DECISION AND FINDINGS

BY THE

U.S. SECRETARY OF COMMERCE

IN THE CONSOLIDATED CONSISTENCY APPEALS OF

WEAVER'S COVE ENERGY, L.L.C. AND MILL RIVER PIPELINE, L.L.C.

FROM OBJECTIONS BY THE

COMMONWEALTH OF MASSACHUSETTS

JUNE 26, 2008

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I. INTRODUCTION

Weaver's Cove Energy, L.L.C. (WCE) and Mill River Pipeline, L.L.C. (Mill River) (collectively, Appellants) seek permits from the U.S. Army Corps of Engineers (Corps)[1] necessary to construct and operate a $550 million liquefied natural gas (LNG) import, storage, and regasification terminal and associated six-mile natural gas pipeline near Fall River, Massachusetts (together, the Project).[2] The LNG terminal would be built along the Taunton River on a 73-acre brownfield site formerly used as a petroleum products terminal.[3] LNG would be delivered by LNG tanker vessels to the terminal by transiting Mount Hope Bay and the lower Taunton River.[4] At the terminal, the LNG would be offloaded, regasified, and transported by pipelines to interstate natural gas pipeline connections.[5]

The Project would help meet a growing demand for natural gas in New England. Regional energy consumption is estimated to rise substantially through 2025.[6] Against this rising demand, it is expected that traditional sources of natural gas for the Nation will decline in both absolute and relative terms.[7] The situation in New England is complicated by the failure of production and reserves off of Sable Island, Nova Scotia, to meet initial expectations.[8] The Project would help address projected regional natural gas demand by providing significant additional capacity.

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[1] On July 15, 2005, the Federal Energy Regulatory Commission (FERC) issued to WCE and Mill River, respectively: (a) a conditional permit authorizing construction and operation of the terminal; and (b) a certificate of public convenience and necessity authorizing construction and operation of the pipeline. FERC, Order Granting Authority under Section 3 of the Natural Gas Act and Issuing Certificate (July 15, 2005) (Conditional Order). Separately, WCE and Mill River seek additional authorizations from the Corps that also are necessary to the Project: (a) authorization under section 10 of the Rivers and Harbors Act to conduct dredging operations; and (b) permits under section 404 of the Clean Water Act for the disposition of dredged material. See also WCE Initial Brief, at 4 (Sept. 26, 2007); Mill River Initial Brief, at 4 (Sept. 26, 2007).

[2] WCE Initial Brief, at 1; Mill River Initial Brief, at 1; see also Conditional Order, at 3.

[3] WCE Initial Brief, at 2.

[4] Id. at 1; see also Conditional Order, at 3.

[5] Mill River's pipeline consists of two lateral segments to connect the terminal to the Algonquin interstate pipeline grid. The first lateral would be a 24-inch pipeline extending in a westerly direction for 2.52 miles from the terminal to the interstate grid. The second lateral would be a 24-inch pipeline extending in a northerly direction for 3.59 miles from the terminal to the interstate grid. Letter from Bruce Kiely, WCE, to M. Roman Salas, Secretary, FERC (Dec. 19, 2003).

[6] Conditional Order, at 2.

[7] FERC, Final Environmental Impact Statement for Weaver's Cove Energy LLC's and Mill River Pipeline, LLC's Weaver's Cove LNG Project, Docket Nos. CP04-36 and CP04-41, at 1-6 (May 20, 2005) (FEIS).

[8] Id. at 1-7.

The Commonwealth of Massachusetts reviewed the Project pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA), and implementing regulations of the Department of Commerce (Department) set forth at 15 C.F.R. Part 930, Subpart D.[9] Massachusetts objected to the Project, finding that it was inconsistent with Massachusetts's Coastal Management Program (Program) because WCE and Mill River failed to obtain and submit all applicable state licenses and permits.[10] WCE and Mill River filed timely notices of appeal, requesting an override of Massachusetts's objection as provided in the CZMA.[11] The two appeals have been consolidated for decision because they involve two components of a single Project.[12]

Opposing Appellants' override request, Massachusetts argues that the Project is not consistent with the objectives of the CZMA for three reasons: (a) the Project does not further the national interest, in light of recent determinations by the U.S. Coast Guard that effectively preclude delivery of LNG to the terminal; (b) because all state permitting processes have not been completed, there is insufficient information on the Project's adverse coastal effects to permit balancing these effects against any national interest furthered by the Project; and (c) because all state permitting processes have not been completed, Massachusetts is unable to determine whether there are reasonable alternatives to the Project that are consistent with the Program.[13] Separately, Massachusetts argues that the Project is not necessary in the interest of national security.[14]

Massachusetts's objection is sustained. This decision is based on the existing record, and, for the reasons set forth below, it is clear that there is sufficient information on the Project within the decision record to rule on the appeal. As explained more fully below, the record establishes that sustaining Massachusetts's objection is appropriate because the Project is not consistent with the objectives of the CZMA. Although 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. Of greatest concern are the effects on navigational safety resulting from LNG tanker traffic called for by the vessel transit plan for the Project. Separately, the record also establishes that the Project is not necessary in the interest of national security.

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[9] The Massachusetts Office of Coastal Zone Management's (MCZM) review of WCE's and Mill River's consistency certifications was triggered by and encompassed the Corps's §§ 10 and 404 authorizations because the state had included them as a "listed activity" under the CZMA. See 15 C.F.R. § 930.53. Massachusetts did not review FERC approval, however, because Massachusetts had not listed the FERC authorization as a "listed activity." Letter from Susan Snow-Cotter, MCZM, to Ted Gehrig, WCE (Apr. 24, 2006).

[10] See Letter from Bruce Carlisle, MZCM, to Ted Gehrig, WCE (July 6, 2007).

[11] Notice of Appeal of Weaver's Cove Energy, LLC from the Objection of the Massachusetts Office of Coastal Zone Management (Aug. 27, 2007) (WCE Appeal); Notice of Appeal of Mill River Pipeline, LLC from the Objection of the Massachusetts Office of Coastal Zone Management (Aug. 27, 2007) (Mill River Appeal).

[12] See Letter from Jane Luxton, NOAA, to Bruce Kiely, Appellants, and Carol Iancu, Massachusetts (Mar. 12, 2008).

[13] Massachusetts Initial Brief, at 9-25 (Nov. 5, 2007).

[14] Id. at 25-30.

Recent amendments to the CZMA, enacted as part of the Energy Policy Act of 2005, apply to this decision. These amendments set forth the requirements for the initial decision record and supplementation of that record with additional information, as well as the timelines for closure of the record and issuance of the decision.[15]

Given this decision, Massachusetts's objection to the Project operates as a bar under the CZMA to Federal agencies issuing licenses or permits necessary for construction and operation of the Project. This decision, however, in no way prevents Appellants from re-filing or amending their consistency determination after revising the Project so that its adverse coastal effects do not outweigh the national interests it furthers.[16]

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 will 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."[17]

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 Appellants to the sufficiency of Massachusetts's objection must be addressed before the merits of the appeal are considered. Appellants argue that Massachusetts's objection should be dismissed because it is not in compliance with section 307 of the CZMA. Specifically, Appellants assert that Massachusetts's objection: (a) is improperly based on the ground that the Project lacked applicable state licenses and permits; and (b) is incorrect in its determination that,

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[15] 16 U.S.C. §§ 1465(b), 1466; 15 U.S.C. § 717n(d)(1).

[16] See infra p. 17 and note 96.

[17] 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.").

based on the information Appellants provided to the state, the Project is in fact inconsistent with Massachusetts's Program.

For the reasons set forth below, Massachusetts's objection is sufficient to withstand dismissal on procedural grounds.

A. Massachusetts Properly Objected Based on Appellants' Failure to Obtain All Applicable State Licenses and Permits.

Appellants argue that Massachusetts's objection is improperly based on the ground that the Project lacked applicable state licenses and permits. Appellants assert that they provided all information that was in fact "necessary" for Massachusetts to evaluate the Project, and that Massachusetts acknowledged this when it indicated in correspondence that its review had commenced.[18]

Under the Department's regulations implementing the CZMA, a state is entitled to certain information from applicants in order to evaluate a project for consistency with its coastal management program. That information includes "necessary data and information" identified by the regulations, such as a copy of the application for the Federal license or permit and relevant materials provided to the Federal agency in support of the application.[19] Once an applicant provides a state with the "necessary data and information," the state's six-month consistency review period commences.[20] A state may, however, also require that an applicant provide it with "other information necessary for the State agency to determine consistency" in accordance with the enforceable policies of the state's coastal management program.[21] If this other information is not provided within the six-month review period, the state may object to the applicant's consistency certification.[22] The Department has interpreted "other information" to include applicable licenses and permits, if required by a state.[23]

Given these requirements, Appellants' argument is misplaced. A state may require that an applicant obtain and submit relevant state licenses and permits as a condition to possessing necessary information. Moreover, commencement of the state's six-month consistency review period does not indicate that the state requires no other information to complete its consistency review. Massachusetts's Program requires submission of applicable licenses and permits, authorizing the state to object to projects when an applicant has failed to obtain and submit all

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[18] See WCE Appeal, at 5; Mill River Appeal, at 4-5.

[19] 15 C.F.R. § 930.58.

[20] 15 C.F.R. § 930.60(a).

[21] 15 C.F.R. § 930.63(c).

[22] Id.

[23] 71 Fed. Reg. 788, 813 (Jan. 5, 2006).

applicable state licenses and permits during the state's review period.[24] As such, Appellants' failure to obtain applicable state licenses and permits provided Massachusetts a valid basis upon which to object to the Project.[25]

B. Consistency in Fact with the Massachusetts Program Is Irrelevant on Appeal.

Appellants also suggest that Massachusetts's objection should be dismissed because Massachusetts is incorrect in its determination that, based on the information Appellants provided to the state, the Project is in fact inconsistent with Massachusetts's Program.[26] This argument is without merit. The issue in a CZMA appeal is not whether an activity is or is not consistent with a state's coastal management program.[27] Rather, the issue on appeal is whether an override of a state objection is appropriate because the activity is either consistent with the objectives of the CZMA or necessary in the interest of national security.[28]

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.[29] These grounds are independent and an affirmative finding on either is sufficient to override. For the reasons set forth below, the record establishes that the Project is not consistent with the objectives of the CZMA. While the Project furthers the national interest in a significant and substantial manner, the national interest in this Project does not outweigh its adverse coastal effects. Massachusetts's objection is therefore sustained.

The 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

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[24] See Mass. Regs. Code tit. 301, § 21.07(3)(g) (2007).

[25] This conclusion is not inconsistent with Massachusetts's statement, set forth in a letter dated January 10, 2007, that it had commenced its review of the Project. Letter from Truman Henson, MCZM, to Michael Howard, Epsilon Associates, Inc., WCE (Jan. 10, 2007). This statement simply acknowledged that Massachusetts possessed all "necessary data and information," for purposes of triggering its six month review. The statement did not necessarily imply that Massachusetts possessed all information it would ultimately require to evaluate the Project for consistency with its Program.

[26] See WCE Appeal, at 5.

[27] See Decision and Findings in the Consistency Appeal of Jessie W. Taylor from an Objection by the State of South Carolina, at 5 (Dec. 28, 1998); Decision and Findings in the Consistency Appeal of Roger W. Fuller, at 5 (Oct. 2, 1992); Decision and Findings in the Consistency Appeal of Korea Drilling Company, Ltd., at 3-4 (Jan. 19, 1989) (hereinafter Korea Drilling).

[28] See 16 U.S.C. § 1456(c)(3)(A); see also 15 C.F.R. §§ 930.63(e), 930.120-930.122, 930.130(d).

[29] 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.120.

effects are considered separately or cumulatively (Element 2); and (3) there is no reasonable alternative 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).[30] As described in detail below, the record establishes that the Project meets Element 1 but fails to meet Element 2.[31]

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, Appellants must demonstrate that the Project furthers the national interest, as defined in sections 302 or 303 of the CZMA, in a significant or substantial manner.[32] Appellants assert that the Project will promote two national interests set forth in CZMA sections 302 or 303 in a significant and substantial manner,[33] specifically:

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;"[34] and

2. "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."[35]

Stated broadly, Congress has defined the national interest in coastal zone management to include both protection and development of coastal resources.[36] A wide variety of activities has been found to meet the competing goals of resource protection and development, and past decisions have held that the siting of coastal-dependent energy facilities furthers the national interest sufficiently for CZMA purposes.[37] Additionally, in interpretive guidance in the preamble to the

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[30] 15 C.F.R. § 930.121(a)-(c).

[31] As Appellants have 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 Program.

[32] 15 C.F.R. § 930.121(a).

[33] WCE Initial Brief, at 7-10; Mill River Initial Brief, at 8-10.

[34] CZMA § 303(2)(D), 16 U.S.C. § 1452(2)(D).

[35] CZMA § 303(1), 16 U.S.C. § 1452(1).

[36] Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company, at 19 (May 19, 1994) (hereinafter VEPCO).

[37] Id. at 19-21; Decision and Findings in the Consistency Appeal of Islander East Pipeline Company, L.L.C., at 8-10 (May 5, 2004) (hereinafter Islander East), remanded on other grounds, Connecticut v. 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 Oil Exploration and Producing U.S., Inc., at 11-12 (June 20, 1995).

Department's 2000 CZMA regulatory amendments, NOAA identified the siting of coastal-dependent energy facilities as an example of an activity that furthers the national interest in a significant or substantial manner.[38]

In light of precedent and the Project-specific findings below, the record establishes that the Appellants' Project would further the national interests set forth in sections 302 or 303 of the CZMA in a significant and substantial manner.

1. The Project is a major coastal-dependent energy facility sited in an existing industrial area.

The Project would constitute a major coastal-dependent energy facility that would be sited in an area where similar industrial activities currently exist.

First, this Project is "major" in scope.[39] Appellants estimate that the $550 million Project would provide substantial volumes of natural gas to New England, with a delivery capacity of 800 million cubic feet per day.[40] This is enough natural gas to heat over one million homes.[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 it would require that LNG be delivered via tankers that will dock and unload at the terminal prior to LNG regasification and transport through the pipeline.[43] The pipeline must traverse the coastal zone from the terminal to regional pipeline connections.[44]

The Project is also an "energy facility" under the Department's regulations implementing the CZMA. Those regulations define "energy facility" as "any equipment or facility which is or will

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[38] See 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, 71 Fed. Reg. 788 (Jan. 5, 2006), do not alter this conclusion.

[39] See, e.g., Islander East, at 4-9.

[40] WCE Initial Brief, at 8; Mill River Initial Brief, at 8; Conditional Order, at ¶ 9.

[41] WCE Initial Brief, at 11; Mill River Initial Brief, at 11; Conditional Order, at ¶ 9.

[42] See, e.g., Islander East. The Islander East project—a natural gas pipeline traversing Long Island Sound—was projected to cost $180 million to build and would provide enough natural gas capacity to heat 600,000 homes. This project was found to further the national interest in a significant and substantial manner, and that finding was sustained on review. See Connecticut v. Dep't of Commerce, 2007 WL 2349894 at *9.

[43] 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.

[44] Id.

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)."[45]

Finally, the Project would be sited in an area where similar industrial activities currently exist. The LNG terminal would be sited in an area that had been a petroleum products marine terminal and storage facility since the 1920s,[46] and a Massachusetts Designated Port Area zoned for marine industrial development.[47] Similarly, 97% of the northern pipeline will either replace another pipeline in an existing right-of-way or run adjacent to a single track railroad, while 72% of the western pipeline will follow an existing right-of-way.[48]

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 a national gas pipeline, construction of a pipeline to transport drinking water, commercial construction, and oil and gas exploration, development and production activities.[49] In this instance, constructing the terminal, dredging adjacent waters to accommodate tanker traffic, and constructing a natural gas pipeline all constitute activities that would develop the coastal zone to facilitate the importation of natural gas to meet anticipated regional energy needs.

In an *amicus curiae* brief, the City of Fall River argues that the Project does not allow for use of the coastal zone "for a particular purpose that was not previously available," because LNG is already available through an LNG facility existing in Massachusetts's coastal zone.[50] Fall River also notes that since FERC issued its July 15, 2005, order conditionally granting authority to construct the Project (Conditional Order), the Northeast Gateway project has been constructed,

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[45] 16 U.S.C. § 1453(6).

[46] FEIS, at 5-12.

[47] Mass. Regs. Code tit. 301, § 25.0.

[48] FEIS, at 2-15; Conditional Order, at ¶ 55.

[49] See, e.g., VEPCO (The proposed water pipeline would provide a source of drinking water for Virginia Beach, Virginia.); Islander East (The natural gas pipeline modified the Sound's bottom to allow its use for a particular purpose that was not previously available. The changed use of a portion of Long Island Sound is a development of the coastal zone.); Decision and Findings in the Appeal of Jesse W. Taylor (December 30, 1997) (A project to fill 0.6 acres of wetlands for commercial development minimally contributed to the national interest in developing the coastal zone.); Mobil Oil Exploring and Producing U.S., Inc. (Jan. 7, 1993) (Oil and gas exploration, development, and production activities further the national interest of developing the coastal zone.); Mobil Oil Exploration and Producing U.S., Inc. (June 20, 1995) (same).

[50] City of Fall River Brief, at n.11 (Feb. 8, 2008) (*amicus curiae*).

and two more offshore facilities have been approved.[51] Past decisions, however, have interpreted the CZMA policy of coastal zone development to include further development as well as new development.[52] Given the Project's potential to provide to New England much-needed natural gas, nearby LNG facilities do not reduce the national interest in developing the proposed Project.

The City of Fall River also argues that the Project, particularly the dredging that would deepen the Taunton River and Mount Hope Bay to previously unmaintained depths to accommodate LNG tanker traffic, does not provide for a new use because the need for such dredging is driven solely by the Project.[53] As stated above, past decisions establish that the national policy of coastal zone development includes further development as well as new development. In addition, the inquiry into whether development of the coastal zone furthers the national interest in a significant or substantial manner takes into account the entire Project, not just a particular portion.[54] Thus, the national interest inquiry does not focus simply on the Project dredging necessary to accommodate LNG tankers. The determination of the national interest in the Project also includes the terminal and associated natural gas pipeline that would transport natural gas to consumers.

3. The Project furthers these 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. In the preamble to the Department's 2000 CZMA regulatory amendments, the word "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. The word "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.[55] Together, these terms encompass both the import and scale

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[51] Id.

[52] See, e.g., VEPCO (The proposed water pipeline would provide a source of drinking water for Virginia Beach. While not stated specifically in the decision, Virginia Beach presumably had other sources of water supply at that time.); Islander East (The proposed pipeline would originate from an interconnection with the pipeline system of Algonquin Gas Transmission Company, which indicates that other sources of natural gas were available in the area.).

[53] City of Fall River Brief, at 13.

[54] See, e.g., Decision and Findings in the Consistency Appeal of Southern Pacific Transportation Company (Sept. 24, 1985) (The proposed bridge rehabilitation project would include constructing a new northern abutment, excavating the northern embankment, and extending the southern abutment, as well as dredging a pilot channel under the center of the bridge. The entire project is found to contribute to the national interest of development of the coastal zone and the siting of transportation facilities.); see also Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc. (June 20, 1995); Decision and Findings in the Consistency Appeal of Amoco Production Company (July 20, 1990) (hereinafter Amoco) (The proposed projects included drilling seven and up to fourteen exploratory wells, respectively; discussion of national interest considered the national interest in the entire exploration activity, not just one well or another.)

[55] 65 Fed. Reg. 77,124, 77,149-50 (Dec. 8, 2000); see also Islander East, at n.26. The definitions articulated in the preamble apply to the terms "significant" and "substantial" only for purposes of the Element 1 discussion. When

of a proposed activity. 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.[56] 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. 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.[57] Here, the Project is both significant and substantial for the reasons set forth below.

The Project is significant because it provides an important contribution to the Nation's interest in siting LNG facilities to meet future energy requirements. The Nation's interest in developing LNG facilities was recently articulated in the White House National Economic Council's Advanced Energy Initiative. This document stated that, at the President's direction, Federal agencies are working to accelerate the development and expansion of LNG terminals to improve natural gas availability and supply.[58]

The Project is substantial given its anticipated contribution to future regional natural gas supplies. Regional demand for natural gas is projected to increase 1.4 percent annually through 2025, increasing from approximately 3.6 quadrillion British thermal units (Btu) in 2003 to 4.5 Btu in 2025.[59]

Against this substantial rising demand, it is expected that traditional sources of natural gas for the region will decline in both absolute and relative terms.[60] The situation in New England is complicated by the failure of production and reserves off Sable Island, Nova Scotia, to meet initial expectations.[61] The Project, with a delivery capacity of 800 million cubic feet per day, would address regional demand by providing significant volumes of natural gas to New England. This is enough natural gas to heat over one million homes and provide 15% of the region's current peak-day natural gas requirements.[62] Beyond its regional impact, the Project will help serve a broader goal of stabilizing (and perhaps decreasing) the price of natural gas on a national level.[63]

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used in the discussion of Element 2, infra, these terms are intended to convey their ordinary meaning.

[56] 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000).

[57] Id.

[58] See White House National Economic Council, Advanced Energy Initiative (Feb. 2006).

[59] FEIS, at 1-6.

[60] Id.

[61] Id. at 1-7.

[62] WCE Initial Brief, at 8; Mill River Initial Brief, at 11.

[63] "[T]he Energy Information Agency . . . within the Department of Energy . . . has forecasted that increased LNG

Massachusetts does not dispute these projections. Rather, it responds that any national interest in the Project has been negated by the Coast Guard's Letter of Recommendation, which concluded that the Taunton River is unsuitable for the type and volume of tanker traffic proposed by Appellants.[64] Massachusetts argues that, in the absence of tankers to deliver LNG to the proposed facility, the Project cannot supply the region with LNG, negating any national interest in the Project.[65] The Coast Guard's assessment, however, relates to safety concerns associated with the Project, not its national interest. These concerns are properly addressed in the analysis of Element 2, where the Project's national interests are balanced against any adverse coastal effects. These concerns do not, however, diminish the national interests in the Project, as examined under Element 1.[66]

In light of the foregoing record, it is clear that the Project will further the national interest both in siting major coastal-dependent energy facilities—particularly because the Project would be sited in an area where such development already exists—and in developing the resources of the coastal zone. The record also establishes that the Project will further these 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 Appellants 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.[67] This determination is made by a preponderance of the evidence in the record.[68] Based on the considerations set forth below, the record establishes that the Project does not satisfy Element 2.

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imports can lower natural gas prices." See Application Under Section 3 of the Natural Gas Act for Authorization to Site, Construct, and Operate Liquefied Natural Gas Import Facilities (Jan. 8, 2007) (citing Annual Energy Outlook 2006 (Feb. 2006)).

[64] Letter from Roy Nash, Coast Guard, to Gordon Shearer, WCE, Encl. 2, at 1 (Oct. 24, 2007) (Letter of Recommendation).

[65] Massachusetts Initial Brief, at 12; Massachusetts Initial Supplemental Brief, at 4 (Mar. 14, 2008). Massachusetts also argues the Coast Guard's decision to affirm its suitability determination on December 7, 2007, bolsters this contention. Massachusetts Initial Supplemental Brief, at 5-6.

[66] Islander East, at 7-8; Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc. from an Objection from the California Coastal Commission, at 23 (Oct. 29, 1990) (declining to consider coastal effects of project as part of national interest analysis); Decision and Findings in the Consistency Appeal of Texaco, Inc. from an Objection by the California Coastal Commission, at 6 (May 19, 1989).

[67] 15 C.F.R. § 930.121(b).

[68] See Islander East, at 35; Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc., at 41 (June 20, 1995).

1. Sufficiency of information to identify adverse coastal effects.

Before the national interest in the Project can be balanced against its adverse coastal effects, there must exist sufficient information to adequately identify the Project's adverse coastal effects.[69]

Massachusetts argues that there is insufficient information on the Project's potential adverse coastal effects because necessary state environmental reviews have not yet been completed.[70] Until the various state permitting processes have run their course and the full environmental impact of the Project is ascertained, Massachusetts maintains that it is not possible to conclude, by a preponderance of the evidence, that any national interest furthered by the Project outweighs the Project's adverse coastal effects.[71] Massachusetts also argues that the record lacks sufficient information on the Project's adverse coastal effects because of uncertainty as to how LNG will in fact be delivered to the terminal.[72]

a. Criteria for sufficiency review.

In determining whether sufficient information exists to adequately identify adverse coastal effects, both the completeness and scientific quality of the information in the record are considered.[73] Appellants bear both the burden of proof and the burden of persuasion.[74] If the record lacks sufficient information as to the Project's adverse coastal effects, the balancing required to support a finding for Appellants on Element 2 cannot occur and the state's objection must be sustained.[75]

An examination into sufficiency of the information available is confined to the evidence in the record, as developed during the appeal. Recent amendments to the CZMA enacted as part of the Energy Policy Act of 2005 require that the initial record for an appeal is the consolidated record maintained by the lead Federal permitting agency for the project—in this instance, FERC.[76] This

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[69] Decision and Findings in the Drilling Discharge Consistency Appeal of Mobil Oil Exploration and Production Southeast, Inc., at 12 (Sept. 2, 1994).

[70] Massachusetts Initial Brief, at 14-20; Massachusetts Initial Supplemental Brief, at 8-13. Massachusetts's underlying objection was in part predicated on this same concern. Specifically, the state objected to the Project, based on 15 C.F.R. § 930.63(c), asserting WCE and Mill River had failed to provide it with sufficient information to determine whether the Project was consistent with the enforceable policies of its Program.

[71] Massachusetts Initial Brief, at 14-20.

[72] Massachusetts Second Supplemental Brief, at 12-15 (May 5, 2008).

[73] Decision and Findings in the Drilling Discharge Consistency Appeal of Mobil Oil Exploration and Producing Southeast, Inc., at 9 (Sept. 2, 1994).

[74] Id. at 8.

[75] Id.

[76] 15 U.S.C. § 717n(d)(1).

record may be supplemented with: (a) information specifically requested to complete a consistency review; or (b) information that clarifies other evidence within the consolidated record.[77]

Additionally, Congress has established new limitations on the time available to develop the decision record. Under recent amendments to the CZMA, the decision record must close within 190 days of receipt of a notice of the appeal.[78] This deadline may be extended for no more than 60 days, and only if needed to gather information to supplement the record as set forth above.[79]

It is important to note that the sufficiency determination on appeal is different from Massachusetts's sufficiency determination, which led to Massachusetts's objection and the instant appeal. On appeal, the question is whether the record contains sufficient information on a project's adverse coastal effects to permit a balancing of those effects against any national interest furthered by a project. This inquiry differs from that conducted by a state in examining the sufficiency of information necessary to determine whether a project is consistent with its coastal management program. Indeed, the CZMA and the Department's implementing regulations provide for an override, with the requisite finding of record sufficiency to identify adverse coastal effects, of a state objection based on insufficient information.[80] In addition, past decisions have found the record sufficient to identify adverse coastal effects despite a valid state objection on the basis of insufficient information.[81]

Massachusetts's contention that the record cannot contain sufficient information on a project's adverse coastal effects until all state licensing and permitting processes have run their course is without merit. Under the newly established deadlines for processing consistency appeals set forth above, it is quite possible that several required environmental reviews will not be completed prior to the deadline for ruling on any consistency appeal involving a major energy project.[82] Massachusetts's argument, extended to its logical conclusion, suggests that the

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[77] Id.; 16 U.S.C. § 1465(b)(3)(A).

[78] 16 U.S.C. § 1465(b)(1).

[79] 16 U.S.C. § 1465(b)(3).

[80] See 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.121(b).

[81] See Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc. (Jan. 7, 1993) (Florida objected on the basis that Mobil had failed to provide sufficient information and analyses to show that its proposed activity was consistent with Florida's coastal management program. Florida's objection was sustained, but only after the adverse coastal effects of the proposed activity were identified and determined to outweigh the national interest.). See also Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc., at 5, 13-17 (June 20, 1995) (Florida objected based on inconsistency with its coastal management program but also stated in its objection that a primary reason for the objection was a lack of information necessary for concurrence. Florida's objection was overridden because sufficient information existed to identify the adverse coastal effects of the proposed activity and because the national interest in the activity outweighed these effects.).

[82] Under the CZMA, a Project applicant must provide the state with a consistency certification within its application for a Federal license or permit. 16 U.S.C. § 1456(c)(3)(A). At the same time the applicant includes the consistency certification in its application, the applicant shall furnish to the state or its designated agency a copy of the

decision record would often not contain sufficient information on a major energy project's adverse coastal effects, thereby requiring that a state's objection be sustained. While enactment of new decision deadlines reflects Congressional desire to more expeditiously process and decide consistency appeals, it is unlikely that these new deadlines are intended to make it impossible for an applicant to meet its burden of proof if information from required environmental reviews is not yet available.

More specifically, the CZMA does not require that any of the numerous review processes, including the Federal and state licensing and permitting processes, be completed prior to issuance of a decision under the CZMA.[83] Thus, information that is insufficient for purposes of these requirements may still be sufficient for purposes of a CZMA analysis.[84] This approach is appropriate because all of the required analyses, consultations, and permit decisions must still be completed prior to actual commencement of a project. Because an appeal determination under the CZMA is but one step in the process for authorizing the Project, the CZMA does not require that the decision record contain all information resulting from these review processes, but rather that it contain sufficient information to identify the Project's adverse coastal effects for purposes of the balancing required by Element 2.

b. Sufficiency of the record.

As required by the Department's regulations implementing the CZMA, Appellants submitted a copy of the consolidated record maintained by FERC with their notice of appeal.[85] Massachusetts was provided the opportunity to review the consolidated record and did not object that any documents were missing or inappropriately included.[86]

Consistent with the CZMA, the parties were afforded multiple opportunities to supplement the decision record with additional information concerning the Project's adverse coastal impacts.[87]

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certification, with all necessary information and data. Id. Once the consistency certification and necessary data and information are received by a state, a state then has six months in which to review the Project for consistency with its coastal management program. Id. Should the state object, an applicant has 30 days in which to appeal that objection to the Secretary. 15 C.F.R. § 930.125(a). A decision on that appeal is due no later than 325 days from service on the Secretary. See 16 U.S.C. § 1465. Collectively, these deadlines envision a final determination by the Secretary on a major energy project as early as 18 months after the license application for the Project, a time frame that may run prior to the completion of environmental reviews required under Federal and state law.

[83] See 16 U.S.C. § 1456(c)(3)(A).

[84] See VEPCO, at n.139 (Several Federal and state agencies characterized FERC's NEPA compliance as inadequate and the Corps's NEPA compliance as inadequate and outdated. The information was nonetheless adequate to assess the effects of the activity on coastal resources and uses based on information submitted since completion of the NEPA documents.).

[85] Letter from Bruce Kiely, WCE, to Carlos Gutierrez, Secretary of Commerce, at 1 (Aug. 27, 2007); Letter from Bruce Kiely, Mill River, to Carlos Gutierrez, Secretary of Commerce, at 1 (Aug. 27, 2007).

[86] See Briefing Order (Sept. 5, 2007). Massachusetts made no such objection.

[87] Letter from Jane Luxton, NOAA, to Bruce Kiely, WCE, and Carol Iancu, Massachusetts (Jan. 2, 2008); Letter from Jane Luxton, NOAA, to Bruce Kiely, WCE, and Carol Iancu, Massachusetts (Jan. 10, 2008); Letter from Jane

Moreover, comments were solicited from both FERC and the Corps—the Federal permitting agencies for the Project—and from other interested Federal agencies, including the Environmental Protection Agency (EPA), the Department of the Interior (DOI), and NOAA's National Marine Fisheries Service (NMFS).[88] Closure of the decision record was stayed for 60 days—the maximum stay authorized under the CZMA—to obtain supplemental information from these various sources.[89]

A review of the evidence in the record shows that sufficient information exists as to the Project's likely adverse coastal effects. The information contained in this record is both complete and scientifically reliable as those terms are applied in CZMA appeals. In particular, the record includes a final environmental impact statement (FEIS) prepared by FERC during its licensing process. This document, which was the product of a process that included comment from both the public and interested Federal agencies, examined all potential environmental effects associated with the Project. While the FEIS contains outdated assumptions with respect to the transit of LNG tankers to the terminal, the record includes a Letter of Recommendation from the Coast Guard that extensively examined navigational safety issues associated with LNG tanker traffic along the Taunton River.

Massachusetts's argument that the record is insufficient because the method of delivering LNG to the terminal remains uncertain is without merit. In considering whether the record is sufficient, the focus is properly on the proposal that existed at the time of Massachusetts's consistency review. This proposal includes, among other things, an LNG vessel transit plan, initially proposed in 2006, that calls for the delivery of LNG to the terminal by tankers 725-750 feet long, 85 feet wide, and with a 37.5-foot draft. Under that 2006 vessel transit plan, tankers would make between 120 and 130 transits up the Taunton River annually.[90]

WCE has since begun to explore alternative means for delivering LNG to the terminal.[91] On

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Luxton, NOAA, to Bruce Kiely, WCE, and Carol Iancu, Massachusetts (Feb. 22, 2008); Letter from Joel La Bissonniere, NOAA, to Bruce Kiely, WCE, and Carol Iancu, Massachusetts (Mar. 6, 2008); Letter from Jane Luxton, NOAA, to Bruce Kiely, WCE, and Carol Iancu, Massachusetts (Apr. 22, 2008); Letter from Jane Luxton, NOAA, to Bruce Kiely, WCE, and Carol Iancu, Massachusetts (May 2, 2008).

[88] Letters from Joel La Bissonniere, NOAA, to Robert Van Antwerp, Corps, Frances Townsend, Homeland Security Council, Joseph Kelliher, FERC, Peter Keisler, Dep't of Justice, Stephen Hadley, The White House, Mary Peters, Dep't of Transportation, Condoleeza Rice, Dep't of State, Samuel Bodman, Dep't of Energy, Robert Gates, Dep't of Defense, and Michael Chertoff, Dep't of Homeland Security (Oct. 24, 2007); Letters from Joel La Bissonniere, NOAA, to Stephen Johnson, EPA, Dirk Kempthorne, DOI, and Admiral Thad Allen, Coast Guard (Apr. 9, 2008); Memorandum from Joel La Bissonniere, NOAA, to Louis Chiarella, NMFS (Apr. 14, 2008); Letter from Joel La Bissonniere, NOAA, to Joseph Kelliher, FERC (Apr. 21, 2008).

[89] 73 Fed. Reg. 11,396 (Mar. 3, 2008); 73 Fed. Reg. 25,667 (May 7, 2008).

[90] Letter of Recommendation, Encl. 2, at 1.

[91] Additionally, WCE had proposed yet another LNG vessel transit plan prior to the one in existence at the time Massachusetts conducted its consistency determination. In May 2004, WCE submitted a proposed plan that envisioned tankers 975 feet long and 145 feet wide, making approximately 50 to 60 trips annually. See id. This plan was abandoned by WCE after Congress prohibited the use of Federal funds to demolish the Old Brightman Street Bridge, an essential precondition to WCE's plan because the bridge only allows vessel traffic narrower than

March 21, 2008, WCE submitted an alternative vessel transit plan to the Coast Guard that envisioned fewer trips (70 instead of 120 trips annually).[92] Separately, on April 18, 2008, WCE filed with FERC a request for prefiling review on a separate alternative plan that would offload LNG at an offshore berth near the mouth of the Taunton River, and transport the LNG to the terminal by way of a four-mile submarine pipeline connecting the berth to the terminal.[93] Massachusetts asserts that these plans have unknown impacts on the national interest and coastal effects of the Project, and, to the extent these alternatives ultimately replace the LNG vessel transit plan currently at issue, that there is insufficient information on the new proposals to reach a decision in this appeal.[94] Conversely, WCE argues that neither of these alternative plans is material with respect to the instant appeal and therefore should not render the decision record insufficient.[95]

It is not appropriate in this appeal to consider these alternative means of transporting LNG to the terminal, because they were not in existence when Massachusetts reviewed the Project for consistency with its Program nor were they the bases for Massachusetts's objection. Indeed, both alternative plans appear to have been developed only recently, shortly before the decision record closed in this appeal. If WCE wishes to develop these alternative transit plans further, nothing in this decision prevents Appellants from doing so. These alternative transit plans, however, likely would require the filing of a new consistency certification with Massachusetts and a new review of the proposal(s) for consistency with the Program.[96]

For the reasons set forth above and discussed in more detail below, the decision record includes information on the Project's adverse coastal effects that is sufficient to make the finding on Element 2 required by the CZMA.

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its 98-foot opening.

[92] Appellants Supplemental Reply Brief, at 5 (Mar. 21, 2008).

[93] Letter from Gordon Shearer, WCE, to Commissioner Burt, FERC (Mar. 28, 2008). Contrary to what this proposal would suggest, WCE has argued in its brief that "there are no alternatives to constructing the requisite berthing and unloading structure at the terminal, connecting the terminal to established pipeline facilities, dredging the Federal Navigation Channel to allow LNG ships to serve the FERC-approved terminal, and dredging and backfilling the pipeline lateral trench for Mill River." WCE Initial Brief, at 27 (emphasis added); see also Mill River Initial Brief, at 25.

[94] Massachusetts Second Supplemental Brief, at 11-15.

[95] Appellants Final Supplemental Brief, at 4 (May 5, 2008).

[96] Applicants must provide states with a consistency certification for all Federal license and permit activities. 15 C.F.R. § 930.57. The phrase "Federal license or permit activity" is defined to include: (a) major amendments of Federal license or permits activities not previously reviewed by a state; (b) renewals and major amendments of Federal license or permit activities previously reviewed by a state that are filed after and are subject to management program changes not in existence at the time of original state review; and (c) major amendments of Federal license or permit activities previously reviewed by a state which will cause an effect on any coastal use or resource substantially different than those originally reviewed by a state. 15 C.F.R. § 930.51(b).

2. 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. The parties have identified four adverse coastal effects of major concern: (a) adverse coastal effects on navigational safety resulting from LNG tanker traffic; (b) adverse coastal effects on winter flounder stocks resulting from dredging; (c) adverse coastal effects on anadromous fish species resulting from dredging; and (d) adverse coastal effects from terminal and pipeline construction. Additionally, the following discussion examines several other adverse coastal effects that the parties did not raise in their arguments on appeal: (a) adverse coastal effects on endangered and threatened species; (b) adverse coastal effects of the disposal of processed dredged material; and (c) adverse coastal effects on vessel traffic.

a. Direct and indirect adverse coastal effects.

i. Adverse coastal effects on navigational safety resulting from LNG tanker traffic.

The Project, as reviewed by Massachusetts, envisions large LNG tankers that would transport LNG up the Taunton River to the terminal. Massachusetts asserts that this method of LNG delivery poses significant navigational safety risks—adverse coastal effects that should be considered in the analysis. Conversely, Appellants argue that LNG tanker transit and delivery plans are not relevant because they were beyond the scope of the proposal reviewed by Massachusetts for consistency.[97]

By regulation, the adverse coastal effects relevant to the analysis include any reasonably foreseeable effect on any coastal use or resource resulting from a Federal license or permit activity. Effects include both direct effects that result from the activity and indirect effects that result from the activity and are later in time or farther removed in distance but are still reasonably foreseeable.[98] Adverse coastal effects are not limited to environmental effects.[99] Rather, the term "adverse coastal effects" can include safety risks to coastal users.[100]

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[97] WCE Reply Brief, at 1-2 (Nov. 26, 2007); Appellants Final Supplemental Brief, at 4-6 (May 5, 2008). Korea Drilling, Decision and Findings in the Consistency Appeal of Long Island Lighting Co. (Feb. 26, 1988) (hereinafter LILCO), and Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S., Inc. from an Objection by the State of Florida (June 20, 1995), cited by Appellants, are inapposite here. Moreover, Appellants effectively concede that the effects of vessel traffic may be considered when they state that "the vessel transits that are the subject of [the Coast Guard's] LOR may be considered by the Secretary because they constitute 'other . . . reasonably foreseeable future activities occurring in the area of . . . the coastal zone,' and . . . may be relevant only when considering the cumulative adverse effects that may possibly occur when the Weaver's Cove Project is combined with other potential activities in the coastal zone." Appellants Initial Supplemental Brief, at 6-9. The effects of vessel traffic associated with the Project are addressed in this subsection.

[98] 15 C.F.R. § 930.11(g).

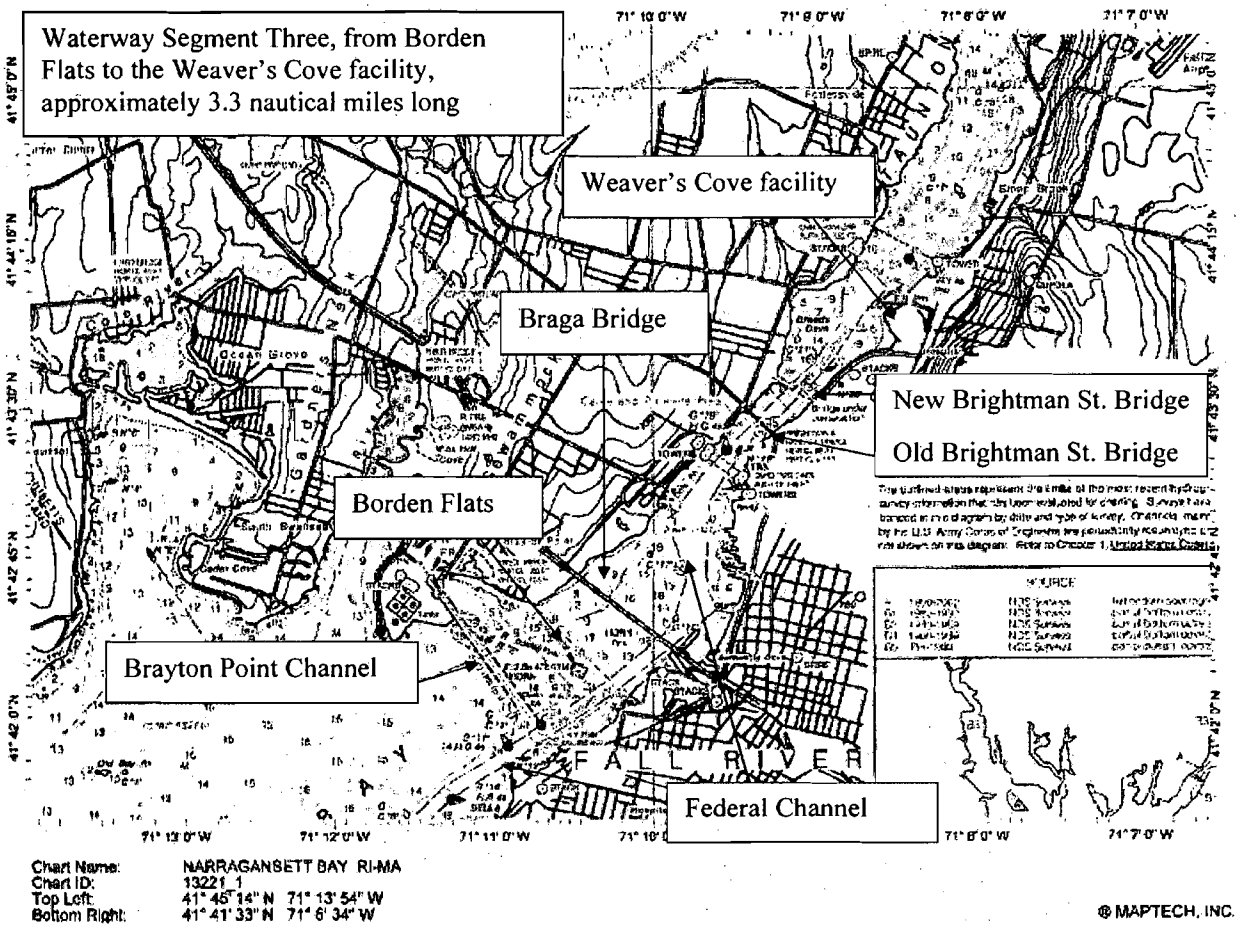
[99] Id.

[100] See Decision and Findings in the Consistency Appeal of Millennium Pipeline, L.P., at n.109 (Millenium) (danger to water supply from potential pipeline explosion); Chevron, at 38-40 (vessel safety issues analyzed).

Given existing regulations and precedent, this assessment must consider any adverse coastal effects associated with the delivery of LNG to the terminal. Safety concerns are plainly adverse coastal effects that are a reasonably foreseeable consequence of the Project.

As discussed above, the focus of this appeal is on the LNG vessel transit plan that existed at the time Massachusetts reviewed the Project for consistency with its Program. That vessel transit plan, which was initially proposed in 2006, envisioned the delivery of LNG to the terminal by tankers 725-750 feet long, 85 feet wide, and with a 37.5-foot draft. Tankers would make between 120 and 130 trips up the Taunton River annually.[101]

Appellants' LNG vessel transit plan raises significant issues concerning adverse coastal effects on navigational safety. These effects arise from the complicated navigational maneuvering—illustrated in the figure below—that an LNG vessel must go through to access WCE's proposed terminal.



[101] Letter of Recommendation, Encl. 2, at 1.

These navigational safety issues are set forth in detail in the Coast Guard's October 2007 Letter of Recommendation.[102] This Letter of Recommendation, prepared under the authority of the Ports and Waterways Safety Act,[103] examined the suitability of the Taunton River for the transit of LNG tankers in the manner proposed by WCE. Following careful assessment of WCE's proposal, the Coast Guard determined that the Taunton River is unsuitable from a navigation safety perspective for the type, size, and frequency of LNG marine traffic proposed by WCE.[104]

In support of its findings, the Coast Guard observed the following:

- Transits of LNG tankers would only be possible with sufficient tidal lift. Any delay in transit while the tanker is in the channel could lead to the vessel losing its tidal lift and result in a temporary grounding.[105] Relatedly, once an LNG tanker enters the channel near Mount Hope Point, there are very limited options for responding to an LNG vessel that is damaged or disabled.[106] In such an event, WCE would have to have its vessel towed backwards out of the channel, a maneuver that would also require sufficient clearance provided by a favorable high tide.[107] The Coast Guard found such an approach "would require extraordinary navigational maneuvers and present additional risks" and also would prevent other commercial and recreational vessels from using the channel while the LNG vessel was being towed.[108]

- LNG vessels transiting the Taunton River would be required to maneuver under the Braga Bridge and avoid a stationary museum ship, the USS MASSACHUSETTS, which receives approximately 90,000 visitors annually, including approximately 24,000 students and scouts, who sleep overnight aboard the vessel throughout the year.[109] As a tanker approaches the Braga Bridge from the south, it must turn approximately 55 degrees to port while passing under the bridge, bringing it close to piers and the USS MASSACHUSETTS.

- After passing the Braga Bridge and the USS MASSACHUSETTS, northbound LNG vessels would need to pass under the old Brightman Street Bridge. WCE's vessels are 85 feet wide, so these vessels would have only six and one-half feet of clearance on either side while passing through the bridge's 98-foot horizontal opening. Although LNG tankers could withstand a collision with the bridge, a collision could damage the bridge to

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[102] Id. at 2.

[103] See 33 U.S.C. § 1221 et seq.

[104] Letter of Recommendation, Encl. 2, at 30.

[105] Id. at 18.

[106] Id. at 22.

[107] Id.

[108] Id. at 23.

[109] Id. at 6, 23.

the extent that the bridge and/or the waterway may be closed to all traffic for a prolonged period of time.[110] The maneuvers required to remove the tanker would be extraordinary, and "may cause inordinate delays to vessel and vehicular traffic, and may cause an arduous indeterminable burden on security resources enforcing a security zone."[111]

- Even after passing under the old Brightman Street Bridge, maneuvering between the old and new Brightman Street Bridges is complicated by two significant factors. First, the bridges are located only 1,100 feet apart. Second, the openings to both bridges are not aligned.[112] Consequently, a tanker traveling upstream would need to stop between the old and new Brightman Street Bridges and then have tugboats move the tanker laterally approximately 100 feet so that the tanker would properly align with the opening for the next bridge.[113] Given the 725-foot to 750-foot length of each tanker, the effective clearance between both bridges is 350-375 feet—a clearance further diminished by the space needed for the tugboats moving the tanker.[114] These physical restrictions, when coupled with the need for tankers to transit during high tide, provide "very little tolerance for human error while simultaneously introducing numerous risk factors."[115] As observed by the Coast Guard:

  > Maneuvering an LNG tanker with an 82- or 85-foot beam through a 98-foot opening [in the old Brightman Street Bridge], and preventing that same vessel combination of approximately 900 feet in overall length (tanker plus tug astern) from colliding with a bridge only 1100 feet beyond the first bridge requires extraordinary precision and should only be attempted—if ever—in the most ideal conditions, not 240 to 260 times per year[—twice for each transit—]in a variety of environmental conditions.[116]

- The segment of the Taunton River just downstream of the Project terminal is "narrow, winding, and in close proximity to significant populations and infrastructure."[117] Infrastructure along this segment includes three bridges, a 400-foot wide Federal navigation channel, piers, and several power plants, including one opposite the Project

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[110] Letter from Roy Nash, Coast Guard, to Gordon Shearer, WCE, at 10 (May 9, 2007).

[111] Id.

[112] Letter of Recommendation, Encl. 2, at 8-9.

[113] Id. at 10. While the opening of the old bridge is adjacent to the western edge of the navigation channel, the opening of the new bridge is located in the center of the channel.

[114] Id. at 14-15.

[115] Id. at 24.

[116] Id. at 26.

[117] Id. at 4.

site and one downstream of the Project at Brayton Point.[118] The channel tankers would use to reach the terminal also passes downtown Fall River.

- Even without an incident, the waterway's narrowness, off-set channel, and close proximity of bridges would make the safety and security zone encompassing a tanker (generally two miles ahead and one mile astern) a barrier to all marine traffic in the Taunton River during the vessel's transit through the two bridges.[119] The Coast Guard observed that stopping vessel traffic to permit frequent transits of LNG tankers could adversely impact navigation safety, particularly for vessels subject to transit restrictions through the old Brightman Street Bridge, and for vessels that would have to exit the relative safety of the channel and await the LNG tanker's passage in less-safe waters outside the channel.[120]

In considering the multiple human risk factors and navigational challenges associated with WCE's proposal, the Coast Guard concluded that the Taunton River is simply not suitable for marine traffic of the type, size, and frequency proposed by WCE.[121]

WCE continues to challenge the conclusions set forth in the Letter of Recommendation.[122] WCE's continued efforts to appeal the Letter of Recommendation, however, do not limit the ability to rely on its findings. As noted earlier in the discussion on the sufficiency of the record, the decision in this appeal must be based on evidence presently in the record.[123]

It bears noting that FERC reached a different conclusion in its FEIS, identifying no significant navigational safety concerns.[124] FERC's assessment, however, predates the Coast Guard's Letter of Recommendation and relies on facts and assumptions that are no longer accurate in two important respects.

- First, FERC's assessment was predicated on the assumption that the old Brightman Street

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[118] Id.

[119] Id. at 28.

[120] Id. at 28-29.

[121] Id. at 25, 30.

[122] On November 20, 2007, WCE requested that the Coast Guard reconsider the Letter of Recommendation. See Request for Reconsideration of WCE of Letter of Recommendation (Nov. 20, 2007). On December 7, 2007, the Coast Guard affirmed the Letter of Recommendation's unsuitability findings. See Letter from Roy Nash, Coast Guard, to Bruce Kiely and Gordon Shearer, WCE, at 1 (Dec. 7, 2007); Appellants Supplemental Reply Brief, at 5. WCE also has stated that it intends to pursue its rights to further administrative and judicial review of the negative Letter of Recommendation. Letter from Bruce Kiely, WCE, to Raymond Perry, Coast Guard, at 1 (Mar. 21, 2008).

[123] See Section IV(B)(1), supra.

[124] For example, FERC concluded that the risk of an LNG spill resulting from vessel casualty (i.e., collision, grounding, or allision) is highly unlikely. See FEIS, at 4-295.

Bridge would be removed.[125] That assumption is no longer accurate, given recent legislation that precludes the use of Federal funding to demolish the bridge. As noted in the Letter of Recommendation and the discussion above, many of the navigational safety concerns stem from the existence of both the old and new Brightman Street Bridges.

- Second, FERC based its assessment on an entirely different LNG vessel transit plan. The plan reviewed by FERC envisioned larger tankers (950 feet long) making 50 to 70 trips annually.[126] This plan is materially different from the one reviewed by Massachusetts, which envisions smaller vessels (725-750 feet long) making 120 to 130 transits annually. As noted in the Letter of Recommendation, the level of risk is in part predicated on the number of vessel trips annually.

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects of the Project on navigational safety resulting from LNG tanker traffic. Additionally, with respect to these adverse coastal effects, the record establishes that they are significant, as detailed in the Coast Guard's highly persuasive Letter of Recommendation.

ii. Adverse coastal effects on winter flounder stocks resulting from dredging.

Dredging may have adverse effects on marine life in the Project area. To allow LNG tankers to reach the terminal, WCE proposed to dredge approximately 191 acres of sediment. This includes dredging of: (a) the navigation channel within the Taunton River and Mount Hope Bay; and (b) the tanker turning basin adjacent to the LNG terminal.[127] The channel, which has not been dredged since the 1970s, is currently 35 feet deep, and would be dredged to a depth of 37 feet at mean low water.[128] The turning basin would be deepened to 41 feet, and expanded from 33 to 54 acres.[129] The proposed dredging operations would create up to 2.6 million cubic yards of dredged material, which WCE proposes to dispose of offshore.

Project dredging will result in adverse coastal effects to winter flounder. The Taunton River has been designated as Essential Fish Habitat (EFH) under the Magnuson-Stevens Fishery Conservation and Management Act for 14 federally-managed species, including the commercially and recreationally important winter flounder.[130] Management measures for this species are recommended to NMFS by the New England Fishery Management Council as part of

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[125] Id. at 4-260; Conditional Order, at ¶ 96; FERC, Order on Rehearing, 114 FERC ¶ 61,058, at 16.

[126] FEIS, at 4-304; FERC, Order Denying Motions to Reopen Record in Proceedings, 115 FERC ¶ 61,058 (Apr. 17, 2006).

[127] WCE Initial Brief, at 16; WCE NGA Application, at 7; FEIS, at 3-70.

[128] FEIS, at 2-26, 4-98.

[129] Id. at 4-106.

[130] Letter from Patricia Kurkul, NMFS, to Magalie Salas, FERC (Sept. 17, 2004).

the Northeast Multispecies (Groundfish) Fishery Management Plan.[131] The Project area serves as important winter flounder spawning area and juvenile development habitat.[132]

Dredging would result in the permanent loss of 11 acres of winter flounder spawning habitat as the result of depth changes associated with the expansion of the turning basin and portions of the channel. Interested Federal agencies view this loss as serious. NMFS has expressed concern about the loss of this spawning and juvenile development habitat, noting that: (a) WCE's expansion of the turning basin will have substantial impacts on winter flounder EFH within the Taunton River; and (b) the loss will contribute to the cumulative adverse impact on winter flounder habitat within the Mount Hope Bay/Taunton River complex.[133] EPA also has categorized this loss as particularly serious.[134]

This adverse coastal effect has not been fully mitigated. NMFS has proposed that WCE develop a dredging mitigation plan to offset the permanent loss of this habitat. This plan would replace the functional value of winter flounder spawning habitat and be specific to the type of work proposed.[135] FERC agreed with this mitigation measure, incorporating it as a requirement in the Conditional License issued to Appellants.[136] While WCE subsequently submitted its proposed dredging mitigation plan to NMFS for review, NMFS is not satisfied with the proposal and is of the view that WCE has yet to agree to an appropriate suite of mitigation measures to offset the permanent loss of winter flounder spawning habitat.[137]

In addition to the permanent loss of 11 acres of winter flounder spawning habitat, dredging would adversely affect at least six additional acres of habitat as a result of dredge-induced suspended sediment.[138] This could result in the burial and suffocation of winter flounder eggs, and NMFS believes the potential magnitude is greater than six acres because certain Project assumptions likely underestimate the overall scope of impacts.[139]

This adverse coastal effect has been sufficiently mitigated. In response to this potential loss of habitat, NMFS has recommended a ban on dredging within the Taunton River between January 15 and May 31 annually, which coincides with when winter flounder eggs and juvenile fish

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[131] Letter from Patricia Kurkul, NMFS, to Christine Godfrey, Corps, at 1 (June 27, 2005).

[132] Letter from Patricia Kurkul, NMFS, to Magalie Salas, FERC, at 3-7 (Sept. 17, 2004).

[133] Id. at 6-7; Letter from Peter Colosi, NMFS, to Christine Godfrey, Corps, at 2 (Dec. 27, 2005).

[134] Letter from Robert Varney, EPA, to Joel La Bissonniere, NOAA, at 1 (Apr. 23, 2008).

[135] Letter from Patricia Kurkul, NMFS, to Magalie Salas, FERC, at 8 (Sept. 17, 2004); Letter from Peter Colosi, NMFS, to Christine Godfrey, Corps, at 2 (Dec. 27, 2005).

[136] Conditional Order, Appendix B, at ¶ 21.

[137] Memorandum from Louis Chiarella, NMFS, to Joel La Bissonniere, NOAA, at 2 (Apr. 17, 2008).

[138] Letter from Peter Colosi, NMFS, to Christine Godfrey, Corps, at 2 (Dec. 27, 2005).

[139] Letter from Patricia Kurkul, NMFS, to Magalie Salas, FERC (June 27, 2005).

would be resident. FERC agreed with this mitigation measure, incorporating it as a requirement in the Conditional License issued to Appellants.[140] WCE has agreed to this restriction as well.[141]

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects of the Project on winter flounder stocks. Additionally, with respect to these adverse coastal effects, the record establishes that dredging will cause the permanent loss of 11 acres of winter flounder spawning habitat. This adverse effect has not yet been adequately mitigated.

iii. Adverse coastal effects on anadromous fish species resulting from dredging.

Dredging will also result in adverse coastal effects to anadromous fish species. The Taunton River supports Massachusetts's most significant anadromous fish runs for the following species: American shad, blueback herring, alewife, and rainbow smelt.[142] These species are important because they serve as prey for a number of federally managed species.[143] Moreover, because anadromous fish from the Taunton River are used by Massachusetts state biologists to restore anadromous fish runs in other rivers around the state, the health of Taunton River anadromous fish population levels is important to water bodies other than the Taunton River and Mount Hope Bay.[144]

Dredging would disrupt normal anadromous fish migration and subsequent spawning activity in the Taunton River. These effects would flow from the direct alteration of the benthic substrate, elevated suspended sediment, and light and noise from the dredging over a multi-year period.[145] Dredging would directly alter the benthic substrate and remove the existing benthic community, with potentially adverse effects on prey species, suitable cover, settlement structure, and/or nursery and spawning areas.[146]

In reviewing the Project, FERC concluded that dredging activity would not have significant effects on anadromous fish species. In its FEIS, FERC concluded that sediment plumes associated with dredging would be temporary, linear, and generally confined to the dredging footprint.[147] FERC found that the use of closed ("environmental") clamshell buckets would likely result in sediment concentrations below 20 mg/L, which is below levels resulting in lethal

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[140] Conditional Order, Appendix B, at ¶ 21.

[141] Appellants Final Supplemental Brief, at 17.

[142] Letter from Patricia Kurkul, NMFS, to Magalie Salas, FERC, at 3 (June 27, 2005).

[143] Id. at 9.

[144] Letter from Robert Varney, EPA, to Magalie Salas, FERC, at ADC-3 (June 28, 2005).

[145] FEIS, at 4-98.

[146] Id. at 4-98.

[147] Id. at 4-101.

and sublethal effects.[148] Moreover, FERC found that anadromous fish would have ample passageways, because dredging would be limited to the Federal navigation channel and would result in a sedimentation plume covering only 25% of the width of the river.[149] Given these conclusions, FERC imposed no additional dredge timing restrictions to protect anadromous fish species.[150]

Resource agencies that have reviewed the Project have taken issue with FERC's assessment. NMFS remains concerned that dredging sediment plumes will have the potential to impair the migration of anadromous species.[151] NMFS questions the modeling assumptions used by FERC and believes that sediment concentrations will temporarily exceed 20 mg/L, thereby adversely affecting anadromous species.[152] Given these concerns, NMFS recommended a complete ban on dredging activities between March 1 and July 31 annually to protect upstream spawning migrations. It further recommended analysis of dredging alternatives that avoid and minimize adverse effects on downstream migrations, including sequencing and restrictions on the number of dredges operating between July 31 and October 31.[153]

EPA also has expressed concerns about potential effects to anadromous species. In commenting to the Corps on the Project, EPA noted that, while anadromous fish in the Taunton River have declined less rapidly than other areas in Massachusetts, data from the spring of 2005 shows that populations continue to decline and that these declines were especially acute in the southeastern part of the state (including the Taunton River).[154] EPA also noted that the importance of fish spawning in Mount Hope Bay and the Taunton River extends well beyond these water bodies—many of the commercial species that spawn in the bay are caught by fishermen in offshore waters.[155] Proposed dredging has the potential to impair three years of anadromous fish runs.[156] The loss of one or more years of anadromous fish runs resulting from high juvenile mortality or negatively-affected spawning success would potentially reduce anadromous fish levels for many years.[157] As a result, EPA recommended "full adoption of dredge restriction windows that will protect the following critical time periods: spawning (i.e., January 15 through May 31), upstream fish migration (i.e., March 1 through July 31) and downstream fish migration (i.e., June 15

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[148] Id. at 4-101, 4-102.

[149] Id. at 4-102.

[150] Id.

[151] Massachusetts Initial Brief, at 23-24.

[152] Letter from Patricia Kurkul, NMFS, to Magalie Salas, FERC (June 27, 2005).

[153] Letter from Peter Colosi, Jr., NMFS, to Christine Godfrey, Corps, at 3-4 (Dec. 27, 2005).

[154] Letter from Robert Varney, EPA, to Magalie Salas, FERC, at ADC-3 (June 28, 2005).

[155] Id.

[156] Letter from Robert Varney, EPA, to Joel La Bissonniere, NOAA, at 1 (Apr. 23, 2008).

[157] Letter from Linda Murphy, EPA, to Christine Godfrey, Corps, at 5 (Mar. 2, 2006).

through October 31)."[158] EPA concluded, "[w]hen considering protection of all [affected fishery] resources this allows dredging from November through January 15."[159]

In response to these continued concerns, WCE has agreed to extend the complete ban on dredging through July 31 annually.[160] In recent correspondence, however, both NMFS and EPA continue to maintain that WCE has failed to adopt sufficient measures necessary to minimize adverse effects to anadromous fishery resources.[161] Appellants disagree, contending WCE has implemented each of NMFS's conservation recommendations.[162] Appellants further state that NMFS relies on outdated correspondence as the basis for its views.[163] Appellants contend that their modeling and analysis demonstrate that additional dredging restrictions are not necessary for the protection of downstream anadromous fish migration.[164]

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects of the Project on anadromous fish species. Additionally, with respect to these adverse coastal effects, the record establishes that Project dredging will have impacts on anadromous species. While WCE has sufficiently addressed adverse coastal effects to upstream migrations by extending its dredging ban through July 31, it has not fully addressed adverse coastal effects for downstream migrations that occur through October 31. Although Appellants disagree with the assessment provided by NMFS and EPA, deference is given to the views of Federal agencies on matters within their expertise.[165]

iv. Adverse coastal effects from terminal and pipeline construction.

The adverse coastal effects of terminal and pipeline construction have also been considered. The terminal will be built on a 73-acre brownfield site formerly occupied by a petroleum products terminal from the 1920s to the 1990s.[166] Terminal construction will require the permanent filling of approximately 0.6 acres of intertidal and sub-tidal habitat associated with: (a) the replacement

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[158] Letter from Robert Varney, EPA, to Magalie Salas, FERC, at ADC-3 to ADC-4 (June 28, 2005).

[159] Id. at ADC-4.

[160] Appellants Final Supplemental Brief, at 20.

[161] Memorandum from Louis Chiarella, NMFS, to Joel La Bissonniere, NOAA (Apr. 17, 2008); Letter from Robert Varney, EPA, to Joel La Bissonniere, NOAA (Apr. 23, 2008).

[162] Appellants Final Supplemental Brief, at 23.

[163] Id. at 17.

[164] Id. at 21-22.

[165] See 15 C.F.R. § 930.128(c)(1) ("The Secretary shall accord greater weight to those Federal agencies whose comments are within the subject areas of their technical expertise.").

[166] Conditional Order, at ¶ 100.

of an existing pier with a pile-supported jetty and mooring structures; and (b) the installation of sheet pilings to stabilize and straighten approximately 2,650 feet of shoreline.[167]

The Project also involves the construction of approximately six miles of natural gas pipeline, which would transport regasified LNG from the terminal to Algonquin interstate pipeline grid.[168] The pipeline component of the Project will largely be built along existing right-of-ways. About 97% of the northern pipeline will either replace another pipeline in an existing right-of-way or run adjacent to a single track railroad, while 72% of the western pipeline will follow an existing right-of-way. Pipeline construction would (a) temporarily alter approximately 14 intermittent and perennial streams, 3.0 acres of inland vegetated wetlands, 0.52 acres of intertidal habitat, and 0.5 acres of subtidal habitat; and (b) permanently convert approximately 0.03 acres of forested wetlands to scrub-shrub or emergent wetlands and approximately 0.4 acres of scrub-shrub wetlands to emergent wetlands.[169] Assuming proposed mitigation measures are implemented, EPA believes the adverse impacts flowing from construction of the two pipelines would be small in extent.[170]

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects of the Project from terminal and pipeline construction. Additionally, with respect to these adverse coastal effects, the record establishes that the Project's terminal and pipeline construction will be modest in scope and, to a large extent, temporary in duration.

v. Adverse coastal effects on endangered and threatened species.

Although not raised by Massachusetts, the adverse coastal effects of the Project on endangered and threatened species have been considered.

In its FEIS, FERC considered the potential effects of the Project on six species listed as endangered or threatened under the Endangered Species Act (ESA) that could occur in the Project area or in offshore waters that would be transited by LNG tankers: bald eagles, four species of sea turtles, and the North Atlantic right whale.

The FWS informed FERC that bald eagles could occur in the Project area, but not on a regular basis. As a result, the FWS concluded that individual eagles would not be disturbed by

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[167] Letter from Linda Murphy, EPA, to Christine Godrey, Corps, at 1 (Mar. 2, 2006).

[168] Letter from Bruce Kiely, WCE, to Maglie Salas, FERC, at 1 (Dec. 19, 2003); FERC, Notice of Filings, at 1.

[169] Letter from Linda Murphy, EPA, to Christine Godrey, Corps, at 1 (Mar. 2, 2006). EPA has said these wetland areas "consist mostly of freshwater systems—shrub, emergent, and forested—but also include an area of estuarine (intertidal) wetlands associated with the western pipeline route that would cross the Taunton River . . . . These streams and wetlands provide ecological functions such as wildlife habitat, water quality maintenance, and fish and shellfish habitat." Id. at 3. EPA, however, has stated that the agency generally agrees with Appellants' suggestion that, assuming proposed mitigation measures are implemented, the adverse impacts flowing from construction of the western and northern pipelines would be individually small in extent and temporary. Id. at 4.

[170] Id. at 4.

construction or operation activities, and that the Project would have no effect on bald eagles.[171] Moreover, in July 2007 DOI delisted the bald eagle under the ESA, so it is no longer endangered or threatened.[172]

NMFS identified four species that may frequent the area adjacent to the Project: leatherback and Kemp's Ridley turtles, which are listed as endangered, and green and loggerhead turtles, which are listed as threatened. FERC concluded that the Project was not likely to adversely affect listed sea turtles.[173] In reaching this assessment, FERC noted that none of these four species is known to nest in the Project area.[174] Sea turtles do from time to time occur in the Project area, tending to migrate to the Project region in June and returning south when water temperatures fall in October. The greatest risk posed to sea turtles is that of vessel strike. While the majority of vessel strikes are caused by smaller vessels with planing hulls, no such vessels are proposed for use during construction or operation of the Project. Rather, the Project envisions use of larger vessels with a deep draft, such as LNG tankers. These larger vessels tend to create a considerable wake in front that displaces water upward and ahead of the hull region. This pushes away smaller objects, such as sea turtles, at the surface. Because the Project would "utilize only large LNG tankers, the potential effects on sea turtles as a result of vessel traffic would be insignificant."[175]

FERC also analyzed the potential impact of the Project on the Northern Atlantic right whale (*Eubalaena glacialis*). The North Atlantic right whale is one of the most critically endangered large whale species in the world and has been listed as endangered under the ESA since 1973.[176] FERC analyzed the interaction between the increased vessel traffic flowing from the Project and Northern Atlantic right whales. FERC concluded that, while additional LNG tanker traffic likely will increase the potential risk of contact, the Project is not likely to adversely affect North Atlantic right whales.[177] FERC's Conditional Order addresses this issue, requiring that WCE coordinate with NMFS to determine appropriate speed and seasonal restrictions, and other applicable measures to avoid or minimize impacts on right whales.[178]

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[171] FEIS, at 4-123.

[172] 72 Fed. Reg. 37,346 (July 9, 2007).

[173] FEIS, at 4-123 to 4-125.

[174] Id. at 4-124.

[175] Id. at 4-125.

[176] This species was originally listed as endangered under the precursor to the ESA in June 1970. See 35 Fed. Reg. 18,319 (Dec. 2, 1970). The species is also designated as "depleted" under the Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq. Critical habitat was designated for the species in 1994. See 58 Fed. Reg. 28,793, 28,805 (June 3, 1994).

[177] FEIS, at 4-125 to 4-126.

[178] Conditional Order, Appendix B, at ¶ 22.

In 2005, FERC initiated consultation under section 7 of the ESA,[179] and requested that the FWS and NMFS consider the FEIS as its biological assessment.[180] This consultation was still pending at the time the decision record closed in this appeal. Upon conclusion of any consultation, NMFS or the FWS will provide a written statement describing how the agency action (i.e., issuance of the Federal license) will affect listed species.[181] If NMFS or the FWS determines through consultation that the Project will jeopardize a listed species or adversely modify critical habitat, reasonable and prudent alternatives to avoid jeopardy or adverse modification will be provided. Measures necessary or appropriate to minimize the impact on listed species will also be specified, as will terms and conditions necessary to implement those measures.[182]

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects of the Project on endangered and threatened species. Additionally, with respect to these adverse coastal effects, the record establishes that impacts to endangered or threatened species will be minimal.

vi. Adverse coastal effects from the disposal of processed dredged material.

Although not raised by Massachusetts, the adverse coastal effects resulting from the disposal of dredged materials have been considered. The record indicates the Project will generate a substantial volume of dredged material. The total volume resulting from Project activities (including terminal construction and channel and turn-basin deepening) is estimated to be up to 2.6 million cubic yards.[183]

WCE proposes to dispose of these dredged sediments offshore.[184] After analyzing the possibility of direct biological effects to benthic organisms and fish in the vicinity of the WCE's proposed disposal sites, the FEIS found that offshore disposal would be "environmentally acceptable," provided that all required chemical testing demonstrated that the sediments at issue were suitable for offshore disposal.[185] Subsequent to FERC's publication of the FEIS, the Corps and EPA

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[179] 16 U.S.C. § 1536(a)(2).

[180] FEIS, at 4-123.

[181] 16 U.S.C. § 1536(b)(3).

[182] 16 U.S.C. § 1536(b)(4).

[183] FEIS, at 3-70.

[184] WCE Initial Brief, at 4. At the time FERC analyzed the project in its FEIS, WCE proposed to dispose of removed sediments by reusing the material as general site fill material at the LNG terminal site. FEIS, at 3-73. On March 17, 2005, however, WCE amended its Corps application to include a request for approval of offshore disposal of dredged materials under the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 et seq. See WCE Initial Brief, at 4. EPA has noted with approval Appellants' decision to opt for offshore disposal for ocean disposal, calling this alternative environmentally preferable. See Letter from Linda Murphy, EPA, to Christine Godfrey, Corps, at 2 (Mar. 2, 2006).

[185] FEIS, at 3-82.

determined that all sediments proposed for dredging meet the criteria required for ocean disposal and are suitable for unrestricted ocean disposal at the offshore locations proposed by WCE.[186]

In its briefs, Massachusetts did not contest the accuracy of Appellants' data on and analyses of adverse effects of dredged material disposal. After being asked for input on potential adverse coastal effects, the Corps, NMFS, DOI, and EPA provided no negative comments regarding the adverse coastal effects from dredged material disposal.[187]

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects of the Project from the disposal of dredged material. Additionally, with respect to these adverse coastal effects, the record establishes that Appellants have identified a means of disposing of dredged material that will not result in significant adverse coastal effects.

vii. Adverse coastal effects on vessel traffic.

Although not raised by Massachusetts, the adverse coastal effects of the Project on vessel traffic have been considered. The Project area includes waters used by both recreational and commercial vessels. In 2002, 723 ocean-going vessels entered Narragansett Bay and 112 of these proceeded up the Taunton River to Fall River or Somerset.[188] These vessels included a variety of fuel and oil tankers.[189] Cruise ships, ferries, and water taxis also operate within Narragansett Bay and cross over or use the channel that would be transited by LNG tankers traveling to and from the terminal.[190] Recreational boating opportunities are provided through numerous private marinas.[191] Sailing regattas are common summertime events in the area.[192]

LNG vessel traffic servicing the terminal may adversely impact commercial and recreational vessels. LNG vessels would add to the overall vessel traffic in the Narragansett Bay and Taunton River. In addition, the safety and security zone (generally two miles ahead and one mile astern) around transiting LNG tankers may increase the inconvenience and delay experienced by other vessels using the area.[193]

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[186] WCE Initial Brief, at 4 (citing Corps and EPA, Suitability Determination (Sept. 22, 2005); EPA, Memo for the Record (July 12, 2007)).

[187] Memorandum from Louis Chiarella, NMFS, to Joel La Bissonniere, NOAA (Apr. 17, 2008); E-mail from Megan Feeney, DOI, to Brett Grosko, NOAA (Apr. 30, 2008); Letter from Robert Varney, EPA, to Joel La Bissonniere, NOAA (Apr. 23, 2008).

[188] FEIS, at 4-187 to 4-188.

[189] Id.

[190] Id.

[191] A study performed in 2000 identified over 12,000 slips and moorings in the Narragansett Bay area, and FERC projected that this number is likely to increase. See id. at 4-168 to 4-169.

[192] Id. at 4-189.

[193] Id.

To quantify the adverse affects on commercial and recreational vessel traffic, FERC identified various scenarios based on 50 to 70 LNG vessel transits per year and a projected transit time of four hours from the entrance of Narragansett Bay to the berth at the terminal.[194] Based on these assumptions, FERC estimated that delays to tankers attempting to depart from Fall River during the inward passage of an LNG tanker would be between 60 and 90 minutes, and would lead to an aggregate annual shipping delay of only about 20 hours due to the modest level of commercial traffic in the area.[195] Recreational boaters would generally have more flexibility than commercial shippers to avoid or get around transiting LNG vessels, but in narrow passages, FERC estimated boaters could experience delays of up to 60 minutes.[196] Delays would tend to be greatest at or near the terminal where vessel speeds tend to be slowest. FERC also noted that delays could increase due to the cumulative effect of other vessel traffic associated with proposed development in the Project vicinity.[197] Overall, however, FERC determined that "even taking into consideration the shipping activity associated with [WCE's] LNG Project, the federal navigation channel in the Taunton River would remain under utilized."[198]

FERC's findings likely underestimate the actual effect of the LNG vessel traffic associated with the Project. As discussed above, since the time the FEIS was prepared, WCE altered its proposed LNG transit plan, increasing the number of trips from a range of 50 to 70 per year to a range of 120 to 130 per year.[199] Additionally, the increased navigational challenges resulting from the retention of the old Brightman Street Bridge on the Taunton River—an outcome not contemplated at the time the FEIS was prepared—will result in increased transit time and lower average vessel speeds than assumed in FERC's analysis, and this would increase potential delays for commercial and recreational vessels.[200] Moreover, if an LNG tanker is damaged, disabled, or grounded in the channel or another narrow passage, it would prevent commercial and recreational vessels from using the channel, and could result in "inordinate delays."[201]

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[194] Id. at 4-188.

[195] Id. at 4-189.

[196] Id. at 4-170.

[197] In its comments on the FEIS, the Coast Guard noted that Rhode Island was seeking to improve its ports on or near Narragansett Bay, which may lead to an overall increase in commercial vessel traffic in the area. Id. at 4-309 to 4-310. Other potential development examined by FERC included the proposed modification of the KeySpan LNG facility to allow import of LNG by ships, but that project was later denied authorization. See 114 FERC ¶ 61,054 (Jan. 20, 2006).

[198] FEIS, at 4-308.

[199] See Section IV(B)(2)(a)(i), supra.

[200] Potential vessel traffic delays increase when the LNG vessel speed decreases. See e.g., FEIS, at 4-188. In the FEIS, FERC assumed that an LNG vessel would not be required to stop between bridges as it transited the Taunton River to and from the Project. Id. This scenario is no longer plausible in light of the retention of the old Brightman Street Bridge and the maneuvers required to negotiate the bridges.

[201] Letter from Roy Nash, Coast Guard, to Gordon Shearer, WCE, at 10 (May 9, 2007).

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects of the Project on vessel traffic. Additionally, with respect to these adverse coastal effects, the record establishes that the LNG vessel traffic associated with the Project will cause delays to commercial and recreational traffic in Narragansett Bay and the Taunton River. Many of these delays will be temporary; however, in the event an LNG vessel is damaged, disabled, or grounded in the channel or another narrow passage, delays could be substantial.

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 reasonably foreseeable future activities in the area of, and adjacent to, the coastal zone in which the objected-to activity is likely to contribute to adverse effects on the natural resources of the coastal zone."[202]

The previous section of this decision discussed the Project's significant adverse coastal effects on navigational safety resulting from LNG tanker traffic. It also discussed adverse coastal effects on winter flounder stocks and anadromous fish species resulting from dredging and on vessel traffic. When considered in light of other past, present, and reasonably foreseeable future activities in the area, the record establishes that the Project poses cumulative adverse coastal effects, as well.

FERC has examined potential cumulative effects of the Project.[203] The Project is located on the Taunton River in an industrialized area, which has already been influenced by human activities and development. The Taunton River has been recognized for its remarkable resource value and its importance to the region; however, neither the river nor Mount Hope Bay currently meets applicable Clean Water Act standards established by Massachusetts or Rhode Island.[204] Some of the causes of their impairment include organic enrichment, nutrients, pathogens, contaminated stormwater runoff, and industrial wastewater discharges.[205] FERC found that the Project "would adversely affect surface water quality and biological resources associated with the Taunton River and Mount Hope Bay" and "could contribute to cumulative impacts on water quality and aquatic organisms" when considered in relation to past, present, and reasonably foreseeable future activities in the area.[206] EPA has also noted that the Project dredging and discharges associated with dredged material will worsen existing water quality problems.[207]

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[202] See Chevron, at 45 (citing to Decision and Findings in the Consistency Appeal of Gulf Oil Corporation (Dec. 23, 1985)).

[203] FEIS, at 4-297 to 4-314.

[204] Id. at 4-67.

[205] Id.

[206] Id. at 4-303 to 4-304.

[207] Letter from Robert Varney, EPA, to Magalie Salas, FERC, at ADC-6 (June 28, 2006).

With respect to aquatic resources, the Project would have a cumulative effect on the entrainment and/or impingement of fish eggs and larvae.[208] These effects would add to the substantial destruction of fish eggs and larvae already occurring as a result of cooling water withdrawals from several nearby power stations and other ships offloading cargo in Narragansett Bay.[209] LNG tankers offloading at the Project terminal would use a ballast control system that would allow the tankers to maintain a constant draft during all phases of operation.[210] Under normal operating conditions, an LNG tanker would take on up to 14 million gallons of ballast water during offloading operations.[211] FERC estimated the operation of the Project could result in the yearly loss of 1.3 million winter flounder eggs and larvae, 5.8 million bay anchovy, 0.2 million windowpane flounder, and 6.9 million tautog.[212] FERC compared the incremental losses from LNG tanker water intake against those already occurring in the Project area and found such impacts "would be relatively short-term and/or minor."[213] EPA questioned FERC's analysis, however, because in EPA's view, water usage by LNG vessels is higher than FERC's estimates suggest.[214] As a result, EPA found LNG vessels would represent a new source of entrainment that would augment the cumulative burden on the ecosystem,[215] and could offset gains made via recent reductions in the Brayton Point Station's water usage, or even make overall conditions worse.[216] In response to a recent request for EPA's views on the Project's coastal effects, EPA

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[208] At the beginning of the briefing period, WCE suggested otherwise, contending ballast water impacts are "not significant." WCE Initial Brief, at n.12. WCE later argued that ballast water intake impacts may not be reviewed because they result from "LNG vessel transit activities within the jurisdiction of the Coast Guard[,] [and] were not reviewed by MCZM or objected to by MCZM." Appellants Final Supplemental Brief, at 34. As explained above, the coastal effects relevant to the analysis in this appeal encompass "both direct effects which result from the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance but are still reasonably foreseeable." 15 C.F.R. § 930.11(g) (emphasis added). Ballast water intake effects are both indirect and cumulative effects of the Project.

[209] FEIS, at 4-304. The Brayton Street Power Plant near the mouth of the Taunton River and the Manchester Street Station on the Providence River together withdraw about 1.26 billion gallons of water per day. Id. Historically, the Brayton Street Power Plant is estimated to entrain/impinge fish eggs and larvae leading to the annual loss of about 0.25 billion winter flounder, 0.01 billion bay anchovy, 0.38 billion windowpane flounder, and 3.5 billion tautog. The Manchester Power Plant's withdrawals lead to the loss of an additional estimated 0.9 billion eggs and larvae per year. Id. Over the past several years, however, EPA has been working with the plant's operators to substantially reduce this impact by reducing the quantity of water withdrawn. Id. at 4-303; Letter from Robert Varney, EPA, to Joel La Bissonniere, NOAA, at 1 (May 23, 2008); Letter from Robert Varney, EPA, to Magalie Salas, FERC, at ADC-5 (June 28, 2006).

[210] FEIS, at 2-10.

[211] Id. at 2-10, 4-73.

[212] Id. at 4-304.

[213] Id. at 4-305.

[214] Letter from Robert Varney, EPA, to Joel La Bissonniere, NOAA, at ADC-5 (May 23, 2008).

[215] Id.

[216] FERC Commissioner Kelly, in a dissenting opinion, echoed this view. See Conditional Order, at 6

reaffirmed its concerns with respect to ballast water impacts indicating "[t]he intake of large quantities of ballast water by the tankers represents a potentially significant source of mortality to fish eggs."[217]

With respect to air quality and noise, the Project is not anticipated to result in any significant cumulative effects. FERC determined that the Project's emissions would not be major source of air pollution in the region, and would not exceed any of the applicable Ambient Air Quality Standards.[218] Noise effects from Project construction will be temporary and localized, and noise from the terminal and pipeline operations should be minor.[219]

FERC also analyzed potential cumulative effects for vegetation and wildlife, infrastructure and public services, vehicular traffic, land use, and natural gas infrastructure, but none of these resulted in a finding of a significant cumulative effect.[220]

Based on the foregoing, it is clear that the record is adequate to identify the cumulative adverse coastal effects of the Project. Additionally, with respect to these adverse coastal effects, the record establishes that they are generally minor, with the exception of cumulative effects on water quality and aquatic resources. Although the Project will add only an incremental increase in water quality degradation and fish egg and larvae impingement/entrainment in light of other major activities in the region—including, in particular, two power plants—the Project nevertheless measurably contributes to these cumulative effects, and would worsen existing adverse conditions.

3. Balancing national interests versus adverse coastal effects.

For Appellants to succeed on Element 2, the national interests furthered by the Project must outweigh its adverse coastal effects, based on a preponderance of the evidence.[221]

As discussed above, the Project furthers two national interests articulated in sections 302 or 303 of the CZMA in a significant and substantial manner: the Project involves the siting of a major coastal-dependent energy facility in an area where such development already exists, and the Project would develop the coastal zone. The Project's contribution to the national interests is significant because it advances the President's national priority of expediting the development and expansion of LNG terminals to improve natural gas availability and reduce prices. The Project's contribution to the national interests is also substantial because the Project will address

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(Commissioner Kelly, dissenting).

[217] Letter from Robert Varney, EPA, to Joel La Bissonniere, NOAA, at 1 (May 23, 2008).

[218] FEIS, at 4-311 to 4-312.

[219] Id.

[220] Id. at 4-297 to 4-314.

[221] See Islander East, at 35; Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc., at 41 (June 20, 1995).

critical future regional energy demands caused by regional growth and diminished natural gas supplies.

On the other hand, the Project would result in significant adverse coastal effects. Of greatest concern are the effects on navigational safety resulting from LNG tanker traffic called for by the vessel transit plan for the Project. As discussed above, the Coast Guard has noted that the channel is "narrow, winding, and in close proximity to significant populations and infrastructure" and that approaching the proposed terminal "would require extraordinary navigational maneuvers and present additional risks," providing "very little tolerance for human error while simultaneously introducing numerous risk factors." While WCE continues to appeal the Coast Guard findings, the fact that the Coast Guard, at the time the record closed in this appeal, had identified serious navigation safety risks that have not been resolved or adequately mitigated cannot be ignored.[222] These risks rise to the level that the Coast Guard has concluded that the Taunton River is unsuitable for LNG tanker traffic as proposed in the Project's vessel transit plan.[223]

Beyond these navigational safety effects, the record establishes that the Project would have other adverse coastal effects. The record establishes that Project dredging would result in the permanent loss of 11 acres of winter flounder spawning habitat. Dredging would also have adverse coastal effects on anadromous fish species, and both NMFS and EPA maintain that Appellants' plan to mitigate those effects is inadequate. In addition, commercial and recreational boaters will experience delays from the transit of LNG vessels and their safety and security zones. Although these delays will generally be temporary, they could be substantial if an LNG vessel is damaged, disabled, or grounded in the narrow and navigationally difficult channel. The record also establishes that the Project will contribute to cumulative adverse coastal effects, particularly with respect to ballast water intake by LNG vessels, which will result in the entrainment and/or impingement of fish eggs or larvae. Other identified effects (i.e., effects on endangered and threatened species, effects from terminal and pipeline construction, and effects from the disposal of processed dredged material) are of limited magnitude and temporary duration.

Based on the foregoing, the record establishes that the national interests furthered by the Project do not outweigh the activity's significant adverse coastal effects. Indeed, the significant adverse coastal effects on navigational safety, standing alone, may compel this conclusion. In any event, it is clear that, when those navigational safety effects are considered together with the additional effects described above, the national interests furthered by the Project do not outweigh its

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[222] Letter of Recommendation, Encl. 2, at 30.

[223] Appellants contend that their future compliance with FERC permitting condition number 75, requiring that WCE annually obtain Coast Guard authorization for its tanker vessel plan, should be assumed. Appellants Initial Supplemental Brief, at 21 (citing Nat'l Audubon Society v. Hoffman, 132 F.3d 7, 17 (2nd Cir. 1997); Korea Drilling); Conditional Order, Appendix B, ¶ 22. The record, however, indicates WCE has thus far failed to obtain Coast Guard approval of its vessel plan on two occasions. Because a decision must be based on the record, Appellants' arguments concerning the ability to rely on compliance with FERC's permitting conditions are unpersuasive.

adverse coastal effects. This decision, however, in no way prevents Appellants from re-filing or amending their consistency determination after revising the Project so that its adverse coastal effects do not outweigh the national interests it furthers.

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."[224] 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."[225] The burden of persuasion on this ground rests with the appellant.[226] General statements do not satisfy an appellant's burden.[227]

Appellants assert the Project is in the interest of national security because it will increase supplies of natural gas to New England and diversify the Nation's natural gas infrastructure.[228] Appellants point to a "looming supply shortfall" that would be prevented by the Project.[229] They also claim that by siting the Project in New England, not the Gulf of Mexico where the bulk of the current proposals would be sited, they will increase diversity and hedge against hurricane damage.[230] Apart from these general statements, however, they fail to identify any significant impairment to national security that would result should the Project not go forward.

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.[231] Comments were solicited from the Departments of Defense, Transportation, Justice, Homeland Security, Energy, and State, as well as from FERC, the Corps, the National Security Council, and the Homeland Security Council.

None of these Federal agencies raised any national defense or other national security interest concerns with the possibility that the Project might not go forward. Indeed, the Department of

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[224] 16 U.S.C. § 1456(c)(3)(A).

[225] 15 C.F.R. § 930.122.

[226] VEPCO, at 53.

[227] Millennium, at 38-39 (comments by FERC and DOE).

[228] WCE Initial Brief, at 27-29; Mill River Initial Brief, at 25-26; WCE Reply Brief, at 15; Mill River Reply Brief, at 11.

[229] WCE Initial Brief, at 28; Mill River Initial Brief, at 26.

[230] WCE Initial Brief, at 28-29; Mill River Initial Brief, at 26.

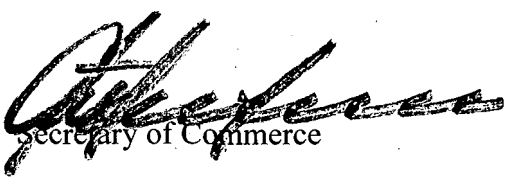
[231] 15 C.F.R. § 930.122.

Defense stated it was "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."[232]

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

VI. CONCLUSION

Massachusetts's objection to the Project is sustained. For the reasons set forth above, the record establishes that the Project is not 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. Given this decision, Massachusetts'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. This decision, however, in no way prevents Appellants from re-filing or amending their consistency determination after revising the Project so that its adverse coastal effects do not outweigh the national interests it furthers.



Secretary of Commerce

[232] See Letter from Peter Verga, Dep't of Defense, to Brett Grosko, NOAA (Nov. 19, 2007).