ New York does not dispute that the Project would develop the resources of the coastal zone in this manner.

3. The Project Would Protect and Preserve the Resources of the Coastal Zone.

The Project would preserve and protect the resources of the coastal zone. By locating the terminal nine miles offshore, the Project would preserve sensitive nearshore resources.⁵⁸ Additionally, the Project would provide a new source of cleaner-burning natural gas, thereby improving air quality.⁵⁹ Natural gas is generally recognized as a cleaner burning fuel, and past decisions have recognized that the use of such energy sources does, to some degree, preserve and protect the resources of the nation's coastal zone.⁶⁰

4. The Project Furthers Certain National Policies in a Significant and Substantial Manner.

Not only must the Project further the national interest as articulated in Sections 302 or 303 of the CZMA, it must do so in a significant or substantial manner.⁶¹ In the preamble to the Department's 2000 CZMA regulatory amendments, the term "significant" is interpreted to encompass projects that provide a valuable or important contribution to a national interest, without necessarily being large in scale or having a large impact on the national economy.⁶² The term "substantial" is interpreted to encompass projects that contribute to a CZMA objective to a degree that has a value or impact on a national scale.⁶³ Together, these terms encompass both the import and scale of a proposed

VEPCO, at 19-20 (finding that a proposed drinking water pipeline would further the national interest in developing the coastal zone); Decision and Findings in the Consistency Appeal of Jesse W. Taylor, at 8-9 (Dec. 30, 1997) (finding that filling in a wetland to construct a commercial storage facility would minimally contribute to the national interest in developing the coastal zone); Mobil Pensacola, at 11-12 (finding that oil and gas exploration, development, and production activities further the national interest in developing the coastal zone); Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S., Inc., at 12-13 (Jan. 7, 1993) (finding that oil and gas exploration, development, and production activities further the national interest in developing the coastal zone).

⁵⁷ AES, at 13.

⁵⁸ Broadwater Initial Brief, at 10.

⁵⁹ Id.

⁶⁰ See Islander East, at 9-10.

⁶¹ 15 C.F.R. § 930.121(a)

⁶² 65 Fed. Reg. at 77,150.

⁶³ Id.; see also AES, at 14; Weaver's Cove, at 10; Islander East, at 6 n.26. The definitions articulated in the preamble apply to the terms "significant" and "substantial" only for purposes of the Element 1 discussion. When used in the discussion of Element 2, infra, these terms are intended to convey their ordinary meaning.

activity.⁶⁴ The regulations provide examples of activities that significantly or substantially further the national interest, such as the siting of energy facilities or oil and gas development on the outer continental shelf.⁶⁵ Such activities have economic implications beyond the immediate locality where they are located. Other activities, such as a marina, may contribute to the economy of the coastal municipality or state, but may not provide significant or substantial economic contributions to the national interest furthered by the objectives in Sections 302 or 303 of the CZMA.⁶⁶ Whether a project significantly or substantially furthers the national interest in the objectives of Sections 302 or 303 will depend on the evidence in the decision record.⁶⁷

Here, the Project is both significant and substantial. The Project is significant because it provides an important contribution to the nation's interest in siting LNG facilities to meet future energy requirements.⁶⁸ The Project is substantial given its anticipated contribution to future regional natural gas supplies. Regional demand for natural gas is projected to require significant additional supplies of natural gas by 2025.⁶⁹ Demand for natural gas in the New York City, southern Connecticut, and Long Island regions, the area that would be most directly served by the Project, is projected to increase from 1.8 billion cubic feet per day in 2005 to 2.6 billion cubic feet per day in 2025, with peak demand rising to 4.6 billion cubic feet per day in 2025.⁷⁰

Against this substantial rising demand, it is expected that traditional sources of natural gas for this region, primarily supply from the Gulf Coast and Canada, will decline in both absolute and relative terms.⁷¹ The Project, with a delivery capacity of 1.0 billion cubic

⁶⁴ AES, at 14; Weaver's Cove, at 10-11.

⁶⁵ 65 Fed. Reg. at 77,150.

⁶⁶ AES, at 14; Weaver's Cove, at 11.

⁶⁷ 65 Fed. Reg. at 77,150.

⁶⁸ Id.; see also AES, at 14; Weaver's Cove, at 11. The national interest in developing LNG facilities was articulated in the White House National Economic Council's Advanced Energy Initiative, issued in 2006. See National Economic Council, Advanced Energy Initiative 8 (Feb. 2006). This document, which has been relied on in prior consistency appeal decisions, stated that, at the President's direction, federal agencies are working to accelerate the development and expansion of LNG terminals in order to improve natural gas availability and supply. See AES, at 14; Weaver's Cove, at 11.

⁶⁹ FEIS § 1.1.6, at 1-20 to 1-21; Approval Order, at 13 ¶ 31.

⁷⁰ See Response to Comments on Broadwater's Petitions and Applications for Easements over New York State Lands (Jan. 2008), Resource Report No. 1, App. A, Energy and Environment Analysts, Inc., Regional Market Growth and the Need for LNG Imports into the Northeast U.S. and Eastern Canada 1-4 (Oct. 13, 2005); see also Energy Information Administration, Annual Energy Outlook 2007: With Projections to 2030, 94 (Feb. 2007); FEIS § 1.1.2.2, at 1-4 to 1-8.

⁷¹ FEIS, at ES-1, and § 1.1.1, at 1-3 to 1-4; see also AES, at 15. On the other hand, the Energy Information Agency's (EIA) recently released Annual Energy Outlook 2009 concluded that the projected growth in demand and prices for domestic natural gas consumption will lead to "significantly higher" domestic production than previously anticipated. EIA, Annual Energy Outlook 2009, Early Release Overview 10 (Jan. 2009), available at <http://www.eia.doe.gov/oiaf/aeo/> (hereinafter AEO2009); see also EIA, Annual Energy Outlook 2009, Early Release Summary Presentation 2 (Dec. 17, 2008) (hereinafter EIA Presentation). Specifically, new "unconventional" production methods, expiration of moratoria on offshore

feet per day, would address regional demand by providing significant volumes of natural gas to the region. Beyond its regional impact, the Project would help serve a broader goal of stabilizing the price of natural gas on a national level.⁷² New York does not dispute these projections.⁷³

By contrast, the record is insufficient to conclude that the Project furthers, in a significant and substantial manner, the national interest in protecting and preserving the resources of the coastal zone. Although locating the Project in deeper waters would undoubtedly help minimize effects to nearshore aquatic resources, Broadwater provides no explanation as to why the Project's siting furthers this national interest in a significant or substantial manner. As to improved air quality, Broadwater's proposal assumes that electric-generating facilities currently fueled by coal or oil will "re-power" to use natural gas.⁷⁴ However, Broadwater's own supporting documentation states that "[t]he environmental benefits associated with repowering have not been quantified."⁷⁵

drilling, and increased supply from Alaska are expected to somewhat offset the predicted decrease in supply from Canada and the Gulf Coast. AEO2009, at 10; EIA Presentation, at 12. Consequently, EIA predicts that domestic supply will rise in response to predicted demand, which will partially offset the share of natural gas imported from abroad. AEO2009, at 10; EIA Presentation, at 11, 12. This assessment does not provide a sufficient basis for questioning Broadwater's and FERC's assessment of future demand for natural gas supplies, however, because the assessment examines national trends and not the future needs of the New York, southern Connecticut, and Long Island regions.

⁷² FEIS § 1.1.4, at 1-13 to 1-14; Response to Comments on Broadwater's Petitions and Applications for Easements over New York State Lands (Jan. 2008), Resource Report 1, App. A, Energy and Environment Analysts, Inc., Regional Market Growth and the Need for LNG Imports into the Northeast U.S. and Eastern Canada 20-36 (Oct. 13, 2005).

⁷³ In an amicus curiae brief, the State of Connecticut asserts that future LNG supplies sufficient to satisfy regional demands may be available from other potential projects, diminishing the national importance of this particular project. See Connecticut Brief, at 15-17. According to Connecticut, currently proposed facilities would supply approximately 10.15 billion cubic feet per day without the Project, rendering the Project superfluous. See id. at 16.

Connecticut's reasoning – which notably was neither initially advanced nor subsequently embraced by either party – is not persuasive in this case because the projected capacity from these other proposed facilities is highly speculative. Many of these facilities are still in the early stages of development and have not received required federal permits. At least one of these projects, Weaver's Cove, is in serious jeopardy given recent decisions by both the Department of Commerce and the Coast Guard. As a result, whether a surplus of natural gas in the region will actually occur because of these potential LNG facilities is uncertain. While a future appeal may require considering whether the national interest in an LNG project could be diminished due to alternate future LNG capacity, the record here is insufficient to make such a finding.

This conclusion is consistent with the finding in AES, discussed above. In that appeal, the additional supplies of natural gas that would result from expansion efforts at existing or approved LNG terminals were quantifiable and the predicted quantities of additional supply did not obviate the need for the AES project. See AES, at 15-16. Given those facts, the decision did not need to consider if the identified supplies were too speculative to be considered in addressing the national interest served by the AES project.

⁷⁴ Broadwater Initial Brief, at 10-11.

⁷⁵ See Levitan & Assoc., Inc., Broadwater LNG, A Technical Assessment: Market, Technology, Environmental, and Safety Impacts in New York State 48 (July 2007), cited in, Broadwater Initial Brief, at 11 n.19.

In light of the foregoing record, the Project would further that national interest in the siting of major coastal-dependent energy facilities, in developing the resources of the coastal zone, and in protecting and preserving the resources of the coastal zone. The record also establishes that the Project would further these first two national interests in a significant and substantial manner.

B. Element 2: The National Interest Furthered by the Project Does Not Outweigh the Adverse Coastal Effects Caused by the Project.

For Broadwater to succeed on Element 2, the national interest in the Project must outweigh its adverse coastal effects, when those effects are considered separately or cumulatively.⁷⁶ This determination must be made by a preponderance of the evidence in the record.⁷⁷ Based on the considerations set forth below, the record establishes that the Project does not satisfy Element 2.⁷⁸

1. Adverse Coastal Effects

In reaching this decision, all adverse coastal effects associated with the Project – both the separate direct and indirect effects and the cumulative effects – have been considered. New York has identified five particular adverse coastal effects of concern: (1) adverse coastal effects on scenic and aesthetic enjoyment; (2) adverse coastal effects from entrainment and impingement of aquatic organisms; (3) adverse coastal effects on benthic habitat; (4) adverse coastal effects on vessel traffic; and (5) adverse coastal effects on the commercial fishing and lobster industries. The discussion that follows examines the coastal effects of specific concern to New York, as well as a sixth potential adverse coastal effect that the parties did not raise in their arguments on appeal: adverse coastal effects on endangered or threatened species.

a. *Direct and Indirect Adverse Coastal Effects*

i. Adverse Coastal Effects on Scenic and Aesthetic Enjoyment

One of the national policies that the CZMA seeks to promote is the preservation and protection of aesthetic values and aesthetic coastal features.⁷⁹ Given this policy, regulations implementing the CZMA define coastal effects to include effects to coastal

⁷⁶ 15 C.F.R. § 930.121(b).

⁷⁷ Weaver's Cove, at 12; AES, at 16; Islander East, at 35; Mobil Pensacola, at 41.

⁷⁸ New York has argued that state consistency determinations should be accorded deference on matters related to coastal effects. That argument is inaccurate. In a federal consistency appeal, neither party's conclusions are accorded deference. Rather, a decision must be based on a balanced assessment of the decision record. Consequently, New York's assessment of coastal effects resulting from the Project has received no greater weight than Broadwater's in this decision.

⁷⁹ 16 U.S.C. §§ 1452(2), 1452(2)(F).

uses including the “scenic and aesthetic enjoyment” of coastal resources.⁸⁰

The scenic and aesthetic enjoyment of Long Island Sound is of vital importance to the State of New York and is a major contributor to the character of the region and its communities. The extensive land-water interface and diversity of views, including vast expanses of open water, create the generally high scenic quality of the Sound. The specific elements comprising the scenic and aesthetic character of the Sound’s nearshore coastline include “a range of natural landscapes such as bluffs, beaches, bays, and inlets, and characteristic coastal flora and fauna, as well as human uses including boating, residences, parkland, agriculture, harbors, historic villages, and commercial activities in defined maritime centers.”⁸¹ Additionally, the mid- and far-shore landscapes are valued for their “sweeping open water vistas, with views to the distant landform of the Connecticut shore, and the transient passage of freighters, ferries, commercial fishing vessels, boats, and sailboats.”⁸²

The importance of the Sound’s scenic and aesthetic character is reflected in longstanding management efforts to preserve and protect the Sound. For more than 30 years, the federal government, the States of New York and Connecticut, regional groups, and local governments have invested significant effort and funds in a variety of studies, plans, programs, and projects to improve water quality, preserve and maintain habitat and open space, enhance public access, balance competing uses, and responsibly manage the resources of Long Island Sound.

At the national level, past efforts have been undertaken that both recognize the scenic and aesthetic character of the Sound, and strive to protect it. As early as 1973, the New England River Basins Commission, a partnership including the federal government and the States of New York and Connecticut, developed the Long Island Sound Regional Study to conserve the Sound as an important resource for the region.⁸³ In 1987, Long Island Sound was designated by the U.S. Environmental Protection Agency (EPA), with the cooperation of the Long Island Sound Study, as an Estuary of National Significance under the Clean Water Act’s National Estuary Program. In making that designation, the Long Island Sound Study found that “Long Island Sound is a national treasure, to be prized for its beauty.”⁸⁴ The Long Island Sound Study issued its comprehensive plan for managing the Sound’s resources in 2006. The importance of the Sound’s scenic resources was further recognized by Congress in the Long Island Sound Stewardship Act of 2006, which authorized grants for the creation of an advisory committee and implementation of the Long Island Sound Study’s management plan, and also directed

⁸⁰ 15 C.F.R. § 930.11(b); TCA, at 21.

⁸¹ Objection, at 24; see also Long Island Sound Coastal Management Program 74-75 (Jan. 1999) (hereinafter Long Island Program).

⁸² Objection, at 24; see also Long Island Program, at 74-75.

⁸³ Objection, at 14.

⁸⁴ Objection, at 25 (quoting Long Island Sound Study Comprehensive Conservation and Management Plan, Introduction, available at <http://www.longislandsoundstudy.net/ccmp/intro.html>).

the designation of stewardship sites.⁸⁵ In the Act, Congress found that “Long Island Sound is a national treasure of great cultural, environmental, and ecological importance.”⁸⁶

Protection of the Sound also has occurred at the state level. In 1998, New York included the north shore of Long Island (the area affected by the Project) in the State Heritage Area System as a place where “unique qualities of geography, history, and culture create a distinctive identity.”⁸⁷ As part of management planning, the Long Island North Shore Heritage Area Planning Commission conducted an inventory of heritage and scenic resources, which included “distant views of water and land, over Long Island Sound and other water” and “panoramic views over Long Island Sound and Great Peconic Bay.”⁸⁸ According to the Commission, “[t]he scenic resources of the Long Island North Shore Heritage Area are the essence of the area and reflect the character of the area.”⁸⁹ The Sound heritage area includes the waters of the Sound north to the Connecticut border, reflecting the commission’s view that the open water of the Sound is the area’s “central, defining element.”⁹⁰ The Commission issued the Long Island North Shore Heritage Area Management Plan in 2005.

Protection of the scenic and aesthetic character of the Sound is also a central tenet in many regional and local plans for Long Island’s north shore coastal area. For example, the harbor management plan for the Port Jefferson Harbor Complex was created in 1988 by five communities on the harbor to protect the coastal environment.⁹¹ Additionally, Suffolk County, through its Open Space Acquisition Policy Plan released in 2007, emphasizes the protection of scenic vistas, in particular the views of its waterways.⁹² Also, the Town of Riverhead’s Comprehensive Plan emphasizes protecting the community’s scenic resources. In its plan, the town found that its identity is linked to the quality of the Sound’s aesthetic resources, stating that “[c]ommunities, like Riverhead, along the north shore of Long Island are closely tied to the Sound and its overall health and visual character.”⁹³

Management efforts intended to protect the scenic and aesthetic character of the Sound are also reflected in New York’s coastal management programs. In 1982, New York developed a state-wide coastal management program that contained policies requiring the

⁸⁵ Pub. L. 109-359, 120 Stat. 2049 (2006) (codified at 33 U.S.C. § 1269 note).

⁸⁶ *Id.* at § 2(a)(1).

⁸⁷ Objection, at 8.

⁸⁸ Long Island North Shore Heritage Area Planning Commission, Long Island North Shore Heritage Area Management Plan, App., 116 (Dec. 2006) (hereinafter LINSHA Management Plan).

⁸⁹ LINSHA Management Plan, App., at 122.

⁹⁰ *Id.* § 1.4.4, at 16.

⁹¹ See generally Broadwater Coastal Zone Consistency Certification, at 294-98.

⁹² Suffolk County Dep’t of Planning, Open Space Acquisition Policy for Suffolk County 42 (June 2007).

⁹³ Town of Riverhead Comprehensive Plan 4-4 (Nov. 2003).

prevention of the impairment of scenic resources of statewide significance.⁹⁴ In 1994, New York developed a Sound-specific coastal management program, the Long Island Program, which explicitly seeks to protect the scenic and aesthetic quality of the Sound. The Long Island Program is replete with references to the need to protect scenic and aesthetic values and community character. The Long Island Program articulates a vision for the Sound's coastal area that "encompasses the tapestry of natural, economic, and cultural resources that make it unique – a Long Island Sound coastal area enriched by enhancing community character, reclaiming the quality of natural resources, reinvigorating the working waterfront, and connecting people to the Sound."⁹⁵ Consistent with that perspective, the Long Island Program's "Vision for Long Island Sound" states that new development must, among other things, "protect vistas and views of the Sound and its embayments."⁹⁶ In an effort to implement this vision, the Program contains the following relevant policies:

- Policy 1 of the Long Island Program requires that coastal development preserve open space. Policy 1 is based on the state's finding that "[t]he collection of natural, recreational, commercial, ecological, cultural, and aesthetic resources in the community or landscape defines its character; and the distribution of developed and open lands establishes a pattern of human use that reflects an historic choice between economic development and preservation of coastal resources."⁹⁷ For that reason, "[w]ater-dependent uses generally should locate in existing centers of maritime activity in order to support the economic base and maintain the maritime character of these centers, and to avoid disturbance of shorelines and waters in open space areas."⁹⁸
- Policy 3 goes further and requires "enhance[ing] visual quality and protect[ing] scenic resources throughout Long Island Sound."⁹⁹ Policy 3 is based on the finding that "[v]isual 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."¹⁰⁰ Specific directives in Policy 3 include requirements to: "[e]nhance existing scenic characteristics by minimizing introduction of discordant features;"¹⁰¹ "[g]roup or orient structures to preserve open space and provide visual organization;"¹⁰² and "[p]revent impairment of

⁹⁴ New York State Department of State, Coastal Management Program, State Coastal Policies 33-35 (2002); see also Broadwater Coastal Zone Consistency Certification, at 308.

⁹⁵ Long Island Program, at 3.

⁹⁶ Id. at 4.

⁹⁷ Id. at 72.

⁹⁸ Id.

⁹⁹ Id. at 74.

¹⁰⁰ Id.

¹⁰¹ Id. at 75.

¹⁰² Id.

scenic components that contribute to high scenic quality.”¹⁰³ Thus, pursuant to Policy 3, it is not acceptable to create new adverse visual effects. Rather, new projects must preserve scenic resources or improve the aesthetic quality of existing facilities in order to comply with Policy 3.

The policies of the Long Island Program are enforceable under New York law. All state agency activities, including the approval of development projects and local zoning rules, must comply with the policies.¹⁰⁴

Building off of the Long Island Program, Local Waterfront Revitalization Programs provide additional management policies for specific shoreside communities. Several Sound communities, including Smithtown, Southold, and Greenport, have invested substantial effort in the development and adoption of Local Waterfront Revitalization Programs.¹⁰⁵ Such programs reflect and implement “the unique vision that each community has for managing its coastal uses and resources.”¹⁰⁶ New York, through its Environmental Protection Fund Local Waterfront Revitalization Program, has invested over \$17 million in conservation projects, in part to advance the goals and objectives of these local revitalization programs.¹⁰⁷

These state and local management plans recognize the important role that the Sound’s scenic character plays in the regional and local economies. The economic value of water-dependent recreation activities for Long Island Sound is estimated to be approximately \$2.238 billion annually.¹⁰⁸ Tourism on Long Island supports over 100,000 jobs with an estimated payroll of approximately \$2.2 billion.¹⁰⁹ For that reason, the Town of Riverhead’s Comprehensive Plan states that the Sound’s scenic character is essential to its “economic vitality and overall quality-of-life.”¹¹⁰ Many tourists visit public areas along the north shore of Long Island, some of which are in the vicinity of the Project. For instance, Wildwood State Park has an average of 300,000 visitors annually.¹¹¹ Other north shore state parks, including Caumsett, Sunken Meadow, Nissequogue, and Orient Beach, had over 2.4 million visitors in 2006 and 2007.¹¹² A survey by the Long Island

¹⁰³ Id.

¹⁰⁴ N.Y. Exec. L. art. 42, § 913; N.Y. Comp. Codes R. & Regs. tit. 19, §§ 600.3, 600.5, 600.6, 617.4, 617.6, 617.9.

¹⁰⁵ See Broadwater Coastal Zone Consistency Certification, at 236, 248, 272. Greenport’s program was approved in 1988, Smithtown’s in 1989, and Southold’s in 2005.

¹⁰⁶ Objection, at 15.

¹⁰⁷ Id.

¹⁰⁸ Town of Southold, Local Waterfront Revitalization Plan, Section II D-1 (Nov. 2005) (citing U.S. Environmental Protection Agency, The Economic Importance of Long Island Sound’s Water Quality Dependent Activities (1992)).

¹⁰⁹ LINHSA Management Plan, App., at 41-42.

¹¹⁰ Town of Riverhead Comprehensive Plan 5-2 (Nov. 2003).

¹¹¹ Objection, at 28.

¹¹² Id. (citing New York State OPRHP, North Shore Park Attendance Data 2007).

Sound Study found that 72 percent of the north shore's residents visit the Sound at least once a year simply to "sit, picnic, and enjoy the view."¹¹³

As proposed, the Project would significantly alter the scenic and aesthetic character of Long Island Sound. Located within the center of the Sound, the Project would be a fixed industrial structure that is 1,215 feet long and 200 feet wide, with a deck that would rise 75 to 100 feet above the water line.¹¹⁴ It would constitute the only surface structure of its kind within the Sound and would significantly differ in size from the vast majority of vessel traffic currently using the Sound.¹¹⁵ Flashing white lights would be installed on the terminal and the mooring tower as aids to navigation.¹¹⁶ Two flashing red "aviation obstruction" lights would likely be required by the Federal Aviation Administration, one on the emergency flare tower (approximately 280 feet above the water line) and a second on the radar mast adjacent to the helipad (approximately 180 feet above the water line).¹¹⁷ For increased daytime visibility, the 282-foot emergency flare tower would be painted with alternating bands of orange and white.¹¹⁸ The terminal would be visible 80 percent of the time from potential viewing locations distributed along approximately 44 miles of New York shoreline, and to all water-born vessels within 25 miles.¹¹⁹ Additionally, the terminal would be supported by LNG tankers larger than 99 percent of the vessels that currently use the Sound, increasing the volume of large commercial traffic within the Sound.¹²⁰

According to New York, the terminal would have a significant adverse effect on the scenic and aesthetic enjoyment of the Sound. The visual landscapes of the Sound are valued for their sweeping, unbroken water vistas, with views to the distant Connecticut shoreline and the transient passage of freighters, ferries, and commercial fishing vessels.¹²¹ These landscapes are a "major contributor to the character" of the region and

¹¹³ U.S. Environmental Protection Agency Region 2, Public Perception Survey of Long Island Sound Watershed Residents, Final Report (Nov. 16, 2006).

¹¹⁴ FEIS, at ES-2; Approval Order, at 2 ¶ 4.

¹¹⁵ Vessel traffic within the Sound consists primarily of recreational, fishing, and small commercial vessels. See Waterways Suitability Report § 2.2.1.1, at 25-27, and § 2.2.3, at 33-37. Very few ships similar in size to the terminal (1,215 feet in length) or the LNG tankers supporting the terminal (typically 886 to 1,132 feet in length) transit the Sound. Between 2003 and 2005, only two vessels in excess of 900 feet transited the Sound. Waterways Suitability Report § 2.2.1.1, at 25. During that same three-year time frame, only 79 vessels between 800 and 900 feet, and 226 vessels between 700 and 800 feet, transited the Sound. Id.

¹¹⁶ FEIS § 3.5.6.4, at 3-148.

¹¹⁷ Id. at 3-148, 3-151.

¹¹⁸ Id.

¹¹⁹ Id. at 3-147, and § 3.5.6.5, at 3-152.

¹²⁰ FEIS § 2.1.4, at 2-19. The LNG tankers making deliveries at the terminal would typically range in size between 886 and 1,132 feet in length. FEIS § 3.7.1.1, at 3-175. Tankers supporting the terminal would increase the number of large ships greater than 700 feet in length transiting the Sound by 100 to 150 percent. See id. (assuming 118 LNG tankers entering the Sound annually); Waterways Suitability Report § 2.2.1, at 21-22, and § 2.2.1.1, at 25.

¹²¹ New York Initial Brief, at 21.

“the primary basis for public appreciation of the Sound’s landscape.”¹²² The terminal would permanently alter the visual character of the Sound, creating a “fixed zone of discordant industrial activity interrupting the Sound’s vast, open maritime land and waterscapes,”¹²³ that would permanently change the character of the Sound and undermine decades of government efforts to improve the Sound’s scenic and aesthetic character.¹²⁴ Locating the terminal in the center of the Sound would exacerbate this effect by maximizing the number of coastal and on-water vantage points that would be visually affected.¹²⁵

While Broadwater acknowledges the Project would have visual effects, it believes New York’s characterization of these effects is exaggerated. It notes that the terminal would be located nine miles offshore – in part to minimize its appearance from shoreline vantage points.¹²⁶ In terms of scale, Broadwater asserts that the terminal would appear on the horizon smaller than the size of a small paperclip held at arm’s length.¹²⁷ The terminal would be completely invisible 20 percent of the time from many vantage points due to meteorological conditions.¹²⁸ When visible, it would appear similar to and consistent with the large commercial vessel traffic that already transits the Sound – in fact, the terminal would appear smaller than most commercial vessel traffic, as such traffic transits along commercial lanes located much closer to shore.¹²⁹ Visual effects to recreational boaters would be modest, considering most recreational vessels stay within three miles of shore.¹³⁰ Visual effects would be reduced through its use of a blue-green color scheme (for portions of the terminal other than the emergency flare tower) and best lighting practices.¹³¹ Finally, installation of the terminal is not inconsistent with other development in the Sound. In particular, Broadwater notes the existence of two offshore petroleum transfer platforms: the ConocoPhillips platform 1.2 miles off the coast of Riverhead and the Keyspan platform 1.8 miles north of Northport.¹³²

¹²² Long Island Program, at 74.

¹²³ New York Initial Brief, at 22.

¹²⁴ New York also argues that the Project would further effect the character of the Sound by facilitating future offshore industrial proliferation. According to the state, siting the Project in the center of the Sound would provide a precedent for future LNG facilities there because it would become an area where industrialization already exists. See New York Initial Brief, at 7-8. This risk, however, is largely speculative. Indeed, FERC concluded in the FEIS that it is highly unlikely that the Project would spur additional offshore development in the Sound. FEIS, at ES-9 to ES-10. The last energy facility sited in the Sound was 30 years ago and it did not increase development. Id. Also, there would be no economic benefit to clustering additional facilities near the terminal. Id.

¹²⁵ New York Initial Brief, at 23.

¹²⁶ Broadwater Initial Brief, at 14.

¹²⁷ FEIS § 3.5.6.4, at 3-148.

¹²⁸ Id.

¹²⁹ Broadwater Initial Brief, at 15 (citing FEIS § 3.5.6.4, at 3-148).

¹³⁰ Id. at 15-16 (citing FEIS § 3.5.5.1, at 3-138).

¹³¹ Id. at 16.

¹³² Id. at 16-17 (citing FEIS § 3.5.6.3, at 3-147).

Broadwater also attempts to minimize these visual effects through reliance upon various studies. One study argues that beach attendance and use of coastal areas has a weak relationship with the presence of an offshore energy facility, but is instead dependent on physical attributes of the area.¹³³ A second study allegedly supports its contention that property values would not diminish.¹³⁴ New York responds, however, that neither Broadwater nor FERC has conducted a visual impact analysis or public perception survey.¹³⁵ Rather, FERC simply conducted a literature review of the effects of other industrial projects on private property values.¹³⁶ Indeed, having considered these competing arguments, FERC concluded that the Project would differ from most existing industrial or commercial uses of the Sound and would result in moderate effects to visual resources.¹³⁷ In considering the competing arguments of Broadwater and the state, the record demonstrates that these studies are unpersuasive in diminishing the likely adverse effects to the scenic and aesthetic character of the Sound.

Based on the foregoing considerations, the record establishes that the adverse effects to the scenic and aesthetic enjoyment of the Sound would be significant. The terminal would introduce a fixed floating industrial structure into an area of the Sound otherwise devoid of development. This structure would be visible 80 percent of the time from potential viewing locations distributed along approximately 44 miles of New York shoreline on the north shore of Long Island. Efforts to characterize the terminal as akin to other commercial vessels within the Sound ignore the fact that the terminal is a fixed structure that is very different in character from other activity occurring on the Sound,¹³⁸ and would substantially diminish the scenic and aesthetic enjoyment of the Sound. While the scenic and aesthetic effects of this Project might carry less weight if located elsewhere, they are highly significant when occurring in an area that is nationally prized for its unspoiled scenic beauty and has been carefully managed for decades by federal, state, and local governments in a manner calculated to protect its unique scenic and aesthetic character.¹³⁹

¹³³ Id. at 17.

¹³⁴ Id.; FEIS § 3.5.6.5, at 3-153.

¹³⁵ New York Initial Brief, at 24.

¹³⁶ Id. at 24-25.

¹³⁷ FEIS § 3.5.6.5, at 3-152 to 3-153.

¹³⁸ Broadwater's view that similar development on the Sound already exists – namely the two currently existing petroleum transfer platforms at Riverhead and Northport – is misplaced. As the FEIS notes, both of these platforms “are located in shallow, nearshore waters outside the Project area.” FEIS § 3.11.3.2, at 3-319. The FEIS also indicates that those facilities are located in areas where similar development already exists – specifically, just offshore from existing harbors. Id. Additionally, the record further demonstrates that those platforms are unlike the Project. The KeySpan platform extends only 17 feet above the sea surface and the ConocoPhillips platform stands only 23 feet above the mean low-water level. Id.; FEIS § 3.11.5.5, at 3-324. Thus, the presence of these structures does not alter the conclusion that the Project would be the first permanent, fixed industrial facility located in the open waters of the Sound.

¹³⁹ In reaching this assessment, no deference to the views of New York has been afforded. Rather, this assessment reflects an independent analysis of the effects to scenic and aesthetic enjoyment, which is based in part upon the importance of this coastal use, as evidenced by past federal, state, and local management

ii. Adverse Coastal Effects from Entrainment and Impingement of Aquatic Organisms

The Project would impinge or entrain eggs, larvae, and other aquatic organisms incidental to the withdrawal of approximately 28.2 million gallons of water daily.¹⁴⁰ Withdrawals are primarily to provide ballast to the terminal and offloading LNG tankers, but also would provide cooling water for the terminal and other purposes.¹⁴¹

The level of entrainment and its significance are disputed by the parties. New York predicts the annual entrainment of approximately 274 million eggs, larvae, and juvenile aquatic organisms.¹⁴² These eggs, larvae, and juvenile organisms (referred to collectively as ichthyoplankton) either develop into adult fish or serve as a food source for larger fish and lobsters. In New York's view, impingement and entrainment would result in significant effects.¹⁴³ The Sound has been designated Essential Fish Habitat (EFH) under the Magnuson-Stevens Fishery Conservation and Management Act (MSA)¹⁴⁴ for dozens of federally managed fish species, including Atlantic salmon, red hake, winter flounder, Atlantic sea herring, bluefish, king mackerel, and Spanish mackerel.¹⁴⁵ The Sound has been designated an Estuary of National Significance and also supports many other "species of concern," most notably hard clams, soft shell clams, striped bass, American lobster, and a wide array of crustaceans and invertebrate forage species.¹⁴⁶

Broadwater disputes New York's assessment. In Broadwater's view, New York assumes a worst-case scenario and the actual level of entrainment would likely be less than half of what New York predicts at 131.5 million eggs, larvae, and juvenile organisms annually.¹⁴⁷ These entrainment levels are likely insignificant, according to Broadwater, given that only a very small percentage of these eggs and larvae would naturally survive to produce sexually mature fish.¹⁴⁸ Moreover, entrainment levels from the Project are insignificant when compared with current facilities on the Sound that collectively capture far larger numbers of aquatic organisms (up to 3.2 billion annually).¹⁴⁹

efforts.

¹⁴⁰ FEIS § 3.3.2.2, at 3-90.

¹⁴¹ Objection, at 35.

¹⁴² Id. at 33-34.

¹⁴³ Id. at 34; New York Initial Brief, at 14-17.

¹⁴⁴ 16 U.S.C. §§ 1801-1884.

¹⁴⁵ Letter from Patricia A. Kurkul, NOAA Fisheries, to Kimberly D. Bose, FERC 2 (Feb. 19, 2008).

¹⁴⁶ Id.

¹⁴⁷ Broadwater Initial Brief, at 19 (citing FEIS § 3.3.2.2, at 3-90).

¹⁴⁸ Id. at 19-20 (citing FEIS § 3.3.2.2, at 3-91).

¹⁴⁹ Broadwater Initial Brief, at 12 (citing Northport Generating Station Biological Fact Sheet – Cooling Water Intake Structures 2; Northport Generating Station State Pollutant Discharge Elimination System Discharge Permit (Jan. 4, 2006)).

Resource agencies that have reviewed the Project have acknowledged likely effects due to entrainment of aquatic organisms. In comments on the draft Environmental Impact Statement (EIS) prepared by FERC, the Northeast Regional Office of NOAA's National Marine Fisheries Service (NOAA Fisheries) initially stated that its ability to assess effects to EFH and associated marine resources "was complicated by less than optimal information"¹⁵⁰ and that FERC should supplement its analysis of effects to EFH before completing the NEPA process.¹⁵¹ In subsequent comments on the final EIS, NOAA Fisheries noted that water withdrawals and pipeline construction would adversely affect EFH and provided 19 separate conservation recommendations – developed through its ongoing EFH consultation – that would, in part, minimize entrainment.¹⁵² In recent comments on this appeal, NOAA Fisheries reiterated those comments it provided during the development of the EIS, and noted that, while FERC has yet to respond to its conservation recommendations, consultation is ongoing.¹⁵³ It further explained that "water intakes and associated entrainment and impingement require minimization, and are issues that remain to be addressed."¹⁵⁴

In commenting on the draft EIS, the U.S. Fish and Wildlife Service (FWS) also expressed "concerns regarding the effects on fish and other aquatic organisms" stemming from the withdrawal and discharge of large volumes of water, and suggested additional mitigation measures intended to minimize entrainment.¹⁵⁵ In recent comments on this appeal, FWS reiterated many of the concerns originally expressed, and continued to regard entrainment as having "a substantial impact on a number of finfish" that use the Sound as a migratory corridor.¹⁵⁶

In its comments on the final EIS, New York's Department of Environmental Conservation stated that entrainment and impingement "is a significant adverse impact to the aquatic ecology of Long Island Sound" and that FERC "incorrectly" minimized this impact.¹⁵⁷ The Department of Environmental Conservation also concluded that entrainment and impingement "will damage the aquatic ecology by removing these organisms as a food source for fishery and lobster populations in this area of the Sound."¹⁵⁸ According to the Department of Environmental Conservation, "[t]his

¹⁵⁰ Letter from Patricia A. Kurkul, NOAA Fisheries, to Magalie R. Salas, FERC 5 (Jan. 23, 2007).

¹⁵¹ *Id.* at 3. NOAA Fisheries specifically identified several categories of information that would be needed in order to assess effects on EFH, including "a full assessment of water intake/discharge impacts on aquatic communities in LIS, including harvested species and their forage. This analysis should be extended to include a discussion of adverse effects to EFH for species with local designations." *Id.* at 5.

¹⁵² Letter from Patricia A. Kurkul, NOAA Fisheries, to Kimberly D. Bose, FERC 2-7 (Feb. 19, 2008).

¹⁵³ Letter from Patricia A. Kurkul, NOAA Fisheries, to Jamon L. Bollock, NOAA 2 (Jan. 30, 2009).

¹⁵⁴ *Id.*

¹⁵⁵ Letter from David A. Stilwell, FWS, to Magalie R. Salas, FERC 2 (Jan. 18, 2007).

¹⁵⁶ Letter from Marvin E. Moriarty, FWS, to Jamon L. Bollock, NOAA 1 (Dec. 29, 2008).

¹⁵⁷ Letter from John Ferguson, NYSDEC, to Kimberly D. Bose, FERC 2 (March 17, 2008).

¹⁵⁸ Letter from John Ferguson, NYSDEC, to Murray Sondergard, Broadwater 2 (June 11, 2008).

potential food chain effect is unaddressed anywhere in the project documents.”¹⁵⁹

FERC ultimately concluded in the final EIS that, with proper mitigation measures, the effect on the aquatic habitat through impingement and entrainment would not be significant.¹⁶⁰ The terminal would be located in deeper water near the center of the Sound, which contains lower densities of marine populations.¹⁶¹ According to FERC, because the predicted number of organisms affected by the Project represents a small percentage of the “standing crop” of ichthyoplankton (approximately 0.1 percent), the losses “are not expected to affect the overall finfish, lobster, or plankton population.”¹⁶² FERC also noted that the Project was subject to future consultation (which has yet to conclude) under the MSA.¹⁶³

With respect to these adverse coastal effects, the record establishes that the Project would affect the aquatic ecosystem through the entrainment and impingement of eggs, larvae, and juvenile aquatic organisms, but that the effects are likely to be minimal. As FERC notes, the terminal’s water intake would occur in an area where marine organisms are less abundant, and the predicted number of organisms affected by the Project represents a small percentage of the “standing crop” of ichthyoplankton. For its part, Broadwater has agreed to adopt and implement all mitigation measures offered by NOAA Fisheries during the construction of the Project.¹⁶⁴ The only recommendation to which Broadwater has not committed is FWS’s recommendation to use wedgewire screens, which Broadwater claims, and FERC agrees, would not be feasible.¹⁶⁵

iii. Adverse Coastal Effects on Benthic Habitat

The Project includes the construction of a 21.7-mile, 30-inch-diameter pipeline extending from the terminal’s mooring tower to an interconnection with the Iroquois Gas Transmission System pipeline.¹⁶⁶ Approximately 4,000 feet of this pipeline would cross Stratford Shoal.¹⁶⁷ Once the pipeline is laid, it would be buried beneath the seafloor to a depth of three feet, except for the first two miles extending from the terminal, which would be buried to a depth of five feet.¹⁶⁸ Burial would be accomplished by way of a subsea plow, towed along the seabed by a lay barge.¹⁶⁹ This plow would create a trench

¹⁵⁹ Id.

¹⁶⁰ FEIS § 3.3.2.2, at 3-91.

¹⁶¹ Id.

¹⁶² Id.

¹⁶³ Approval Order, App. B, at 39 ¶ 25.

¹⁶⁴ Letter from Sara Allen-Mochrie, Broadwater, to Diane Rusanowsky, NOAA Fisheries 1 (Feb. 29, 2008).

¹⁶⁵ FEIS § 3.3.2.2, at 3-90.

¹⁶⁶ Approval Order, at 1 ¶ 1.

¹⁶⁷ FEIS § 3.1.2.2, at 3-31.

¹⁶⁸ Id.

¹⁶⁹ Id. at 3-29.

25 feet wide, with a spoil mound 25 feet wide on each side.¹⁷⁰ If seafloor conditions preclude use of a subsea plow – notably the substrate along Stratford Shoal – Broadwater would trench the seafloor by way of dredging.¹⁷¹ In addition to the pipeline, the Project includes the construction of a mooring tower for the terminal, which would be permanently imbedded in the sea floor.¹⁷²

The benthic communities that the pipeline would cross can be divided into four general categories: a Deep Basin Mud Community; a Western Transition Community; a Shoal Community; and an Eastern Transition Community. The Deep Basin Mud Community is located on the eastern and western ends of the pipeline. The substrate in this location is characterized by fine silt and sand, with patches of clay. Dominant benthic organisms within this community include polychaetes, amphipods, and juvenile bivalves. The Western Transition Community, located to the west of the Stratford Shoal, consists of a fine-grained silt substrate, and contains pea crabs, tunicates, and polychaete worms as its dominant organisms. The Shoal Community, located on the Stratford Shoal, has a substrate consisting primarily of gravelly sand and bedrock. Organisms on the Shoal include a variety of bivalve, crustacean, and polychaete species. Additionally, the Shoal is home to aggregations of finger sponges, northern star coral, and blue mussels. Finally, the Eastern Transition Community, located just east of Stratford Shoal, is made up of silt and sand, and is home for a benthic community consisting of polychaetes, burrowing anemones, and tunicates.¹⁷³ Additionally, the entire pipeline route is home to a variety of crustaceans, most notably several species of crab and American lobster.¹⁷⁴

The Project likely would result in mortality to those benthic organisms residing along the footprint of the Project. Pipeline trenching would result in mortality along a 75-foot wide path over the 21.7-mile run of pipeline – a total area of 263 acres.¹⁷⁵ Should dredging be required along the Shoal, effects would extend to an additional five acres of benthic environment.¹⁷⁶ Pipeline installation also would result in mortality to benthic organisms within an additional 16 acres of seabed affected by anchors used to secure and propel the lay barge.¹⁷⁷ Finally, installation of the yoke mooring system would result in mortality to benthic organisms within the 0.8-acre footprint of the mooring tower.¹⁷⁸

Recovery of the benthic environment would occur at varying rates, depending upon location and species affected. Benthic communities that inhabit muds (like those along

¹⁷⁰ Id.

¹⁷¹ Id. at 3-31.

¹⁷² Id. at 3-27.

¹⁷³ FEIS § 3.3.1.1, at 3-66.

¹⁷⁴ Id. at 3-67.

¹⁷⁵ Id. at 3-69 to 3-70.

¹⁷⁶ Id. at 3-70.

¹⁷⁷ FEIS § 3.1.2.2, at 3-29.

¹⁷⁸ FEIS § 3.3.1.2, at 3-69.

most of the pipeline route) typically recover within one year.¹⁷⁹ Communities that inhabit sands and gravels can take two to three years to recover, and even longer where slow-growing components such as coral species are present.¹⁸⁰ Because northern star coral is common throughout the Sound, it is anticipated that adjacent communities not affected by construction would aid in reestablishing populations in disturbed areas through natural recruitment,¹⁸¹ although the extent and rate at which this would occur is uncertain.¹⁸²

NOAA Fisheries has expressed concerns as to the Project's effect on benthic resources. While the agency did not independently characterize the nature or extent of benthic effects caused by the Project, it noted that the Project would adversely affect benthic habitat, in part through disturbance and re-suspension of seabed sediments.¹⁸³ In connection with its providing recommendations addressing effects to EFH as discussed above, NOAA Fisheries included recommendations that would, in part, avoid or minimize benthic effects. Recommendations that address benthic concerns include: (a) attaching mid-line buoys to anchor lines that secure and propel the lay barge, in order to minimize effects to the seabed resulting from slack anchor lines as the lay barge moves along the path of the pipeline; (b) backfilling the trench using excavated spoil in order to accelerate recovery; and (c) reconsulting with the agency should Broadwater need to dredge at Stratford Shoal.¹⁸⁴ Broadwater has agreed to adopt and implement all recommended mitigation measures proposed by the agency during Project construction and operation,¹⁸⁵ and the agency's recommendations are now either incorporated into the scope of the Project or included as conditions within FERC's Approval Order.¹⁸⁶

In recent comments on this appeal, NOAA Fisheries reaffirmed its position, as reflected in its comments on the final EIS, and noted that FERC has yet to respond to all of its EFH conservation recommendations. The agency does not specify which recommendations remain unaddressed, but it does suggest that these remaining recommendations would

¹⁷⁹ Id. at 3-70.

¹⁸⁰ Id.

¹⁸¹ Id.

¹⁸² See Sean Patrick Grace, A Long Island Sound Survey of the Temperate Scleractinian Coral *Astrangia Poclata* (Grant Proposal) 1; R.C. Newell et al., Impacts of Marine Aggregate Dredging on Benthic Macrofauna off the South Coast of the United Kingdom, 20 J. of Coastal Res. 115, 123-124 (2004), cited in, FEIS § 3.3.2.2, at 3-70.

¹⁸³ Letter from Patricia A. Kurkul, NOAA Fisheries, to Kimberly D. Bose, FERC 2 (Feb. 19, 2008).

¹⁸⁴ Id. at 4-6.

¹⁸⁵ Letter from Sara Allen-Mochrie, Broadwater, to Diane Rusanowsky, NOAA Fisheries 1 (Feb. 29, 2008).

¹⁸⁶ See Approval Order, App. B, at 37-38 ¶¶ 13-17. FERC's Approval Order requires that Broadwater file plans with FERC "describing methods to mechanically backfill the trench with excavated spoil material in a manner that successfully results in the excavated material being returned to the trench following installation. The plan shall be developed in coordination with COE, EPA, and [NOAA Fisheries] to identify the conditions under which backfilling would be required [and] the appropriate methods for backfilling." Id. at 37 ¶ 16.

later be addressed through further consultation as the Project moves forward.¹⁸⁷ Additionally, the agency does not attempt to characterize the nature or level of effect to benthic resources assuming its recommended mitigation measures are incorporated.

With respect to these adverse coastal effects, the record establishes that effects to benthic habitat are likely to be limited, temporary, and minor for most of the pipeline route. As FERC notes, effects to the majority of the pipeline route would be minimal and recovery in most areas could be complete within about one year.¹⁸⁸ Effects would be greater in the Stratford Shoal, and recovery would take longer there due to the type and variety of species affected and the nature of the substrate.¹⁸⁹ Nonetheless, even in the Stratford Shoal, effects would be limited to a small area and recovery could take place within a few years.¹⁹⁰ The adverse effects from pipeline construction have been largely addressed by the resource agencies through proposed mitigation measures, which have been adopted by Broadwater through the continuing EFH consultation process. None of the resource agencies that have commented on this appeal have stated that effects resulting from pipeline construction would be unacceptable.

iv. Adverse Coastal Effects on Vessel Traffic

The Project would result in adverse coastal effects to both commercial and recreational vessels. These effects result from the need to establish safety and security zones around both the terminal and LNG tankers transiting the Sound. These safety and security zones are both required by the Coast Guard in order to make the Sound suitable for the Project and a condition of FERC's Approval Order.¹⁹¹ As discussed earlier in this decision, navigational effects are reasonably foreseeable adverse coastal effects resulting from the Project. The review on appeal from a state's consistency objection must consider all reasonably foreseeable coastal effects from a proposed project.¹⁹² Therefore, navigational effects must be considered as part of this appeal.

There are two potential navigational conflicts resulting from the Project: conflicts resulting from the terminal and conflicts resulting from LNG tanker traffic. As to the terminal, the Coast Guard would establish a safety and security zone around the mooring tower that would have a 1,200-yard (0.7-mile) radius and would take up approximately 1.5 square miles.¹⁹³ All vessels would be required to avoid the safety and security zone around the terminal, with the exception of ferries and certain fishing vessels.¹⁹⁴ As to

¹⁸⁷ Letter from Patricia A. Kurkul, NOAA Fisheries, to Jamon L. Bollock, NOAA 2 (Jan. 30, 2009).

¹⁸⁸ FEIS § 3.1.2.2, at 3-32, and § 3.3.1.2, at 3-70.

¹⁸⁹ FEIS § 3.3.1.2, at 3-70.

¹⁹⁰ FEIS § 3.1.2.2, at 3-32, and § 3.3.1.2, at 3-70.

¹⁹¹ Approval Order, at 31 ¶ 90(h), App. B, at 50 ¶ 86.

¹⁹² 15 C.F.R. §§ 930.11(g), 930.121(b).

¹⁹³ FEIS § 3.7.1.1, at 3-174.

¹⁹⁴ FEIS § 3.7.1.4, at 3-198.

tanker traffic, approximately two to three LNG tankers would make deliveries to the terminal weekly, entering the Sound from one of two established navigational routes.¹⁹⁵ Each LNG carrier would have a safety and security zone of 3.2 square miles, extending 2 nautical miles ahead, 1 nautical mile behind, and 750 yards on each side.¹⁹⁶ All vessels, including fishing and commercial traffic, would be prohibited from entering the safety and security zone around a carrier. Commercial vessels could be required to wait up to 40 to 60 minutes while LNG carriers are transiting due to the time required to weigh anchor, move, wait, return to the original location, and reset the anchor.¹⁹⁷ Commercial vessels changing course could potentially interfere with other commercial, recreational, and fishing vessels.¹⁹⁸ Also, LNG carriers passing through the Montauk Channel would disrupt commercial fishing and trawling lanes.¹⁹⁹

LNG tanker traffic through the Race – a popular boating and fishing area on the eastern edge of the Sound – presents the most significant navigational effect. There is considerable vessel traffic through the Race because it is the main entrance to the Sound from the east used by commercial deep-draft, tug, and barge traffic, commercial ferries, charter fishing boats, recreational boats, and military ships. Approximately 4,000 to 7,000 commercial vessels transit the Race annually.²⁰⁰ The most constricted portion of the Race is the 1.4-mile wide area between Race Rock and Valiant Rock.²⁰¹ There, more than half the distance would be taken up by an LNG tanker’s safety and security zone.²⁰² Additionally, weather, sea state, and vessel traffic congestion in the Race may cause LNG carriers to reduce speed, resulting in longer transit times.²⁰³ The final EIS estimates that 210 deep-draft vessels per year would experience displacement when attempting to approach or transit the Race at the same time as an LNG carrier.²⁰⁴

The Coast Guard’s Waterways Suitability Report concluded that, with the implementation of several mitigation measures, including the establishment of security and safety zones, the Sound is suitable for operation of the terminal and LNG vessel traffic. Regarding the terminal, the Coast Guard assessed potential risks to navigational safety and found the Sound a suitable waterway, provided mitigation measures were adopted.²⁰⁵ Recreational boating is generally concentrated to within 3.5 miles of the

¹⁹⁵ Waterways Suitability Report § 2.1, at 16-17.

¹⁹⁶ FEIS § 3.7.1.1, at 3-176.

¹⁹⁷ FEIS § 3.5.5.1, at 3-140.

¹⁹⁸ FEIS § 3.6.8.4, at 3-171, and § 3.7.1.4, at 3-201.

¹⁹⁹ FEIS § 3.5.5.1, at 3-140; Objection, at 10, 59.

²⁰⁰ FEIS § 3.6.8.1, at 3-170.

²⁰¹ FEIS § 3.7.1.1, at 3-176.

²⁰² Id.

²⁰³ Waterways Suitability Report § 3.2.5.1.1, at 78.

²⁰⁴ FEIS § 3.6.8.1, at 3-170.

²⁰⁵ Waterways Suitability Report §§ 8.3, 8.4, at 162.

shore.²⁰⁶ Satellite data demonstrates that recreational boating in proximity to the location of the terminal is minimal (less than two boats per day within three miles of the proposed location).²⁰⁷ Based on the width of the Sound and the low density of boat traffic in the area, recreational traffic could easily route around the terminal.²⁰⁸ Commercial shipping would not be affected because the terminal would be located in a spot between the two primary shipping routes in order to minimize disruptions.²⁰⁹ Boat traffic surveys and satellite data have confirmed that commercial vessel traffic uses the two main shipping routes and, therefore, would not be negatively affected.²¹⁰ Moreover, Broadwater has committed to additional mitigation measures, such as allowing traditional users (e.g., ferries and commercial fishermen) to freely transit the proposed terminal safety and security zone.²¹¹

Regarding the safety and security zones around the LNG carriers, the Coast Guard similarly assessed potential risks to navigational safety and found the Sound a suitable waterway, provided mitigation measures were adopted.²¹² The safety and security zones around the LNG carriers would affect any particular location for no more than 15 minutes, four to six times per week.²¹³ Outside the Race, the routes that will be traveled by the carriers are not in high use and are surrounded by waters with unrestricted access.²¹⁴ In the Race, LNG carriers would be present in any given location less than one percent of the time.²¹⁵ Vessels that are not deep-draft would be able to pass through the Race simultaneously with LNG carriers because they can travel closer to shore.²¹⁶ Deep-draft vessels would be disrupted for a short period of time.²¹⁷ Broadwater has committed to mitigation measures recommended in the Waterways Suitability Report, such as giving priority to other commercial traffic, restricting LNG carriers to transiting the Race only at nighttime, and avoiding the Race during slack tide to minimize interference with lobster harvesters.²¹⁸

Comments on the adverse coastal effects on vessel traffic from navigational conflicts

²⁰⁶ Waterways Suitability Report § 3.1.2.3, at 51.

²⁰⁷ FEIS § 3.5.5.1, at 3-138; Response to Comments on Broadwater's Petitions and Applications for Easements over New York State Lands 63-66 (Jan. 2008).

²⁰⁸ FEIS § 3.7.1.4, at 3-200.

²⁰⁹ *Id.* at 3-198, and § 3.7.1.3, at 3-183 to 3-187.

²¹⁰ FEIS § 3.5.5.1, at 3-138, § 3.7.1.3, at 3-182 to 3-192, and § 3.7.1.4, at 3-198.

²¹¹ Letter from Jimmy Culp, Broadwater, to Jeffrey Zappieri, NYSDEC 3-4, 11-12 (April 2, 2008).

²¹² Waterways Suitability Report §§ 8.3, 8.4, at 162.

²¹³ FEIS § 3.6.8.1, at 3-170, and § 3.7.1.4, at 3-201; Approval Order, at 3 ¶ 5.

²¹⁴ FEIS § 3.6.8.4, at 3-171.

²¹⁵ FEIS § 3.6.8.1, at 3-170.

²¹⁶ Waterways Suitability Report § 2.2.3.1, at 34.

²¹⁷ FEIS § 3.6.8.1, at 3-170.

²¹⁸ Letter from Jimmy Culp, Broadwater, to Jeffrey Zappieri, NYSDEC 3-4, 9-10 (April 2, 2008).

were specifically requested from other federal agencies involved in ongoing reviews of the Project, including the Coast Guard, FERC, and the U.S. Army Corps of Engineers. These agencies provided no negative comments regarding these adverse coastal effects.

With respect to adverse coastal effects on vessel traffic, the record establishes that they would not be significant throughout most of the Sound, but would be moderate within the Race. Navigational conflicts would occur because LNG vessels would add to the overall vessel traffic in the Sound and may adversely affect commercial and recreational vessels, particularly in the Race. Nevertheless, effects would be temporary, limited in scope, and largely mitigated through measures recommended by Broadwater to minimize the effects consistent with security requirements for LNG vessels.

v. Adverse Coastal Effects on the Commercial Fishing and Lobster Industries

The Project would affect commercial trawlers and lobster fishers, largely through the establishment and operation of safety and security zones around the terminal and LNG carriers.

As to trawling, the 1.5-square-mile safety and security zone surrounding the terminal would preclude the use of 30 percent of two trawling lanes.²¹⁹ These lanes, however, are used by at most twelve trawlers, all of which fish in other areas of the Sound.²²⁰ Total revenue lost to trawlers is estimated to be approximately \$42,000 (and at most \$53,000) over the 30-year useful life of the Project.²²¹ Trawlers affected by the Project would be able to continue to operate in other areas of the Sound and would be fully compensated by Broadwater.²²²

As to lobster fishing, the terminal would be located in an area traditionally fished for lobster and the terminal's safety and security zone would preclude the use of that area by fishers.²²³ Only nine lobster fishers, however, currently use that area.²²⁴ Total annual revenue lost to lobster fishing (both directly and indirectly) would be \$48,166 and the total economic effect to the lobster industry over the useful life of the Project would be \$648,775.²²⁵ This represents less than one percent of the estimated value of the lobster

²¹⁹ FEIS § 3.6.8.1, at 3-168.

²²⁰ Waterways Suitability Report § 3.1.2.3.1, at 53; FEIS § 3.7.1.3, at 3-194, and § 3.7.1.4, at 3-200; Approval Order, at 22 ¶ 59.

²²¹ Broadwater Coastal Zone Consistency Certification, App. E, Marine/Land Use Compatibility Assessment 18 (April 2006), App. F, Commercial Fisheries, Recreation, and Long Island Sound Dependent Commercial Activities – An Economic Analysis 38 (April 2006).

²²² Letter from Jimmy Culp, Broadwater, to Jeffrey Zappieri, NYSDEC 3-4, 11-15 (April 2, 2008).

²²³ FEIS § 3.7.1.4, at 3-199.

²²⁴ FEIS § 3.6.8.1, at 3-169.

²²⁵ Broadwater Initial Brief, at 24.

industry in the Sound.²²⁶ Lobster fishers affected by the Project would be able to continue to operate in other areas of the Sound, however, and would be fully compensated by Broadwater.²²⁷

The final EIS determined that the Project's effects on commercial trawling and lobster fishing would be minor due to the small number of trawlers and lobster fishers and Broadwater's commitment to compensate those affected by the Project.²²⁸ Broadwater has established a Fisheries Advisory Council to formulate compensation packages, and FERC's Approval Order requires compensation agreements to be complete prior to commencement of the Project.²²⁹ The final EIS also noted that this minor effect would not result in a measurable effect on the economies of local fishing communities.²³⁰

Comments on the adverse coastal effects on the commercial fishing and lobster industries were specifically requested from other federal agencies involved in ongoing reviews of the Project, including the Coast Guard, FERC, and the Army Corps of Engineers, as well as resource-management agencies including NOAA Fisheries, FWS, and EPA. These agencies provided no negative comments regarding these adverse coastal effects.

With respect to these adverse coastal effects, the record establishes that they would not be significant. Effects would be limited and largely mitigated through financial compensation by Broadwater.

vi. Adverse Coastal Effects on Endangered and Threatened Species

Although not raised by New York, the adverse coastal effects of the Project on endangered and threatened species have also been considered. Constructing and operating a major energy project in the middle of an estuary of national significance would invariably affect some individual members of federally listed species. For that reason, FERC engaged in consultation with NOAA Fisheries pursuant to Section 7 of the Endangered Species Act (ESA).²³¹ Consultation examined potential effects to listed aquatic species in the Sound, including loggerhead, leatherback, Kemp's ridley, and green sea turtles, as well as right whales, humpback whales, and fin whales, which may be found seasonally near the entrance to the Sound.²³²

Following consultation, NOAA Fisheries concurred with FERC's determination that the Project is not likely to adversely affect threatened or endangered species within its jurisdiction. Although construction of the terminal and pipeline has the potential to affect

²²⁶ *Id.*

²²⁷ FEIS § 3.7.1.4, at 3-199.

²²⁸ FEIS § 3.6.8.1, at 3-170.

²²⁹ Approval Order, App. B, at 39 ¶ 29.

²³⁰ FEIS § 3.6.8.1, at 3-170.

²³¹ 16 U.S.C. § 1536.

²³² Letter from Patricia A. Kurkul, NOAA Fisheries, to Kimberly D. Bose, FERC 2-3 (Nov. 14, 2008).

sea turtles through interaction with equipment, turbidity, and diminished water quality, potential effects were either “insignificant or discountable” because turtles would be present in the Sound during only one month of construction,²³³ turtles are not commonly known to forage near the pipeline route,²³⁴ and Broadwater must comply with state water-quality standards.²³⁵ Similarly, effects to whales were deemed insignificant or discountable because the vessel-speed restriction of ten knots already in place in the area where whale sightings have occurred would protect whales from ship collisions.²³⁶

Additionally, FWS has completed its Section 7 consultation with the Coast Guard regarding potential risks to listed and candidate bird species, particularly the piping plover, roseate tern, and red knot, resulting from the creation of LNG carrier traffic and hazard zones.²³⁷ FWS concurred with the Coast Guard’s determination that the Project is not likely to adversely affect those species.²³⁸ The risk of a collision or allision of an LNG carrier is “anticipated to be remote and, therefore, extremely unlikely to occur.”²³⁹ Consequently, “any adverse effects that might result from a collision or allision are expected to be discountable.”²⁴⁰

Several other species of marine mammals that are not protected under the ESA are present in the Sound. These include several pinniped species, with the harbor seal and gray seal being the most abundant.²⁴¹ All marine mammals are protected under the Marine Mammal Protection Act of 1972 (MMPA).²⁴² The final EIS indicates that pile-driving during construction may generate noise levels that could adversely affect marine mammals present in the area.²⁴³ The final EIS ultimately concludes, however, that effects on marine mammals from noise during construction would be “insignificant and temporary” because any affected marine mammals would be expected to leave construction areas and return when construction stops, and Broadwater plans to limit pile driving to daylight hours for a four-week period.²⁴⁴ Also, Broadwater intends to employ mitigation measures to reduce potential effects, including the use of bubble curtains to limit sound propagation, as well as commencing pile driving with lower force and

²³³ Id. at 3.

²³⁴ Id. at 4.

²³⁵ Id.

²³⁶ Id. at 9-10.

²³⁷ Letter from David A. Stilwell, FWS, to Daniel A. Ronan, U.S. Coast Guard (Jan. 7, 2009).

²³⁸ Id.

²³⁹ Id.

²⁴⁰ Id.

²⁴¹ Letter from Patricia A. Kurkul, NOAA Fisheries, to Kimberly D. Bose, FERC 11 (Nov. 14, 2008); FEIS § 3.3.4.1, at 3-102.

²⁴² 16 U.S.C. § 1372.

²⁴³ FEIS § 3.3.4.2, at 3-103.

²⁴⁴ FEIS § 3.3.4.2, at 3-104.

gradually increasing to full capacity.²⁴⁵ Broadwater has also committed to avoid active construction while marine mammals are present and to use trained observers to identify any marine mammals near construction areas.²⁴⁶ FERC's Approval Order requires Broadwater to coordinate with NOAA Fisheries to identify appropriate mitigation measures to minimize potential noise effects to potentially affected species during construction and operation.²⁴⁷ This may require underwater acoustic modeling to determine the need for an incidental take permit under the MMPA.²⁴⁸ NOAA Fisheries has informed Broadwater that it is responsible for obtaining an incidental take permit if construction has the potential to harass any marine mammals.²⁴⁹ Broadwater has not yet stated an intent to apply for an incidental take permit, and New York has pointed to no record evidence demonstrating that an incidental take permit would be necessary.

Comments on the adverse coastal effects to endangered and threatened species were specifically requested from federal resource-management agencies involved in ongoing reviews of the Project, including NOAA Fisheries, FWS, and EPA. These agencies provided no negative comments regarding these adverse coastal effects.

With respect to these adverse coastal effects, the record establishes that effects to endangered and threatened species would not be significant. NOAA Fisheries and FERC both found that the construction and operation of the Project are not likely to adversely affect listed species of sea turtles or whales.

b. *Cumulative Adverse Coastal Effects*

Cumulative adverse coastal effects have been defined in past decisions as “the effects of an objected-to activity when added to the baseline of other past, present, and future activities in the area of, and adjacent to, the coastal zone in which the objected-to activity is likely to contribute to adverse effects on the natural resources of the coastal zone.”²⁵⁰ Thus, an analysis of cumulative effects considers the adverse coastal effects of a project when added to the temporary or permanent effects associated with other activities that already are likely to occur.

The final EIS examined the cumulative adverse coastal effects of the Project when aggregated with anticipated effects from twelve existing and planned operations in the Sound.²⁵¹ In general, the primary effects of many of these projects would not

²⁴⁵ Id.

²⁴⁶ Id.

²⁴⁷ Approval Order, at 26 ¶ 74.

²⁴⁸ FEIS § 3.3.4.2, at 3-104.

²⁴⁹ Letter from Patricia A. Kurkul, NOAA Fisheries, to Kimberly D. Bose, FERC 11 (Nov. 14, 2008).

²⁵⁰ AES, at 39; Weaver's Cove, at 33; Decision and Findings in the Consistency Appeal of Chevron USA, Inc., at 45 (Oct. 29, 1990).

²⁵¹ The twelve facilities include two existing and one proposed natural gas pipeline, five existing subsea telecommunications or electric transmission cables, two offshore oil transfer platforms, and two proposed dredged material disposal sites. FEIS § 3.11, at 3-312.

substantially overlap temporally with the Broadwater Project because they are primarily complete.²⁵²

Effects to visual resources were considered along with two existing nearshore oil transfer platforms.²⁵³ The platforms themselves were deemed far enough away from the terminal not to create cumulative visual effects. FERC concluded that the presence of tankers making deliveries to the platforms would not result in significant cumulative visual effects.²⁵⁴

As to the construction of the pipeline, the final EIS considered the cumulative effects of this pipeline given the proposed Islander East pipeline construction project, the existing Iroquois Gas Transmission System pipeline, including the Eastchester Extension pipeline,²⁵⁵ several existing subsea telecommunications or electric transmission cables,²⁵⁶ and two dredge material disposal sites.²⁵⁷ In particular, cumulative effects from the existing pipelines and cables would not be significant, according to the final EIS, because those projects are largely physically removed from the planned Broadwater pipeline route and recovery of the benthic habitats affected by construction of those facilities has either occurred or is assumed.²⁵⁸ Construction of the proposed Islander East pipeline could have “the potential to contribute cumulative impacts to the project area” if the Broadwater pipeline is constructed at the same time.²⁵⁹ Given the likelihood of expected delays for the Islander East pipeline,²⁶⁰ however, along with mitigation measures that have been adopted for both projects, the final EIS concluded that possible cumulative effects would be avoided or minimized.²⁶¹

²⁵² Id.

²⁵³ FEIS § 3.11.3.2, at 3-319, and § 3.11.5.5, at 3-323 to 3-324.

²⁵⁴ FEIS § 3.11.5.5, at 3-323 to 3-324.

²⁵⁵ FEIS § 3.11.1, at 3-312 to 3-317.

²⁵⁶ FEIS § 3.11.2, at 3-317 to 3-318.

²⁵⁷ FEIS § 3.11.3, at 3-319.

²⁵⁸ FEIS § 3.11.5.4, at 3-323.

²⁵⁹ FEIS § 3.11.5.9, at 3-326; see also FEIS § 3.11.5.4, at 3-323.

²⁶⁰ The Islander East project, as currently proposed, cannot go forward. The State of Connecticut has denied the applicant’s request for a certification under Section 401 of the Clean Water Act, which is a prerequisite for the issuance of a permit by the Army Corps of Engineers under Section 404 of the Clean Water Act. The United States Supreme Court declined to consider the state’s denial. See Islander East Pipeline Co. v. McCarthy, 129 S. Ct. 630 (Dec. 1, 2008). Separately, Connecticut objected to the Islander East project as inconsistent with its coastal management program, and the applicant appealed to the Department of Commerce under Section 307 of the CZMA. On March 10, 2009, the Department dismissed as moot Islander East’s federal consistency appeal, precluding the issuance of certain federal permits necessary for the project as currently proposed. See Letter from Jane H. Chalmers, NOAA, to David Wrinn, Assistant Attorney General, State of Connecticut, and Frederick M. Lowther, Islander East (Mar. 10, 2009).

²⁶¹ FEIS § 3.11.1.1, at 3-316, and § 3.11.5.9, at 3-326.

With respect to water intake, the final EIS considered effects from existing facilities at the Millstone Nuclear Power Plant and KeySpan’s power-generation facilities at Northport, Port Jefferson, and Wading River.²⁶² Here, the final EIS found that there would be no spatial overlap with effects from entrainment and impingement at the Broadwater Project because each of those facilities is located at least 40 miles from the site of the proposed terminal, and because water-intake effects dissipate moving away from those facilities due to tidal flushing, currents, and the overall volume of the Sound.²⁶³ For those reasons, the final EIS concluded that cumulative effects from water intake at these two existing power-generating facilities would be insignificant.²⁶⁴

Existing commercial vessel traffic, along with expected increases in vessel traffic, was considered cumulatively with respect to navigational effects.²⁶⁵ If commercial shipping in the Sound increases in the future, vessels may be required to change course and speed more frequently.²⁶⁶ Even then, the final EIS concluded that the cumulative effect on shipping would be minor.²⁶⁷ On the other hand, if the construction schedule for the Islander East pipeline overlaps with the schedule for the Broadwater Project, “temporary and minor” cumulative effects on recreational and commercial boaters could occur.²⁶⁸ The final EIS found that vessel-to-vessel communication and scheduling would minimize those effects during construction, as demonstrated during the completion of existing pipelines and cables.²⁶⁹

Overall, the final EIS concluded that cumulative effects relative to the baseline of other past, present, and future activities in the area would not be significant, assuming FERC’s mitigation recommendations are followed and Broadwater complies with all applicable laws and permit requirements.²⁷⁰ The record does not support a finding to the contrary. Thus, factoring in the temporary or permanent effects associated with other activities that are occurring or are likely to occur does not affect the magnitude of the potential adverse coastal effects from the Project.

2. Balancing National Interest Versus Adverse Coastal Effects

For Broadwater to succeed on Element 2, the national interest furthered by the Project must outweigh its adverse coastal effects.²⁷¹ The balancing of the national interest

²⁶² FEIS § 3.11.5.3, at 3-322.

²⁶³ Id.

²⁶⁴ Id.

²⁶⁵ FEIS § 3.11.4, at 3-319 to 3-320.

²⁶⁶ FEIS § 3.11.5.8, at 3-325.

²⁶⁷ Id.

²⁶⁸ Id.; see also n.260 supra (discussing the current status of the Islander East project).

²⁶⁹ FEIS § 3.11.5.8, at 3-325.

²⁷⁰ FEIS § 3.11.5.9, at 3-326.

²⁷¹ 15 C.F.R. § 930.121(b).

against the adverse coastal effects of a project, both separately and collectively, is a discretionary judgment based upon a preponderance of the evidence.²⁷²

As discussed above, the Project furthers two national interests articulated in Sections 302 and 303 of the CZMA in a significant and substantial manner. Specifically, the Project involves the siting of a major coastal-dependent energy facility and the Project would develop the resources of the coastal zone.²⁷³ The Project's contribution to the national interest is significant because it advances the national objective of expediting the development and expansion of LNG terminals in order to improve natural gas availability and reduce prices. The Project's contribution to the national interest is also substantial because the Project would address critical future regional energy demands caused by regional growth and diminished natural gas supplies.²⁷⁴

On the other hand, the Project would result in substantial adverse coastal effects. Most significant is the Project's effect on the scenic and aesthetic enjoyment of the Sound. Broadwater's proposal would locate a permanent industrial structure in the center of the Sound where no development currently exists. This terminal would be visible from potential viewing stations distributed along approximately 44 miles of Long Island coastline, substantially altering the Sound's currently scenic and unfragmented viewshed. Beyond these scenic and aesthetic effects, the Project would have other adverse effects. Construction of the facility would temporarily affect over 21 miles of seabed, including a portion of the Stradford Shoal. Once operational, the Project would withdraw over 28 million gallons of water daily to provide necessary ballast, entraining large numbers of ichthyoplankton. The terminal also would result in an increase in the number of large tanker ships transiting the Sound, causing navigational effects to commercial and fishing vessels that would need to steer clear of necessary safety and security zones, particularly vessels transiting the Race. While the Project's non-aesthetic effects are, for the most part, minor and limited in scope, they collectively assume greater weight when balancing these effects against the national interest furthered by the Project.

In this appeal, the balance tips in favor of New York, particularly given the adverse effects to the scenic and aesthetic enjoyment of Long Island Sound. The scenic and aesthetic character of the Sound – principally its sweeping and uninterrupted vistas – is a unique feature that is integral to the character and quality of the Sound.²⁷⁵ Installation of

²⁷² See AES, at 41; Weaver's Cove, at 35; Islander East, at 35; Mobil Pensacola, at 41.

²⁷³ As discussed above, the Project also furthers the national interest in the protection and preservation of the resources of the coastal zone, but does not do so in a significant or substantial manner. Accordingly, this interest is not considered when balancing the national interest in the project against its adverse coastal effects. 15 C.F.R. § 930.121(a); 65 Fed. Reg. at 77,150.

²⁷⁴ See Weaver's Cove, at 35-36; AES, at 41.

²⁷⁵ The balance struck in this appeal is consistent with past appeals in which state objections were sustained, in part, due to a project's potential to affect unique or sensitive resources. See Weaver's Cove, at 36 (finding that a waterway to a proposed LNG terminal was not suitable given safety concerns to nearby population center); Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc., at 14-15, 19, 31, 33-34 (Jan. 7, 1993) (sustaining a state's objection to an exploration project proposed in area partially encompassed by the Florida Keys); Decision and Findings in the Consistency

a floating industrial complex within the center of an otherwise undeveloped area would significantly and permanently alter the character of the Sound, damaging one of its most prized features. As the positions of the parties make clear, there is room for debate on whether aesthetic and scenic effects to the Sound are significant. Resolution of this dispute is not aided by the inherently subjective nature of whether the aesthetic character of the Sound is diminished. In the end, however, decades of past efforts to protect the Sound objectively and persuasively demonstrate both the importance of this characteristic and the significant adverse effect the Project would impose. While other effects that would result from the Project are, for the most part, minor and limited in scope, they take on greater weight in the aggregate and also further tip this balance.

In light of the foregoing considerations and based upon a preponderance of the evidence contained within the decision record for this appeal, the national interest in the proposed Project does not outweigh its adverse coastal effects, when considered separately or collectively.

V. THE PROJECT IS NOT NECESSARY IN THE INTEREST OF NATIONAL SECURITY

The second ground for overriding a state's objection to a proposed Project is a finding that the activity is "necessary in the interest of national security."²⁷⁶ A proposed activity is necessary in the interest of national security if "a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed."²⁷⁷ The burden of persuasion on this ground rests with the appellant.²⁷⁸ General statements do not satisfy an appellant's burden.²⁷⁹

Broadwater advanced a national security argument in its notice of appeal, but that argument was relegated to a footnote in its principal brief and did not appear at all in its reply brief. Broadwater argues that the Project is necessary to national security because it would add both increased supply and geographic diversity to the nation's energy infrastructure, as well as help prevent energy disruptions to population centers like New York City.²⁸⁰

Even if geographic diversity and increased access to energy sources were important national security goals, Broadwater fails to establish a "specific link" between the Project

Appeal of Union Exploration Partners, Ltd. with Texaco, Inc., at 16, 26, 30-31, 34-35 (Jan. 7, 1993) (sustaining a state's objection to an exploration project proposed near sensitive mangroves, fisheries, coral reefs, and a nearby national marine sanctuary).

²⁷⁶ 16 U.S.C. § 1456(c)(3)(A).

²⁷⁷ 15 C.F.R. § 930.122.

²⁷⁸ TCA, at 25; Weaver's Cove, at 37; VEPCO, at 53.

²⁷⁹ Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Millennium Pipeline Co., LP., at 38-39 (Dec. 12, 2003); TCA, at 25; Weaver's Cove, at 37.

²⁸⁰ Broadwater Initial Brief, at 7 n.13.

and a significant impairment of national security if the Project is not allowed to proceed as proposed.²⁸¹ In prior cases, the Secretary has dismissed arguments similar to the one advanced by Broadwater as a “general statement.”²⁸²

In this analysis, considerable weight is given to the views of the Department of Defense and other federal agencies with national defense or other essential national security interests.²⁸³ Comments were solicited from the Departments of Defense, Homeland Security, Justice, Transportation, State, and Energy, as well as from the Homeland Security Council, National Security Council, U.S. Army Corps of Engineers, and Coast Guard. None of these federal agencies raised any national defense or other national security concerns with the possibility that the Project might not go forward. Indeed, the Department of Defense stated that it is “not aware of any national defense or other national security interest that would be significantly impaired if the Project is not permitted to go forward as proposed.”²⁸⁴ Additionally, the Department of Energy stated that, although “there is a collective need for the continued expansion of U.S. energy infrastructure such as LNG import terminals in order to advance the energy security of the U.S., ... the impact of a single LNG facility is difficult to assess.”²⁸⁵

Based on the foregoing, the record establishes that the Project is not necessary in the interest of national security.

VI. CONCLUSION

For the reasons set forth above, the record does not establish that the Project is consistent with the objectives of the CZMA. While the Project furthers the national interest in a significant and substantial manner, the national interest furthered by the Project does not outweigh the Project’s adverse coastal effects. The record also does not establish that the Project is necessary in the interest of national security. Accordingly, New York’s objection to the Project operates as a bar under the CZMA to federal agencies issuing licenses or permits necessary for the construction and operation of the Project.

New York’s objection to the Project is therefore sustained.



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²⁸¹ Mobil Pensacola, at 46 n.70.

²⁸² Weaver’s Cove, at 37.

²⁸³ 15 C.F.R. § 930.122; TCA, at 25; Weaver’s Cove, at 37.

²⁸⁴ Letter from Peter F. Verga, Principal Deputy, Homeland Defense & America’s Security Affairs, Department of Defense, to Joel La Bissonniere, NOAA (Jan. 14, 2009).

²⁸⁵ Letter from Victor K. Der, Acting Assistant Secretary, Office of Fossil Energy, Department of Energy, to Jamon L. Bollock, NOAA 2 (Feb. 12, 2009).