

September 20, 2004

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

Secretary Ellen Roy Herzfelder
Massachusetts Executive Office of Environmental Affairs
MEPA Unit
100 Cambridge Street, Suite 900
Boston, MA 02114

**RE: Weaver's Cove, LLC and Fall River, LLC;
Docket Numbers CP04-36-000 and CP04-41-000
EOEA Number 13061**

**City of Fall River, Massachusetts' Comments on Draft
Environmental Impact Statement/Draft Environmental
Impact Report**

Dear Secretary Salas:

The City of Fall River, MA is, by this correspondence, submitting written comments in response to the Draft Environmental Impact Statement (DEIS)/Draft Environmental Impact Report (DEIR) issued by the Federal Energy Regulatory Commission (Commission) on July 30, 2004.

The City has made two previous submissions of comments in these dockets; testimony provided on September 8, 2004 at the Commission's Public Hearing and written comments concerning NOAA Fisheries and Division of Marine Fisheries issues raised by the DEIS/DEIR filed with the Commission on September 10, 2004. The City requests that the Commission consider this final submission in conjunction with the two previous submissions concerning the DEIS/DEIR.

The DEIS/DEIR fails to provide to cooperating agencies and to the public the detailed information required by Section 102 of the National Environmental Policy Act (NEPA); 42 U.S.C. § 4332. The DEIS/DEIR does not sufficiently describe or adequately articulate:

- (1) the environmental impact of the proposed action,
- (2) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (3) alternatives to the proposed action,
- (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

In support of this conclusion, the City incorporates its written comments of September 8, 2004 and September 10, 2004. The City further incorporates its September 17, 2004 comments submitted to the United States Army Corps of Engineers (USACE) concerning the Weaver's Cove Energy, LLC and Mill River Pipeline, LLC joint permit application under Section 404 and Section 10 of the Clean Water Act; USACE File Number 2004-2355; [copy attached here](#).

Finally, the City specifically references and endorses the comments submitted to the Commission by the USACE on September 17, 2004, the comments submitted to the Commission by of NOAA Fisheries on September 17, 2004, and the comments submitted to the Commission by Massachusetts Attorney General Thomas F. Reilly on September 17, 2004.

The DEIS/DEIR, as exemplified in **Section 5.0: Conclusions and Recommendations**; does not make the fundamental determinations it is required to make concerning the need for this project or the public interest served. It cannot, because the information critical to making such determinations is not included in the DEIS/DEIR.

The DEIS/DEIR does not consider some of the most basic information in one of two ways: it either postpones the gathering and submission of such information until construction is imminent, following the issuance of a Commission authorization, or it recommends the submission of such information following the close of the DEIS/DEIR comment period.¹

¹ The original intent of the Coordinated Review Process agreed upon between the Commission and the Massachusetts Executive Office of Environmental Affairs was to offer simultaneous public review and comment periods. This did not occur. The DEIS/DEIR was issued by the Commission on July 30, 2004, but was unavailable for Massachusetts state review purposes until well after that. Consequently, the Massachusetts Environmental Policy Act (MEPA) public notice of availability of the DEIS/DEIR was not issued until August 25, 2004 and the MEPA public comment

Postponement of Receipt and Consideration of Information Until After the Commission Issues an Authorization and Construction is Imminent

By postponing the submission and consideration of critical information until after the Commission issues its authorization and construction is imminent, the DEIS/DEIR eliminates baseline screening criteria concerning the propriety of the project and the public interest it is intended to serve. The following examples illustrate this deficiency.

Recommendation 19. (DEIS/DEIR at 5-17) provides that the project file documentation with the Commission prior to construction and following Commission authorization, that placement of the dredged material is consistent with the Massachusetts Contingency Plan. This determination is NOT a construction detail or a remediation waste management issue. It is a threshold question concerning project and site suitability. If the 3.1 million cubic yards of contaminated sediments that the project insists MUST be dredged and disposed of on the terminal site violates the Massachusetts Contingency Plan, that fact should be sufficient to require the project to:

- find an alternative site,
- find an alternative mode of LNG transport,
- submit alternative disposal plans and a demonstration of compliance with Massachusetts Solid Waste Site Assignment requirements, and/or
- demonstrate that the material will qualify for a Beneficial Use Determination.

Once that information is provided, it should be offered, in a supplementary DEIS/DEIR, for public review and comment. Postponing this as a fundamental determination does NOT fulfill any rational project purpose, ensures delay, expense, and extensive negative impacts, and provides no certitude that a reliable new source of energy will be created and maintained for New England.

Recommendation 22. (DEIS/DEIR at 5-18) provides that, prior to construction and following Commission authorization, the project shall confer with NOAA Fisheries and state natural resource agencies to develop a dredging program that avoids the devastating impacts endorsed in the DEIS/DEIR. This is NOT a construction implementation detail. It is a threshold consideration concerning the public interest served by the project, the evaluation of need, and the assessment of alternatives. It is a question that must be answered first, not following authorization.

period closes on September 24, 2004, rather than September 20, 2004, the close of the Commission's comment period.

Recommendation 23. (DEIS/DEIR at 5-18) provides that, prior to construction and following Commission authorization, the project shall file a demonstration of consistency with the Massachusetts Coastal Zone Management Program (MCZM) and a concurrence from MCZM. Once again, this is a threshold issue, not a construction implementation detail. This issue must be resolved now, not following an authorization by the Commission.

The above examples are not exhaustive, merely illustrative. The DEIS/DEIR fails to explain how the Commission could even consider issuing an authorization to allow the project to commence without the most basic information about where and how the project should be sited and to what extent it will impose permanent, negative impacts upon natural resources and, potentially on public health and safety. This, however, is the inevitable result of postponing consideration of these questions.

Deferral of Receipt and Consideration of Critical information Until the Close of the DEIS/DEIR Comment Period

Deferring receipt of such basic information as disposal plans, sediment sampling results, dredging impacts, and wetland and public trust resource impact minimization plans, effectively removes these issues from public consideration and public review and comment procedures. Public participation, input, review and comment are a fundamental requirement of NEPA that is simply being ignored by this DEIS/DEIR. The following examples illustrate this basic deficiency.

Recommendation 20. (DEIS/DEIR at 5-18) states that the project shall provide, **in its comments on the draft EIS or in a separate document submitted at the same time**, a revised site plan for the northern parcel of the site that avoids permanent wetland impacts or demonstrates that an alternative layout is not practicable or feasible.

This information and alternatives analysis is a basic statutory requirement and is a criterion for determining whether a project should, at the outset, be considered. Further, this is a fundamental requirement of the Massachusetts Executive Office of Environmental Affairs Certificate for this project. To treat this requirement as a comment to be dealt with in the final EIS/EIR removes this information from state and public consideration.

Recommendation 21. (DEIS/DEIR at 5-18) states that the project shall provide, **in its comments on the draft EIS or in a separate document**, a conceptual compensatory wetland mitigation plan. Once again, this is a basic threshold requirement of the DEIS/DEIR, a fundamental requirement established

in the MEPA Certificate, and a component upon which the state and the public have an absolute right to review and comment.

As with the earlier examples, these are illustrative, not exhaustive by any means.

The DEIS/DEIR Ignores The MEPA Scope and Requirements

The DEIS/DEIR was, in accordance with the agreement for coordinated and joint review under the NEPA and the Massachusetts Environmental Policy Act (MEPA) intended to provide sufficient information and make determinations based upon screening criteria that would satisfy the requirements of the NEPA, the MEPA, and provide the information necessary for stating permitting agencies. This DEIS/DEIR is remarkable in the extent to which it fails to provide that basic information.

The MEPA Certificate issued on August 28; 2003, EOE Number 13061; required extensive and specific information to be provided in the DEIS/DEIR. The following list is, as before, not exhaustive, but illustrative as to what the DEIS/DEIR fails to include, as follows:

- Evaluation of no-build alternative to establish baseline conditions;
- Inclusion of all alternatives necessary for the state permitting processes, including the Chapter 91 License and the Water Quality Certification;
- Evaluation of alternative site lay-outs to arrive at a lay-out that minimizes overall impacts;
- Evaluation of a site layout without disposal of dredged sediment on the site;
- Demonstration of compliance with any applicable state regulatory or statutory performance standard;²
- Demonstration of alternatives that will meet CZM program policies;
- Methodology for reducing impacts to 1700 sq. ft of salt marshes;
- Inclusion of analysis of impacts to wetland resources and fisheries from dredging operations, including a detailed analysis of the physical and chemical characteristics of the dredged material. As set forth in the USACE comments, Tier III sediment sampling has not yet begun;
- Inclusion of a feasibility analysis concerning the upland placement of dredged material in light of the comments received from DEP and others;

² In fact, the DEIS establishes that the project cannot demonstrate compliance with the requirements of the Massachusetts Contingency Plan and that it will not meet state water quality standards or Chapter 91 requirements.

- Inclusion of a BACT analysis;
- Demonstration of compliance with DEP Noise Policy.³

Concluding Comments

Based upon the September 13, 2004 comments of the Commission's Chairman, Patrick H. Wood, III, to the ISO-NE energy conference, there is no imminent energy shortfall in this region that cannot be adequately addressed by projects already ongoing in Eastern Canada:

If two [Eastern Canadian projects] of those get built, you should be in good shape. If we don't get any of those built, we'll be in trouble. Where the two are built has some importance, but frankly, getting the volume in here is the important thing.⁴

These remarks are of significance to this project, as they undercut the basic project purpose. The substantial negative impacts and potential threats to public safety occasioned by this project are justified in the DEIS/DEIR by an imminent public need for additional natural gas to meet peak demand beyond 2005 (DEIS/DEIR at 1-5). The comments of the Commission's Chairman render that urgency, at a minimum, significantly less compelling than the conclusions set forth in the DEIS/DEIR. Further, they underscore the opportunity presented to plan and develop a reasoned, rational, and regional approach to LNG siting that truly serves the public interest, which this project, as presented in the DEIS/DEIR, simply does not do.⁵

The one consistent theme that has accompanied the development and NEPA/MEPA review of this project is HASTE. There has been insufficient time allocated for the development of the underlying information concerning project purpose, project alternatives, environmental impacts, avoidance or mitigation of unavoidable impacts, or public safety and security. There has been insufficient time afforded to the state agencies and to the public to conduct a rational, informed, and complete review of this project.

³ In fact, the DEIS/DEIR demonstrates that the project will not comply with the DEP Noise Policy.

⁴ See Peter J. Howe, "Two Gas Plants Needed for New England: But facilities can be built in Canada instead of here, U.S. Official states," *The Boston Globe* (September 14, 2004).

In fact, of the Eastern Canadian projects, one of them, proposed in New Brunswick by Irving Oil, has already received preliminary regulatory approvals and would provide approximately one billion cubic feet/day of gas.

⁵ The 2005 prediction set forth in the DEIS is based on a 2003 FERC analysis that did not anticipate the multiple project filings and proposals, the proliferation of existing facility expansions, and the feasibility of offshore siting demonstrated by the May 2004 permitting and commencement of construction of a Deepwater Port facility off the coast of Louisiana.

This rush to construction is best exemplified by correspondence issued by Commission staff on May 20, 2003, [copy attached here](#). This correspondence advised Weaver's Cover Energy, LLC that the project schedule for review was insufficient to comply with the Commission's own guidance:

You must be aware that your intended filing date of October 1, 2003 does not meet our guidance to begin this process 7 to 8 months prior to filing. My staff is committed to completing the environmental impact statement (EIS) as rapidly as possible. However, we are concerned that your current schedule does not allow sufficient time for you to develop complete environmental resource reports before your planned filing date, and for us to issue a draft EIS shortly thereafter.

In light of the comments presented and the national importance of the issues that have been raised to the Commission, the City of Fall River, MA requests that the Commission:

Suspend further review of this project until: (1) a regional approach to the siting of LNG facilities in New England is developed, such that projects are not reviewed in isolation, true energy needs can be established, and reasoned cost/benefit analyses can be performed, and (2) the Department of Transportation establishes regional siting and safety regulations consistent with the intent of Congress.

Following the development of such regional planning tools and regional siting and safety regulations, assuming that this project would still be considered, the City requests that the Commission:

Prepare and provide a Supplementary DEIS/DEIR that includes: (1) all of the missing and/or incomplete information identified in the City's comments filed on September 8, 2004, September 10, 2004, September 17, 2004 (USACE comments incorporated herein), (2) fully complies and responds to the Scope and Certificate issued by the Secretary of the Massachusetts Executive Office of Environmental Affairs on August 28, 2003, and (3) complies with all applicable requirements of the National Environmental Policy Act and the Massachusetts Environmental Policy Act.

Respectfully submitted on behalf of the City of Fall River, MA,

Carol R. Wasserman

September 17, 2004

Brian Valiton
Ted Lento United States Army Corps of Engineers
New England District
696 Virginia Road
Concord, MA 01742-2751

**RE: File Number 2004-2355;
Weaver's Cove Energy, LLC and Fall River Pipeline, LLC**

Dear Sirs:

The following submission and attachments constitute the written comments offered on behalf of the City of Fall River, MA, on the above-referenced permit applications.

The applications are administratively incomplete and substantively deficient, making it difficult to capture the full scope of interests upon which the public ordinarily would comment in such a permit proceeding. Further, the applications do not stand as independent documents that can be effectively reviewed, within the intent of the regulations, because they do not include much of the material upon which conclusions and demonstrations concerning the meeting of performance standards are based; they merely reference other documents.

Despite these material limitations and constraints, the City of Fall River offers the following comments.

Project Description

On March 16, 2004, Weaver's Cove Energy, LLC and Mill River Pipeline, LLC, collectively the "Applicant," filed applications, collectively treated in these comments as the "Application," for U.S. Army Corps of Engineers permits under Section 404 of the Clean Water Act, 33 U.S.C. § 1344 et. seq. and Section 10 of the Rivers and Harbors Act, 33 U.S.S.C. § 403 et. seq.

The LNG terminal, pipelines, and ancillary facilities, ("project") are proposed to be constructed on an approximately 73 acre site, the former Shell Oil Products Distribution and Storage facility. The pipelines will traverse portions of Fall River, Somerset, Swansea, and Freetown and include fourteen stream crossings and a proposed 2000' open cut trench through the Taunton River.

The LNG terminal portion of the project includes docking facilities for at least two 780' LNG tankers at once, as well as a boat ramp for security vehicles and docking for tugs and other marine vehicles and barges, as well as a truck loading facility. The trucking facility is designed to service up to four trucks simultaneously and to provide service for 100 trucks/day entering and leaving the facility.

The staging and construction of the terminal and associated facilities has been described in only the broadest terms in the Application; no accurate assessment of impacts resulting from pre-construction preparation and demolition, construction, and operations and maintenance can be discerned from the information currently filed with or issued by the U.S. Army Corps of Engineers (USACE), the Federal Energy Regulatory Commission (FERC) and the Massachusetts Department of Environmental Protection (MADEP). This information includes the Draft Environmental Impact Statement/Draft Environmental Impact Report issued by the FERC on July 30, 2004, a construction plan approval filed with the MADEP in March 2004, three Section 401 Water Quality Certificate Applications filed with the MADEP in April and May 2004, and two Chapter 91 Waterways License/Permit applications filed with the MADEP in April and May 2004.¹

Project Construction

The construction process has been described by the Applicant as follows. In order to provide sufficient depth and breadth to LNG tankers, an estimated three years of continuous, twenty-four hour/day, seven day/week dredging of the Taunton River, to depths in excess of the Federal Channel limits, with no Time of Year restrictions, will be commenced. The contaminated sediments dredged from the waterways will be brought to the upland, with backflow directed into the Taunton River and other coastal resources, in volumes estimated from 2.1 million cubic yards to 3.1 million cubic yards. This is described to be the most critical piece of site development, but the basic volumes of contaminated sediments have yet to be established and the estimated volumes vary significantly. The Applicant estimates 2.1 – 2.5 million cubic yards. The DEIS estimates 2.8 – 3 million cubic yards. NOAA Fisheries estimates 3.1 million cubic yards.²

¹ Additional submissions have been made to Rhode Island executive agencies that are outside the scope of this review.

² As set forth in the City of Fall River's September 10, 2004 comments to the FERC in Docket Numbers CP04-36-000 and CP04-41-000, NOAA Fisheries has estimated this volume since September 26, 2003. That estimate has finally been accepted by the FERC and the DEIS recommends that a plan be developed for managing this amount of material. NOAA Fisheries has also repeatedly pointed out that the overdredge figures are incorrect and that the

There are at least three other critical components concerning the dredging program missing from the information provided in the Application, making it impossible to realistically assess impacts of the project:

Management of Dredged Sediments. The Application describes three possible methods for managing the dredged sediments; in-water processing on scows at variable production rates, pug mill processing in coastal resources areas, again at variable production rates, and land-based placement and processing anywhere space may become available during construction on the southern portion of the site. "Anywhere" includes Waters of the United States, as defined by the USACE. The Application reserves any final process and production rate to the dredging contractor.

Alternative Dredging Methodologies. The utility of the alternatives analysis for managing the dredged materials is described by the Application as, "solely for illustrative purposes of the typical dredging and disposal alternatives, sequence, and inter-relationships." (App. at page 53). This "illustrative" analysis describes hypothetical dredging limits that would be sufficient to satisfy navigational requirements and dredging methodology alternatives, but fails to provide project-specific information.

Alternative Dredge Disposal Methodologies. The Application provides a table of possible disposal methodologies and possible disposal sites in Southeast New England. (App. at page 58). The table is used to justify the conclusion that only land-based disposal on the project site will work for the project purpose. The table has all of the utility of a telephone book when it comes to assessing alternatives.

Following the ongoing, indeterminate methodology, indeterminate volumes of contaminated sediments, and indeterminate processing, stockpiling, de-watering, and stabilization activities, the dredged sediments will be used for site grading and for the creation of berms and containment facilities around the LNG tank and associated piping. It will also be used to create a 100' high "landform" to, according to the Applicant, provide some visual screening and noise buffering. See Attachment 1: Correspondence dated October 10, 2003 from Applicant to Shell Oil Company, copy attached hereto. See also DEIS at 4-132.³

maintenance and improvement dredging figures are inaccurate. On July 28, 2003, the MADEP and the Massachusetts Office of Coastal Zone Management both commented that any dredging beyond the authorized channel depth of 35' would be considered improvement dredging. That distinction and the associated performance standards have been ignored by the Applicant.

³ Copies of all pages of the DEIS referenced in these comments are provided in Attachment 6.

Finally, the LNG terminal will be connected to proposed pipelines, which will be constructed in sequence, following the completion of the dredging and disposal program.

USACE Application Standards

As a threshold matter, the Application submitted to the USACE fails to provide the basic information necessary to conclude the Application is complete.

The following example of essential incompleteness is illustrative, not exhaustive. The USACE New England Division Guidance for submitting permit applications for dredging projects (page 16) requires, at a minimum, the following information. The information that has not been submitted, or is materially incomplete, is highlighted:

Plan view with existing bottom depths;

Section view;

Amount of material to be dredged;

Proposed dredging depth;

Method of dredging;

Stipulate maintenance or new dredging;

Disposal Site for dredged material;

Location of any discharges on the plan and any potential non-point source discharges of pollution;

Point Source discharges/spills must be investigated;

Submit any previous test data;

If the disposal site is upland, specify the site on a map; provide the site's existing characteristics;

Method of containment;

Specify the materials to be used for berm construction and the construction method;

Specify the method of transporting the dredged material from the site to the disposal area;

Submit grading plans;

Specify the long-term planned use of the site;

Specify containment site capacity calculations;

If open water disposal is chosen as the disposal site for the material to be dredged, submit a detailed upland disposal alternative analysis.

Amount of material to be dredged. While total volumes may be initially uncertain for many projects, the uncertainty in the volumes proposed to be dredged here amounts to a potential difference and increase of approximately one million cubic yards of contaminated sediments. Until that amount can be established with some certitude, no credible assessment of dredging methodology, impacts, or disposal alternatives can be formulated.

Proposed dredging depth. There is no certitude about these figures either. The Applicant has misapplied the concept of "overdredge," as commented upon by NOAA Fisheries, and has failed to apply the USACE standards for overdredge calculations. Providing possible depths is insufficient to evaluate the impacts of this project under the USACE's Guidelines.

Stipulate maintenance or new dredging. While numbers have been provided, the numbers are inaccurate. As commented upon by NOAA Fisheries, areas that are clearly improvement dredging have been characterized as "maintenance" dredging.⁴ Until those numbers are certain, there is insufficient information, under the USACE's Guidelines, to assess the impacts of the project.

Location of any discharges on the plan and any potential non-point source discharges of pollution.

This requirement emphasizes a number of problems with the Application.

The Application does not identify potential non-point source discharges of pollution, because it cannot. The construction management and sequencing program is so ambiguous and incomplete and the proposal to manage the

⁴ See also Attachment 2: City of Fall River Comments to the MADEP on July 9, 2004, concerning the Chapter 91 Permit Applications, at pages 2 – 3.

significant volumes of dredged sediments anywhere and everywhere on the southern portion of the site make such identification impossible.

The plans do identify existing discharges from current site activities, as well as an existing CSO discharge and a NPDES permitted discharge from the Chapter 21E groundwater treatment system operated on the project site by Shell Oil Products. However, the Applicant also states that it plans on relocating several discharge points. As the Applicant has no right to control and does not hold the permits for these discharges, any assertion about relocations has no credible basis and is insufficient for assessing impacts of discharges from the project.

The plans for erosion and sedimentation control are, in large part, conceptual. The proposal for demolition of existing piping, buildings, and facilities prior to construction has not even been submitted yet.⁵ It is impossible to reliably identify discharges, point sources and potential non-point sources, without this information.

Finally, until the volumes of dredged sediments, a management and sequencing plan, and a selection of methodology for stabilization and placement on the site are identified, there is no credible way to identify discharges from the project.

If the disposal site is upland, specify the site on a map; provide the site's existing characteristics.

The Application proposes to dispose of the dredged sediments on the southern portion of the site, to construct berms and a 100' "landform."⁶ While

⁵ Weaver's Cove Energy, LLC and Miller River Pipeline, LLC have submitted two Notices of Intent to the City of Fall River, and Notices of Intent for the Pipelines to Swansea, Somerset, and Freetown.

The Notices to the City of Fall River were filed on June 28, 2004; one for the construction of the LNG terminal and one for the pipeline ROW within Fall River. These Notices expressly provided that pre-construction demolition and site preparation were out of the control of either Weaver's Cove Energy, LLC or Mill River Pipeline, LLC and that the current site owner, Fall River Marine Terminal, LLC, would be filing the applications for these activities. To date, nothing has been filed and no information has been provided concerning the submission of this information.

⁶ The Application fails to include, under necessary state permits and approvals, the need to secure a site assignment for the disposal of solid waste in Massachusetts or, alternatively, the need to obtain a Beneficial Use Determination from the MADEP. While the project uses the words "re-use" and "disposal" almost interchangeably, the DEIS acknowledges, as do portions of the dredging program description, that the upland is the only alternative being considered by the Applicant for disposing of the sediments.

the berms and the landform are included on the site plans, as well as the fill areas in the wetlands, there is no information concerning upland disposal of the total 3.1 million cubic yards of contaminated dredged sediments upland. The areas where this material may be staged, stockpiled, processed, and graded are unknown, as the plans identify the entire site for use at any point for all of these activities.

The Application does describe the ongoing remediation activities being performed on the site by Shell Oil Products, under the direct supervision of the MADEP's Chapter 21E (state Superfund) program under RTN 04-0749. It does not describe in any detail the three to four foot layer of LNAPL that overlays portions of the groundwater under the site, which discharges to the Taunton River. It also fails to include a series of other, very significant pieces of information.

The Application neglects to mention that portions of the active remediation system, which removes the LNAPL and contains its migration to the Taunton River, will have to be shut down for prolonged periods during construction of the LNG terminal and that Shell Oil Products, the operator of the system, has not agreed to allow this or any other modification of the treatment system, nor has the MADEP modified the approved remediation plan.

The Application neglects to mention that before any dredged material will be allowed to be placed on the site, the MADEP will require a characterization of existing conditions on the site. While this requirement has been acknowledged in the DEIS, no sampling has been performed, which means no information is available for consideration in this Application.

The Applicant has concluded that contamination in the sediments to be placed on the site will not violate the "anti-degradation" requirements of the Massachusetts Contingency Plan; 310 CMR 40.0032(3) (which is also a requirement for the Massachusetts Section 401 Water Quality Certification); but no LSP Opinion, as would be required under Massachusetts state law, was submitted with the Application.⁷ See also Attachment 3: July 26, 2004 Shell Oil Products Comments to the Fall River Conservation Commission, copy attached hereto, as well as the March 2004 Shell Oil Products Comments to the FERC, copy attached hereto.

Existing site conditions have not been described adequately and the information necessary to consider impacts under this Application has not been

⁷ As set forth in Attachment 1, it is impossible to determine whether levels of contaminants in the sediments, including arsenic and mercury, combined with existing contamination on the site, would violate the Massachusetts Contingency Plan, because the testing has not been done.

developed. Without such information, no credible assessment of impacts of this Project may be performed.

Specify the materials to be used for berm construction and the construction method.

The Application provides a list of hypothetical methodologies and admixtures, but fails to include any project-specific methods, quantities of materials, stabilization techniques, ways to minimize compaction, erosion, and destruction of wetland resources, or ways to mitigate unavoidable impacts.

Specify the method of transporting the dredged material from the site to the disposal area.

The Application provides a list of hypothetical techniques, but no project specifications. Those specifications, according to the Applicant, are being left to the judgment of the dredging contractor after commencement of construction. This makes it impossible to credibly quantify impacts, propose avoidance measures, evaluate alternatives, or propose reasonable mitigation plans.⁸

If open water disposal is chosen as the disposal site for the material to be dredged, submit a detailed upland disposal alternative analysis.

This requirement assumes that a complete and appropriate alternatives analysis was performed prior to filing an application is filed with the USACE. No disposal alternative other than placing the dredged sediments on the project site has been realistically considered by the Applicant, which leaves open the suggestion that this requirement is not applicable to this Application. However, such a position flies in the face of the requirements of the USACE, the National Environmental Policy Act (NEPA), and the Massachusetts Environmental Policy Act Certificate issued by the Executive Office of Environmental Affairs on August 28, 2003 (MEPA Certificate); included here as Attachment 4, to evaluate all practicable alternatives, including a disposal plan that did not require any upland disposal.⁹

⁸ The DEIS recommends that the Applicant, as part of the DEIS process, submit a plan for mitigating unavoidable wetland impacts. Such a plan would be assessed by the FERC and conclusions would be drawn in the final EIS without any opportunity for public review or comment.

⁹ "The EIR should evaluate a site layout without disposal of dredged sediment on the site." MEPA Certificate, page 4.

It would be impossible at this juncture for the Applicant to evaluate open water disposal. The Tier III testing required to perform such an analysis has not been commenced and the Supplemental Tier III Plan has been classified as "trade secret" material, which, according to the DEIS, is still being evaluated by the USACE. This deficiency raises a significant issue.

The Applicant, as set forth earlier, provides a table of hypothetical disposal options. The Applicant fails to go beyond creating this table and has never purported to conduct an alternatives analysis to consider any method of disposal other than placing the contaminated sediments on the project site.

The Applicant is not in any position to even commence a Tier III sampling program, even if approved by the USACE, because the Applicant has not fulfilled the basic requirements of a Tier III precursor, the Tier II sediment sampling plan developed by the Applicant with participation from the USACE and the MADEP.

The Tier II sediment sampling performed by the Applicant failed to comply with the sediment plan in several notable respects. The Tier II Sediment Plan called for 55 cores and 105 discrete samples. The Applicant performed 43 cores and averaged 55 samples. As noted previously, no sampling at all was conducted by the Applicant in the East Channel. Earlier sampling conducted by the Massachusetts Office of Coastal Zone Management (MCZM) was relied upon for this purpose, even though the goals of the MCZM program and this project were distinctly different.

According to the DEIS (4-21 through 4-24) the Tier II sediment samples were screened using the NOAA Screening Quick Reference Tables, employing the Effects Range – Low (ER-L), Effects Range – Median (ER-M) and the Probable Effects Level (PEL).

Of the 12 polycyclic aromatic hydrocarbons (PAHs) tested for in the samples with screening values, eight of the 12 PAHs exceeded the ER-L value, while four PAHs have no assigned values using these screening values, but the actual effects range was not provided. It is therefore impossible to comment on the effects of these contaminants at the levels at which effects frequently occur (ER-M) or where adverse biological effects may be expected (PEL).

Of the eight metals tested for in the samples, individual metals were detected in 82% to 100% of the samples, but in which samples and at what percentages is not provided. The DEIS reports that average concentrations of seven of the eight metals (which included arsenic, cadmium, chromium [III or VI not distinguished], copper, lead, mercury, nickel, and zinc) exceeded the ER-L criterion and seven of the eight metals had average concentrations below the

ER-M and PEL thresholds, again with no distinction about the metals or percentages in each criterion.¹⁰

The DEIS also reports that average mercury concentrations in the sediment samples exceeded both the ER-M and the PEL values. In other words, mercury levels were found to occur in all the samples at levels where adverse biological effects could reasonably be predicted. Based on even this limited sample set, by ignoring Tier III sampling it is reasonable to infer that either the Applicant never intended to evaluate any other alternative or has a basis to conclude that open water disposal of the materials would be foreclosed without treatment.

While it is simple for the Applicant to say that this requirement is not applicable; that open water disposal is not being considered; that is only because the Applicant has ignored the basic requirement of the USACE regulations to evaluate all practicable alternatives so as to determine which proposal will be the least environmentally damaging, practicable alternative.

State Permits

The Application fails to address several required Massachusetts state permits, should the project go forward in its present form. The Application cannot be considered complete without this additional information.

The Application fails to include that either a site assignment or a beneficial use determination will be required for the disposal of the estimated 3.1 million cubic yards of contaminated sediments on the LNG terminal site.

The Application fails to include that hydrostatic testing of the LNG tank and the pipelines will require a Massachusetts Water Management Act Permit or a Notice of Exclusion from Permitting. The DEIS provides that the 32 million gallons of water needed to test the tank and 760,000 gallons of water needed to test the pipelines will either be taken from the City of Fall River's water supply¹¹

¹⁰ These values also demonstrate that state water quality standards in Massachusetts for, at a minimum, copper and zinc, will not be met. Further, the Massachusetts Water Quality Certification Program incorporates the anti-degradation requirements of the Massachusetts Contingency Plan (MCP); 310 CMR 40.0032(3); and the testing required by the MADEP to demonstrate that these MCP requirements will be met has not been done.

¹¹ It is very doubtful that the City of Fall River could ever provide that amount of water. Further, as the Applicant has refused to provide the City of Fall River with a copy of the report it prepared concerning water supply and water use, it is unlikely that the City would be in a position to entertain such a request.

or will be withdrawn from the Taunton River, which is classified as a medium-stressed basin by the Massachusetts Executive Office of Environmental Affairs.

The Application fails to include that the MADEP and Shell Oil Products will have to agree to modify the current MCP Phase V remediation plan for removing and containing levels of LNAPL that exceed Upper Concentration Limits in the groundwater flowing under the project site. It also fails to include that any changes to the locations of current discharges authorized under permits and/or waivers held by the City of Fall River and Shell Oil Products, will have to be agreed upon by the City and by Shell.

The Application fails to include that the dredging program as proposed will violate the requirements of the MADEP Noise Policy; DAQC 90-001; (DEIS at pages 4-171 and 4-172).

The Application fails to include the information that the dredging program will not comply with the Massachusetts Waterways program because, among many other notable deficiencies about which comments have previously been submitted to the MADEP, the project refuses to comply with required time-of-year-restrictions on dredging and the DEIS does not recommend either sequencing or time-of-year restrictions. (DEIS at page 4-78).

The Application fails to include that the current site owner, Fall River Marine Terminal, will need to file a Notice of Intent with the Fall River Conservation Commission to demolish existing structures and facilities on the site and to commence pre-construction activities on the site.

Public Interest Review

The USACE bases its decision to issue or to deny a permit based upon a series of factors, which include the public interest review described in the public notice and at 33 CFR § 320.4. The public interest review evaluates the probable impacts, which include cumulative impacts, of the project and its intended use on the public interest.

Relevant factors to be considered in this Application include conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, considerations of property ownership and, in general, the needs and welfare of the people.

The Application failed to consider a series of these factors at all, including economics, aesthetics, general environmental concerns, and the needs and welfare of the people.

For the factors considered in the Application, the cumulative impacts were not evaluated in compliance with the requirements of NEPA for consideration of cumulative impacts.

The Application itself does not include this cumulative effects analysis. The DEIS does address it to some extent (4-235 through 4-246), but fails in several significant ways. This is not to suggest that the DEIS may or should substitute for the required cumulative effects analysis necessary to issue a permit under Section 404 and Section 10. Rather, it is to illustrate that even the minimal efforts at cumulative effects analysis provided by the DEIS, if offered as a supplement to the Application, are inadequate to comply with the USACE requirements.

First, the analysis fails to distinguish or effectively address direct, indirect, and cumulative impacts. The analysis provides a series of simplistic and limited conclusions.

Second, as set forth in the CEQ Guidance entitled "Considering Cumulative Effects Under the National Environmental Policy Act (NEPA);" CEQ 1997; cumulative effects on a resource must consider whether a resource is especially vulnerable to incremental effects. This requirement is generally ignored for most resources and is not addressed at all concerning the effects on the Taunton River, which is both the only free-flowing, un-dammed river in the region and subject to protection under the Wild and Scenic Rivers Program.

Third, the focus of the limited cumulative effects analysis set forth in the DEIS is on specific affected resource areas, not the function of the resources, particularly the aquatic resources, within the broader ecosystem.

The Application is materially deficient and does not comply with the USACE requirements.

The 404(b)(1) Guidelines

As part of its permit application, the Applicant must demonstrate compliance with the Guidelines developed by the United States Environmental Protection Agency in conjunction with the USACE under Section 404(b)(1) of the Clean Water Act. The Guidelines are applicable in the review of proposed discharges of dredged or fill material into navigable waters.

The Guidelines prohibit discharges:

Where less environmentally damaging, practicable alternatives exist;

Which result in violations of State or Federal Water Quality Standards, the Endangered Species Act, and the Marine Sanctuaries Act;

Which cause or contribute to significant degradation of waters and wetlands;

If all appropriate and practical mitigation has not been taken; or

If there is not sufficient information to determine compliance with the Guidelines.

Least Environmentally Damaging Practicable Alternative

The Applicant, under the 404(b)(1) Guidelines, is required to demonstrate that no practicable alternative to the proposed project exists that would have a less adverse impact on the aquatic ecosystem. An alternative is considered "practicable" if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose. If it is an otherwise practicable alternative, an area not presently owned or controlled by the Applicant that could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the project may be considered. 40 CFR § 230.10(a).

The Applicant has failed to comply with this requirement because the Application does not adequately evaluate realistic alternatives to the project.

On-Site Alternatives

The Application states that alternative lay-outs for the project are not practicable. Specifically, the Application states that the lay-out is predicated on the placement of the LNG tank, which has been sited to maximize required setbacks and exclusion zones. If the lay-out were altered, a site redesign would have to be developed, but the project would comply with all relevant standards for setbacks and exclusion zones to the extent that it does now.¹²

¹² As set forth earlier and as set forth in the comments of Dr. Jerry Havens submitted to the FERC on September 8, 2004, the City of Fall River believes that the project fails to comply with the relevant setback and exclusion zone requirements.

The Application also states that an alternate lay-out would be inferior for maintaining straight lines-of-sight, which are advantageous for security. While there appears to be no regulatory requirement for this and the Application cites none, this conclusion is also offered to demonstrate that the current lay-out is the only practicable one for the site.

The USACE is not alone is requiring alternate site lay-outs that would minimize impacts on aquatic ecosystems. The Massachusetts Wetlands Protection Act and the Massachusetts Waterways Act also require such analyses. In addition, the MEPA Certificate issued by the Secretary of the Massachusetts Executive Office of Environmental Affairs required the Applicant to provide alternative site lay-outs (at page 4) to minimize such impacts. That analysis was not done.

The current lay-out of the LNG terminal (exclusive of the pipelines), in addition to imposing long-term and potentially permanent impacts on 191 acres of sub-tidal habitat, which includes Essential Fish Habitat for fourteen finfish species and three shellfish species, also carries the following, permanent impacts:

25' Riverfront Area	-	60,150 s.f.
Land Subject to Coastal Storm Flowage	-	613,150 s.f.
Salt Marsh	-	1,790 s.f.
Coastal Bank	-	3,935 l.f.
Coastal Beach	-	47,635 s.f.
Coastal Dune	-	11,000 s.f.
Land Under the Ocean	-	8,850 s.f.
Land Containing Shellfish	-	5,210 s.f.
Anadromous/Catadromous Fish Runs	-	42,125 s.f.

(All figures taken from Notice of Intent for the LNG terminal filed with the Fall River Conservation Commission and the MADEP.)

The Application fails to include any quantitative basis for its conclusion, nor does the Applicant claim that technology constraints or logistics render an alternative "impracticable."

Dredging Program Alternatives

The Application provides a series of conclusions in support of the proposed dredging program. It fails, however, to justify the scope and extent of the dredging footprint, the volumes of dredged materials, or the complete failure to assess alternatives to the continuous three-year, twenty-four hour/day, seven-day/week dredging activities.

The Application fails to include any site-specific quantitative basis for its impact conclusions, nor does the Applicant claim that technology constraints or logistics render a less-intrusive program; e.g. a program that would comply with Massachusetts Wetlands Protection Act and Waterways Act requirements for time-of-year restrictions; impracticable.

Dredged Material Management Alternatives

The Application proffers one paragraph concluding that placement on the project site is the only practicable management solution. In-water disposal alternatives, as discussed above, have not been contemplated, and the Application specifically states that none are being proposed.

The Application also states that the filling of .04 acres of salt marsh and one acre of inter-tidal habitat, which includes a coastal beach, with the dredged sediments, are not significant impacts.

The failure to comply with the Guidelines and consider practicable alternatives does not provide a basis to destroy these resource areas. The Salt Marsh Functional Analysis submitted with the Application, prepared and performed by the Applicant, concludes that the salt marshes proposed to be filled provide the following functions and values: finfish and shellfish habitat and juvenile population habitat, groundwater recharge/discharge, sediment and toxicant reduction, production export, and wildlife habitat.

The impacts of the dredging program and the dredged material management information are further set forth in Attachment 5: September 10, 2004 comments submitted to the FERC by the City of Fall River, MA.

The Application is materially deficient in providing a reasonable and complete alternatives analysis for on-site alternatives or alternatives to the

dredging program. As such, the Application does not comply with the Guidelines.

Off-Site Alternatives

The limited set and scope of the off-site alternatives analysis, which is not included in the Application,¹³ is inadequate and outdated.

Resource Report 10 fails to include any alternative site north of Massachusetts and summarily dismisses off-shore alternatives as technically infeasible.¹⁴ The Applicant does not consider the current off-shore proposal in Gloucester at any point in the Application.

According to Resource Report 10, in order to consider an alternative site, the Applicant must have the ability to control that site (10-7). As set forth earlier, that is not a requirement for considering an alternative and it does not provide the basis for an applicant to reject consideration of an alternative site.

Resource Report 10 also eliminates sites where the Applicant could not secure control over adjacent areas within exclusion zones. (10-11). In fact, the Applicant does not have control over portions of the Fall River site within those zones. As set forth in the Comments of Dr. Jerry Havens, copy attached hereto, the correct exclusion zones calculations demonstrate that the zone extends over Massachusetts Route 79N, which is certainly not under the control of the Applicant.

Resource Report 10 rejected a site on New Haven Harbor because it would require dredging a volume of materials of 2.7 million cubic yards (10-21). This project will require dredging of an estimated 3.1 million cubic yards.

Several other sites in the New Haven area, according to Resource Report 10, were identified, but were eliminated when "a telephone call to the state's port marketing director (identified on the state's web site) was not returned." (10-21).

¹³ It is referenced as appearing in Resource Report 10 (December 2003).

¹⁴ In fact, El Paso Energy Bridge successfully permitted a facility approximately 117 miles off of the Louisiana coast in May 2004. The permit, which was issued by the U.S. Department of Transportation and the Maritime Administration, included an Environmental Assessment that found the impacts of the offshore facility to be significantly less than what would be imposed onshore. It also found that the remote siting provided a greater level of safety and security than would be provided by an onshore facility.

There are plans being proposed currently for a similar offshore facility, permitted under the Deep Water Ports Act, for an LNG facility off of the coast of Gloucester, MA.

Brayton Point was assessed to some extent, but, according to Resource Report 10, was rejected because it had existing environmental contamination, could not accommodate the disposal of dredged sediments on site, and it would take two years to properly characterize and test the sediments. (10-25 through 10-27).

The proposed site has known and extensive environmental contamination, cannot accommodate the disposal of the dredged material without a site assignment and MADEP approvals that have not been sought, and NO Tier III testing of the sediments has commenced.

The Application is materially deficient and fails to comply with the requirements for providing a reasonable and practicable alternatives analysis.

Actions to Minimize Adverse Effects

Subpart H of the Section 404 (b)(1) Guidelines sets forth specific requirements for minimizing unavoidable, adverse effects upon aquatic resources. The Application fails to demonstrate that the impacts from this project are unavoidable and largely ignores the Subpart H requirements.

Section 230.70(a) provides for minimization by locating and confining the discharge to minimize smothering of organisms. The Application, as well as the DEIS, rejects any time-of-year restrictions and rejects the comments of NOAA Fisheries concerning avoidance of activities during the 21 – 45 embryonic development period for winter flounder, a finfish species that will suffer potentially permanent impacts as a result of the dredging program.

Section 230.73(3) provides for setting limitations on the amount of material to be discharged per unit of time or volume of receiving water. The project has rejected any suggestion of such limitations and proposes a dredging program that maintains daily production volumes of dredged material between 2,000 – 10,000 cubic yards/day every day for a minimum of three years.

Section 230.74(c) provides for using machinery and techniques that are especially designed to reduce damage to wetlands. The Application is devoid of specific information concerning equipment to be employed. The Application states that best management practices will be used and reserves specifics to be developed prior to construction.

Section 270.75(c) provides that sites having unique habitat or other value be avoided. Section 270.75(e) provides for timing discharges to avoid spawning or migration seasons and other biologically critical time period. The Application

affirmatively imposes impacts on Essential Fish Habitat, with no proposed mitigation or avoidance techniques, and rejects any project sequencing or time-of year restrictions.

Finally, Section 270.75(d) directs that, when a significant ecological change in the aquatic environment is proposed by the discharge of dredged or fill material, the permitting authority should consider the ecosystem that will be lost as well as the environmental benefits of the new system.

The impacts upon the aquatic environment from the project are extensive and, potentially, of permanent duration. Those impacts include but are not limited to water quality degradation, habitat loss, elimination of shell fish species, potential for establishing opportunistic or invasive species, and impacts upon seven federal and Massachusetts listed threatened and/or endangered species identified by NOAA Fisheries and the Massachusetts Division of Marine Fisheries.¹⁵

Conclusions

The Applications filed by Weaver's Cove Energy, LLC and Fall River Pipeline, LLC with the USACE are administratively incomplete and substantively deficient. They do not comply with the requirements of the National Environmental Policy Act, the Massachusetts Environmental Policy Act, the Massachusetts Wetland Protection Act, or the USACE permitting requirements for Section 10 and Section 404 permits.

The City of Fall River requests that the USACE reject the Applications without prejudice and require that full and complete Applications be submitted to the USACE and published for public review and comment.

Alternatively, the City of Fall River requests that the USACE require the Applicants to fully comply with all of the requirements of the National Environmental Policy Act, the Massachusetts Environmental Policy Act, the Massachusetts Wetlands Protection Act, and the USACE permitting requirements for Section 10 and Section 404 permits in a supplemental submission to the pending Application. Once such a submission is completed and accepted by the USACE as complete, the USACE should provide a second opportunity for public comment, as contemplated by the USACE regulations for public review and participation.

¹⁵ These include four species of sea turtles, oystercatchers, least terns, and roseate terns.

Respectfully submitted on behalf of the City of Fall River, MA,

Carol R. Wasserman

cc: United States Environmental Protection Agency, Region One
NOAA Fisheries
Massachusetts Department of Environmental Protection

In Reply Refer To:
OEP/DG2E/Gas 1
Weaver's Cove LNG Project
Docket No. PF03-4-000
May 20, 2003

Ted Gehrig
President
Weaver's Cove Energy, LLC
One New Street
Fall River, MA 02720

Re: Establishment of PF Docket

Dear Mr. Gehrig:

Thank you for your letter dated May 8, 2003, which supplements your February 14, 2003 request to use our National Environmental Policy Act (NEPA) pre-filing process for a planned LNG import terminal and related pipeline laterals (Weaver's Cove LNG Project) in Fall River, Massachusetts. I am granting your request that we begin our NEPA process prior to our receipt of your application. We believe that beginning the Commission's NEPA review now would greatly improve the chances of completing the process in the requested time frame. As outlined in your request, Weaver's Cove Energy (Weaver's Cove) has already made significant progress with consulting the affected federal, state, and local agencies, who have agreed to participate in our pre-filing process. Weaver's Cove has also demonstrated that it is willing to resolve any issues and work with my staff in promoting the involvement of all stakeholders affected by this planned project.

You must be aware that your intended filing date of October 1, 2003, does not meet our guidance to begin this process 7 to 8 months prior to filing. My staff is committed to completing the environmental impact statement (EIS) as rapidly as possible. However, we are concerned that your current schedule does not allow sufficient time for you to develop complete environmental resource reports before your planned filing date, and for us to issue a draft EIS shortly thereafter. A more reasonable time frame for filing your application will be our first order of business under the pre-filing docket. With this in mind, you should modify your project schedule to reflect our concerns.

We will shortly be issuing a notice announcing the establishment of the PF docket for this planned project and our NEPA pre-filing involvement. To facilitate this effort, please provide us with the names and addresses of all interested parties and landowners potentially affected by construction and operation of the planned LNG import terminal and the related pipeline laterals.

Your project has been assigned Docket No. PF03-4-000. All future "pre-filing" correspondence and submissions by Weaver's Cove to the Commission for this project should reference this docket number. If you have any questions, please contact Mr. Chris Zerby at (202) 502-6111.

Sincerely,

J. Mark Robinson
Director
Office of Energy Projects

cc: Public File, Docket No. PF03-4-000

Larry Brown
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