

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Weaver's Cove Energy, L.L.C. and))
Mill River Pipeline, L.L.C)
_____)
	Docket Nos. CP04-36-000, CP04-41-000,
	CP04-42-000, and CP04-43-000

REQUEST FOR REHEARING
AND FOR ORAL ARGUMENT

I. INTRODUCTION

The City of Fall River, Massachusetts,¹ Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts, Patrick C. Lynch, Attorney General of the State of Rhode Island, and the Massachusetts Energy Facilities Siting Board, pursuant to Section 19(a) of the Natural Gas Act (“NGA”), 15 U.S.C. 717r(a), and 18 CFR § 385.713, hereby request Rehearing of the Order of July 15, 2005 (“Order”) in the captioned dockets authorizing the Weaver’s Cove project. In the event that the Commission is not disposed to grant the relief requested on the basis of this written filing, we request that it provide an opportunity for oral argument before the full Commission before acting on Rehearing.

There is, however, a preliminary and potentially dispositive matter that should first be addressed: the question of whether the Weaver's Cove project is now moot, obviating the need for consideration by the Commission of the broader grounds for Rehearing presented in this

¹ We note that the Order issued by the Commission on July 15, 2005, explicitly grants the City of Fall River’s late motion for intervention. Order at ¶ 15. However, Appendix A to the Order, which purports to list all the intervenors, fails to include the City of Fall River. We request that the Commission correct this apparent oversight.

Request and requiring, instead, grant of Rehearing for purposes of dismissing the applications as moot. On August 10, 2005, the President signed into law Public Law No. 109---, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”). Included in that Act is a specific prohibition against the expenditure of federal funds “for the demolition of the existing Brightman Street Bridge connecting Fall River and Somerset, Massachusetts,” and the Act provides that “the existing Brightman Street Bridge shall be maintained for pedestrian and bicycle access, and as an emergency service route” with a specific appropriation statutorily earmarked for that purpose. SAFETEA-LU, §§ 1702 (project no. 4270), 1948. These provisions ensure the continued use of the existing bridge after completion of the new bridge,² and it is our belief that with the continuing existence of the bridge the Weaver's Cove project is not viable.³ Accordingly, the Commission should rehear its Order, requesting Weaver's Cove to establish why, in light of the legislation, its applications should not now be dismissed as moot or because the project is no longer feasible. If the Commission determines that the applications are not moot and that the applications should not be dismissed as being infeasible, then the Commission should grant rehearing on the many additional grounds presented in this Request.

The Commission’s Order approving the Weaver’s Cove project would allow the construction and operation of a liquefied natural gas terminal within a densely populated urban area, and it would result in the need for the LNG carriers serving the terminal to traverse narrow inland waterways adjoining densely populated areas, passing under critical transportation

² We understand that the Governor of Massachusetts has sent a letter to the docket in this matter, informing the Commission that, in the light of the enactment of these provisions, it is “the Commonwealth’s intention to preserve the existing bridge for pedestrian, bicycle and emergency access.”

³ Our understanding that the continued existence of the existing bridge would make operation of the Weaver’s Cove terminal impossible is reflected as well in the Final Environmental Impact Statement (“FEIS”). *See* FEIS at 3-75; *see also*, Order at ¶ 109.

infrastructure, and passing through uniquely important recreational waters. The project is strongly opposed by the Governors of the States through which the LNG carriers would pass and in which the terminal would be located, and it is strongly opposed by the local officials up and down the LNG carrier route. Further, the federal agencies with environmental responsibilities and expertise that have commented on the FEIS issued by the Commission, and adopted by the Commission in its Order, continue to question the adequacy of the Commission's NEPA process, and urge the adoption of substantially more protective environmental conditions – including the prohibition of all dredging activities in the Taunton River and Mount Hope Bay from January 15 through October 31, each year.

In the Specification of Errors and in the body of this Request following the Specification, the legal and factual infirmities that permeate the Order are enumerated in detail. Though the errors are numerous, a series of themes can be distilled that appear to have led the Commission Majority to the misguided conclusion that the Weaver's Cove project can be found to have met the standard of Section 3 of the NGA. We begin with a brief discussion of those themes, hopeful yet that the Commission will come to the only permissible conclusion: no amount of conditioning can alter the reality that authorization of the Weaver's Cove proposal would be inconsistent with the public interest.

We begin with a theme that is both disturbing and confounding: the systematic refusal to permit, indeed to embrace, a probing analysis. The deliberate avoidance of information relevant to a required public interest determination is always intolerable; where the core public interest concerns are the implications of a proposal for public security, health and well-being, the avoidance is unconscionable. Yet, that is the path that the Majority has chosen. The Majority

declines even to look at, let alone to consider, the *only* sworn testimony available to it, testimony that is addressed to the very issues the primacy of which the Order acknowledges.

It is distressing that the Majority, confronted with the awesome responsibility thrust upon the Commission by the Weaver's Cove applications, would choose to insulate itself from the sworn views of experts by the invocation of artificial time constraints.⁴

Almost 40 years ago, in the context of a far more benign proposal, the Commission was admonished for its failure to recognize that its public interest responsibilities require more of it than passive acceptance of an applicant's submission.⁵ It is incumbent upon the Commission itself to seek out the truth, to develop all information relevant to the ultimate public interest determination. Fall River and the Attorneys General chose to shoulder much of that burden. The Commission Majority has chosen not even to look.

Material factual issues critical to the required public interest determination were placed in substantial dispute. The City and the Attorneys General have shown that:

- the terminal and the tankers would present terrorists with precisely the type of targets of opportunity they desire;
- intentional attacks are not preventable;
- an accident or intentional attack could place tens of thousands of lives at imminent peril;
- evacuation would be infeasible and emergency response capacity totally inadequate; and

⁴ Whatever the justification for the Commission's refusal to consider the testimony prior to the issuance of the Order, no such justification is available for a continuing refusal to consider the testimony during the Commission's consideration of this Request for Rehearing. The testimony responds to the FEIS issued by the Commission, and that testimony, together with the comments on the FEIS filed by the other federal agencies, must fully and carefully be considered – if not prior to the issuance of the original Order at least now, prior to the decision whether to rehear the Order and, if reheard, prior to issuance of the order on rehearing.

⁵ *Scenic Hudson Preservation Conf. v. Federal Power Comm.*, 354 F.2d 608 (2nd Cir. 1965), cert. denied 384 U.S. 941 (1966).

- largely because of these unavoidable consequences, the mere presence of the facility and the tankers could destroy the economic life blood of the area and render unachievable the plans developed by Fall River for the restoration of economic vitality.

Instead of dealing with the implications of these facts – by explaining why they do not compel a denial of the Weaver’s Cove application; by finding, based on substantial evidence, that the facts are otherwise; or by denying the Weaver’s Cove application – the Commission simply chose not to consider them. This is arbitrary and capricious, an abuse of discretion, and not in accordance with either precedent or established law.

A second basic theme is the Commission’s inappropriate willingness to assume away all difficult and unresolved issues. For example, the Commission Majority *assumes* that, once developed, the security, evacuation, and emergency response plans will result in a project that satisfies the Section 3 standard. But that presumes the security plan will ensure security; that the evacuation plan will ensure that a timely and safe evacuation would occur; and that an emergency response plan would ensure that adequate emergency response resources are available to cope with an accident or attack so as to ensure protection of the public. It is not now possible to reach those conclusions.⁶ Moreover, none of those plans, no matter how good, and carefully prepared, will either eliminate risks to public safety or adverse consequences to the human and natural environments. Residual effects will remain. The Order acknowledges as much. It acknowledges, for example, that when a tanker is at the terminal or when a tanker is passing in close proximity to coastal cities, populations will be at risk – a risk that can be reduced but never eliminated – with the potential for horrific human consequences. The

⁶ The evidence the City and the Attorneys General have submitted shows that it is not possible to develop security, emergency response, and evacuation plans that would satisfy the public interest standard. Even if that evidence were properly disregarded, there is no basis for the assumption that requiring the creation of such plans can achieve security and can make an effective emergency response, and evacuation, possible.

Commission must evaluate the burdens that these plans would impose on the public; it must evaluate what these plans can accomplish, and the residual risks that would remain; and it must thoughtfully weigh these burdens and the risks remaining against the benefits that this project would produce that are not otherwise available from alternative projects at lower costs to the human and natural environments.

Section 3 imposes a non-delegable obligation on the Commission. Before it may discharge that obligation, the Commission must have *the pertinent facts, not assumptions based on wishful thinking*.

The limitation imposed on the specification of alternatives is a third fundamental theme that permeates the Order and the FEIS that it adopts. Seizing on the project objectives specified by the applicants, the Order (and FEIS) is dismissive of any alternative that itself could not satisfy each and every one of those objectives. There are two fundamental errors with this approach: (1) while careful consideration is to be given to the project sponsor's specification of project purpose, it is for the Commission to define the necessary characteristics of alternatives and (2) it is not necessary that any one alternative satisfy all intended objectives, particularly where in combination with other options even the needs specified by the applicant would be fulfilled. Truck deliveries of LNG are an important component of reliable supply in New England. But there is absolutely no indication that the need for truck deliveries is not being met, or that the current supplier (Distrigas) could not increase shipments, or that the capability of certain satellite facilities to liquefy natural gas off the pipeline and then to store the liquefied gas for future use could not be employed, or that power plant use could not be moderated during periods of peak demand through fuel switching. The only suggested public benefit of truck deliveries from Weaver's Cove is the introduction of a competitive supply. There is no

suggestion of the likely economic benefit to the ultimate consumer (nor why the ability to liquefy pipeline supply does not serve as an adequate competitive brake), and there is certainly no effort made to compare that hypothetical economic benefit with the very real residual risks.

It is the nature of the unavoidable residual risks that makes a comparative evaluative process so necessary. The Commission evaluates the request for comparative hearings as if economics alone were the determinative issue, expressing a willingness to certificate a project as long as its sponsors accept the business risk. That may be an appropriate decisional rule where the project is benign, but it is entirely unacceptable where the project would expose the public to a risk of a catastrophic event. Where “residuals” remain, with the potential for exacting dire human consequences, it is incumbent upon the Commission to ascertain whether any alternative or combination of alternatives can satisfy the need at lesser cost to the human and natural environment. This is not only the essence of the National Environment Policy Act (“NEPA”), it is the condition precedent to the exercise of judgment under Section 3.

The fourth misguided theme, like the first, flows from an erroneous conception of the public interest standard. The Commission assumes that if an area of potential concern falls within the regulatory jurisdiction of another body (*i.e.*, DOT, the Coast Guard), the Commission need do no more; that whatever the other body decides will establish the conformity of that aspect of the project with the public interest.

Not only is this deference inconsistent with the Section 3 standard, it is flatly at odds with the applicable Inter-Agency Agreements and with the Commission’s recent holding in *KeySpan LNG, L.P.*, Docket Nos. CP04-223-000, etc. (July 5, 2005). Moreover, even assuming *arguendo* that each other governing authority will do all that it can to minimize human and environmental

risks and consequences, adverse residuals will remain: *e.g.*, threats to human safety that can never entirely be eliminated; impacts on fishery resources that cannot be abated.

The residual consequences must be considered by the Commission for two reasons. First, to determine whether more in the way of protection is required or, indeed, whether the project should be permitted to go forward at all. Second, to factor the risks and adverse consequences that remain into the evaluation of alternatives.

These errors and others are explicated below. We urge that they be evaluated in the context presented by the Weaver's Cove applications. If the Commission is wrong, the consequence may not simply be the sanctioning of prejudice to environmental resources or the imposition of economic harm, as important as those considerations may be. Rather, it may be sanctioning creation of a substantial threat to regional and national security and placing tens of thousands of lives in harm's way.

With the stakes potentially so high; with the reality that even before the enactment of SAFETEA-LU the Weaver's Cove project could not become commercial any sooner than 2010 and, with the enactment of SAFETEA-LU, much later than that (if ever); and with the fact that before Weaver's Cove can break ground it has to satisfy a variety of agencies about a myriad of considerations, there is time yet to proceed thoughtfully and to get into the position to reach an informed decision. If the Commission is not convinced to dismiss the applications, it must subject them to full evidentiary review.

Finally, if what has been said already and what follows does not convince the Commission to reverse its Order, we respectfully move that the Commission schedule this request for Rehearing for oral argument. In so moving, we appreciate fully the novelty of this

request. It is, however, the uniqueness of the Weaver's Cove proposal that makes necessary the fullest possible examination.

II. SPECIFICATIONS OF ERROR

1. In violation of the Natural Gas Act, and its obligation for reasoned decision-making, the Commission failed to invoke procedures that would permit it to reach a sound, informed judgment about the consistency of the Weaver's Cove applications with the "public interest" standard of section 3. In particular, the Commission erred in

- a. arbitrarily establishing the date of issuance of the FEIS as the retroactive cut-off date for the consideration of pertinent information;
- b. rejecting and declining to consider the written testimonial evidence filed by Fall River and the Attorneys General;
- c. reaching judgment on the consistency of the Weaver's Cove applications with the "public interest" while important issues remain unresolved, including the development of security, evacuation and emergency response plans, and responses to the outstanding environmental issues, including the manner of disposal of dredging spoils;
- d. delegating to other agencies the ultimate determination of issues bearing on the public interest; and
- e. delegating to its staff the review and approval of matters relevant to the ultimate public interest determination, including the acceptability of security, evacuation and emergency response plans and the acceptability of procedures for the disposal of dredging spoils.

2. In violation of the Natural Gas Act and its obligation for reasoned decision-making, the Commission arbitrarily, capriciously, and not in accordance with law, found that approval of the Weaver's Cove applications would not be "inconsistent with the public interest."

In particular, the Commission erred in

- a. failing to find that a breach of containment either at the terminal or at a tanker, and whether accidental or intentional, would have devastating human consequences;
- b. failing to recognize the potential for the cascading loss of an entire tanker and, accordingly, failing to understand the credible consequence of a tanker containment breach;
- c. failing properly to estimate the off-site consequences of a spill at the terminal site, including inability to prevent a vapor cloud from escaping the designed impoundment and drifting off-site;
- d. failing to recognize that the presence of the Weaver's Cove terminal and the associated tanker traffic would be likely to invite a terrorist attack and that such attacks would not be preventable;
- e. failing to recognize that approval of the Weaver's Cove proposal would be inconsistent with existing Coast Guard and DOT safety requirements;
- f. failing to utilize appropriate methodologies in assessing the safety implications of the Weaver's Cove proposals;
- g. concluding that NVIC 05-05 had substantially been applied and failing to apply NVIC 05-05 fully or, alternatively, undertaking a comparable suitability assessment of the waterway for the contemplated LNG traffic;

- h. concluding that existing DOT and Coast Guard safety requirements will provide adequate protection to the public and in failing to discharge its own independent responsibility to ensure safety as required by the 1985 and 2004 MOUs and by the Commission's decision in KeySpan;
- i. failing to recognize that the requirements imposed by other authorities whether for the protection of human health and safety or for the protection of the environment, represents the starting point of the Commission's Section 3 analysis and that the Commission must still determine whether more must be required or whether, in light of the residual consequences, the proposal can be approved;
- j. concluding that adequate safety can be provided without the establishment of thermal exclusion zones in connection with the marine transport of LNG;
- k. concluding that all "credible" spills have been analyzed;
- l. concluding that the risk of explosion, particularly in unconfined open spaces, is not a credible threat in the event of a breach of containment;
- m. failing to recognize that the consequences of a spill could not be handled by the local communities, including the inability to effectively evacuate those in danger and the inability to provide effective emergency care;
- n. failing to recognize that the Weaver's Cove proposal cannot be approved without violating the principles of Environmental Justice as specified in Executive Order 12898;

- o. failing to recognize that approval of the Weaver's Cove proposal would be inconsistent with regional and local economic development plans and would be incompatible with the unique physical characteristics of the affected areas;
- p. failing to recognize that approval of the Weaver's Cove proposal would be inconsistent with the Pipeline Safety Act of 1979;
- q. failing to recognize that there are alternatives to Weaver's Cove that can meet the region's needs for additional supplies of natural gas while avoiding the serious human safety and health consequences and the prejudicial environmental consequences that are unavoidable should Weaver's Cove go forward;
- r. requiring that an alternative, to be considered seriously, must be capable of satisfying all of the project purposes as specified by the applicants, including the ability to make truck deliveries of LNG;
- s. failing to recognize that alternatives exist which, in combination, can meet all specified project purposes while avoiding substantial human and environmental prejudice;
- t. concluding that bridge closures would not significantly impact the affected communities;
- u. concluding that the Weaver's Cove project would have limited environmental effect and that the impacts of dredging would not adversely affect fish resources;

- v. failing to recognize that dredging conducted during any portion of the entire period from January 15th through October 30th would severely adversely affect aquatic resources, including anadromous fish, and that dredging should be prohibited during that full period, as recommended by EPA and by NOAA Fisheries;
- w. failing to consider the desirability of maintaining the attributes of the waterways whether or not they ultimately are included within the Wild and Scenic River system and whether the presence of the Weaver's Cove proposal would negatively impact those attributes; and
- x. failing to recognize or simply ignoring the fact that the dredging will result in an exacerbation of the violation of water quality standards within the Taunton River.

3. In violation of the Natural Gas Act and established Commission and judicial precedent, and without a reasoned explanation justifying the departure from precedent, the Commission in its Order impermissibly denies Petitioners' request for full evidentiary hearings on disputed material issues of fact including, but not limited to, issues bearing on

- a) the threat of terrorist attack directed at the proposed terminal and the tankers while traversing narrow in-land waterways;
- b) the adequacy of security plans to deal with the threat of terrorist attack, and the capacity of local, state, and federal authorities to respond to the consequences of any such attack;
- c) the vulnerability of tanker traffic to accidents due to the congested nature of the waterway and the risks during transit as a result of fog and high winds given the

narrowness of the waterways and channels the tankers would have to traverse and the presence of hazards, such as bridges;

- d) the extent of the consequences to the human and natural environment from either an accidental or an intentional breach of LNG containment either at the terminal or on a tanker during its route along the narrow in-land waterways or adjacent to the terminal;
- e) the ability to manage satisfactorily the human and environmental consequences of either an accidental or intentional breach of LNG containment;
- f) the extent of environmental damage associated with the construction of the terminal, including the substantial dredging that would be required within Mount Hope Bay and the Taunton River;
- g) the extent of adverse impacts that would be imposed on minority and low-income populations;
- h) the consistency of authorization of the proposed terminal with local and regional planning objectives and economic revitalization efforts, with the preservation and enhanced utilization of places of special interest and/or public assembly, and with the preservation of the Taunton River and the protection of its designation as a Wild and Scenic River;
- i) the impact of LNG tanker traffic on existing and future uses of the in-land waters of Massachusetts and Rhode Island and on the uses and development of the shorelines; and

- j) the ability of an alternative project or combination of projects to satisfy the identified need and to do so in a manner less threatening to public health and safety and with less prejudice to the human and natural environment.

4. In violation of the “public interest” standard of the Natural Gas Act, and the requirement of the National Environmental Policy Act that full and fair consideration be given to reasonable alternatives to the proposed action that would avoid or minimize adverse impacts to the human and natural environment, the Order improperly

- a) defers to the project applicants’ specification of the project purposes;
- b) dismisses an alternative if the alternative by itself is incapable of meeting one of the project objectives identified by the applicant;
- c) fails to consider combinations of alternatives and their collective ability to satisfy the project objectives;
- d) ignores that a direct consequence of approval of the applicants’ proposal would be to prejudice the financeability of projects more compatible with the public interest;
- e) frustrates the expression of Congressional intent that, wherever possible, LNG facilities be located in remote areas away from population centers;
- f) abdicates its responsibility to apply any analysis of alternatives to its decision whether to approve the project under Section 3; and
- g) authorizes a project which will impose irreparable damage to the natural environment, will impose large, unquantified costs on local communities and render infeasible existing plans for economic revitalization, and will place tens of thousands of people in jeopardy of suffering fatal or life-altering injuries,

notwithstanding the availability of alternatives fully capable of meeting the identified need while avoiding or moderating significantly those detrimental consequences to the natural and human environment.

5. In violation of the “public interest” standard of the Natural Gas Act, the requirements of the National Environmental Policy Act, and the explicit recognition that since the attacks of 9/11 it is incumbent upon federal agencies to assess the vulnerability of a proposed project to terrorist attack, the Commission in its Order of July 15, 2005 arbitrarily and capriciously

- a) fails to undertake an assessment of the vulnerability of the terminal and associated tanker traffic to terrorist attack;
- b) excuses the need to undertake that vulnerability assessment because the likelihood of a terrorist attack is thought to be “unpredictable” or “speculative;” because there is only modest historical experience upon which to base judgments; and because the duration of the risk is limited, even though none of these factors goes to the vulnerability to terrorist attack that would be created by the operation of the proposed project, nor to the catastrophic consequences that such an attack could have;
- c) excuses the need for a vulnerability assessment, or the credibility of concerns, because of the existence of other targets of opportunity, even though the existence of other targets goes to the question of whether it is in the public interest to create an additional target of opportunity where there are practical and available feasible alternatives; and

- d) fails to compare the relative vulnerability to terrorist attack of the proposed project with alternatives, as well as the relative consequences of successful attack.

6. In violation of the “public interest” standard of the Natural Gas Act, including the requirement of reasoned decision making, and the requirements of the National Environmental Policy Act, the Commission impermissibly declined to issue a supplemental DEIS following issuance of the Sandia Report and the Commission, in its Order prematurely sanctions completion of the Environmental Impact Statement process and impermissibly reaches judgment on the merits of the applications, while significant issues affecting human health and safety and bearing on the ability to assess impacts, including residual impacts, from construction and operation of the proposed project on the human and natural environment remain unresolved including, but not limited to

- a) the development of plans for the protection of the terminal and of the tankers from terrorist attack, including the costs associated with the provision of security and the availability of funding sources;
- b) the completion of a vulnerability assessment;
- c) the development of remediation and emergency response plans to be implemented in the event of either an accidental or intentional breach of LNG containment;
- d) the identification of LNG supply sources, including the chemical composition of the supply and the presence and safety implications of “hot” gases, and the terminal and tanker designs that will be utilized;
- e) the development of operation and maintenance plans and written procedures for the terminal and tanker unloading operations;

- f) the determination of security zones around tanker traffic and the impact of those security zones on commercial and recreational waterway traffic;
- g) the determination of required bridge closures, the impact on vehicular traffic and local commerce, and, in particular, the emergency response implications for populations on the western side of the Taunton River;
- h) the development of dredging and sediment disposal plans;
- i) the development of plans to deal with contaminated soil and groundwater during construction;
- j) the development of odor and noise reduction plans; and
- k) the completion of consultation with, and the receipt of advice and recommendations from:
 - (i) Advisory Council on Historic Preservation – Comment on the project under section 106 of the National Historic Preservation Act (16 USC § 470(f));
 - (ii) NOAA Fisheries – Consultation regarding compliance with section 7 of the Endangered Species Act; the Magnuson-Stevens Fishery Conservation and Management Act; and the Marine Mammal Protection Act (16 USC §§ 1856 et seq.);
 - (iii) U.S. Department of the Interior, U.S. Fish and Wildlife Services -- Consultation regarding compliance with section 7 of the Endangered Species Act, the Migratory Bird Treaty Act, and the Fish and Wildlife Coordination Act (16 USC § 1536);
 - (iv) U.S. National Park Service – Consultation regarding the National Wild and Scenic River Act (16 USC §§ 1271-1287);

- (v) Massachusetts Department of Environmental Protection – Massachusetts Contingency Plan approval (G.L. c. 21E, 310 CMR 40.00);
- (vi) Massachusetts Department of Fisheries, Wildlife, and Environmental Law Enforcement, Natural Heritage and Endangered Species Program – State-listed threatened and endangered species consultation (G.L.c. 131 § 5B, 321 CMR 10.00);
- (vii) Massachusetts Historical Commission – Review and comment on undertakings potentially affecting cultural resources (section 106, National Historic Preservation Act, G.L.c. 9 §§ 26 through 27c, 950 CMR 71.00);
- (viii) Massachusetts Board of Underwater Archeological Resources – Review and comment on undertakings potentially affecting underwater cultural resources (section 106, National Historic Preservation Act);
- (ix) Massachusetts Division of Marine Fisheries – Marine fisheries consultation;
- (x) Massachusetts Office of Coastal Zone Management – consistency determination pursuant to the Coastal Zone Management Act;
- (xi) Rhode Island Coastal Resources Management Council – consistency determination pursuant to the Coastal Zone Management Act;
- (xii) Rhode Island Department of Environmental Management – State-listed threatened and endangered species consultations; and
- (xiii) Rhode Island Historic Preservation and Heritage Commission – Review and comment on undertakings potentially affecting cultural resources (section 106, National Historic Preservation Act).

As a consequence of the unavailability of the above information the Commission is not now in a position to complete the FEIS and the NEPA review process, is unable to assess the impacts of the proposed project on the human and natural environment and to compare those impacts with those that would be associated with alternatives, including combinations of alternatives, to the proposed action, and is left to “assume,” improperly, that adequate protective plans and mitigation measures can be implemented.

7. The Commission’s issuance of the Order approving the proposed project is, in light of the Department of Interior’s comments filed on July 7, 2005, directly in violation of section 7(b) of the Wild and Scenic Rivers Act. The Commission’s action in issuing its Order is, therefore, arbitrary, capricious, and not in accordance with law.

8. In violation of the “public interest” standard of the Natural Gas Act and in abuse of its discretion, the Commission in its Order improperly

- a) defers to the judgments of other agencies on critical matters affecting human health and safety and the human and natural environment instead of treating those recommendations as minimums, not as the final specification of what is required in the public interest; and
- b) fails to incorporate the full recommendations of expert agencies on matters affecting the human and natural environment.

9. In violation of announced decisional criteria bearing on the conformity of proposed LNG projects with the “public interest” standard, the Commission in its Order arbitrarily and capriciously sanctions

- a) the location of an LNG terminal in close proximity to population centers and residences and the transit of tanker traffic in close proximity to residentially and

commercially developed shorelines and through heavily utilized recreational and commercial waterways resulting in significant disruption of existing waterway uses;

- b) the location of the terminal and the associated tanker traffic so as to conflict with existing and planned land and waterway uses;
- c) the location of the terminal at a site that does not provide a sufficient buffer zone to protect public health and to avoid irreparable prejudice to the human and natural environment including, most particularly, to minority and low-income populations;
- d) the transit of tankers and the placement of the turning basin at locations that require environmentally unacceptable levels of entirely avoidable dredging; and
- e) the location of the terminal and the transit of tankers along a route that would negatively impact state and local parks, important tourist attractions, and the development potential of unique shoreline environments.

10. In violation of the “public interest” standard of the Natural Gas Act, as that standard is informed by the Executive Order addressed to Environmental Justice (Executive Order 12898), the Commission in its Order improperly

- a) exposes the large minority and low-income population that resides in close proximity to the proposed terminal site to disproportionate exposure to safety and human health threats, and to disproportionate environmental damage including, but not limited to, added noise, odors, and prejudicial aesthetic impacts;
- b) exposes that population to similar threats whenever a ship is berthed at the terminal;

- c) fails to recognize the unique risks that would confront that population due to the inability of local police, fire and rescue resources to cope with an accident or intentional release at the terminal or at a berthed tanker and due to the unavailability of an Emergency Response Plan;
- d) fails to assess the unavailability of escape routes for large segments of that population due to the presence of natural and manmade barriers; and
- e) fails to consider the inappropriateness of authorizing the location of an LNG terminal in proximity to low-income housing in violation of the spirit, if not the letter, of regulations of the Department of Housing and Urban Development.

11. The Commission's assertion in its Order that States or localities may not "prohibit ... the construction or operation of facilities approved by this Commission" is arbitrary, capricious, and not in accordance with law, particularly with respect to those matters to which the Commission has failed to make its own determination of consistency with the public interest.

12. The Commission failed to properly apply the requirements of 49 CFR Part 193; specifically, the Commission's calculation of the flammable vapor exclusion zone fails to comply with the requirements of 49 CFR 193.2059, and therefore is arbitrary, capricious, and otherwise not in accordance with law.

13. The Commission failed to apply the requirements of 33 CFR Part 165; specifically, the Commission failed to find that the Weaver's Cove project could not go forward without violating the safety and security zones established by the Coast Guard as applied both to the terminal site and to the tankers.

14. The Commission's approval of the Weaver's Cove project violates 33 U.S.C. § 1341(a), Clean Water Act § 401(a).

15. The Commission's Order asserts an authority it does not have to pre-empt the application of generally applicable State and local laws if the application of those laws prohibit or "unreasonably" delay the construction or operation of facilities approved by the Commission.

III. AS A MATTER OF PROCEDURE AND OF SUBSTANCE, THE ORDER IS ARBITRARY AND CAPRICIOUS AND NOT IN ACCORDANCE WITH LAW

The exercise of Section 3 jurisdiction is not unfettered. As a prerequisite, it requires that the Commission place itself in a position where it is capable of making an informed judgment. Second, following the compilation of a complete record, the judgment made must find credible support in that record. Sound decision-making has both a procedural and a substantive component. The Order fails on both counts. It is arbitrary and capricious, and not in accordance with law.

A. The Procedures Utilized Precluded Informed Decision-Making

As a matter of procedure, the Commission systematically denied itself the opportunity even to be in a position to make an informed judgment. First, the Commission declined even to consider the only available sworn testimony. Second, it proceeded to judgment although fully aware that factual and technical questions central to the public interest determination remain unresolved. Third, the Commission impermissibly delegated to other agencies and to its staff judgments that are the Commission's alone to make.

1. The Rejection of Expert Testimony

In its Order, the Commission underscores that the central issue is whether the Weaver's Cove project can be operated without imposing undue risks to public security and safety. In view of the acknowledged primacy of so serious a set of considerations, it would have been expected that the Commission would go to extraordinary lengths in an effort to assure that it is best able to evaluate all credible information, particularly in the presence of conflict. Instead, the Commission chose not even to look at what already was before it.

Fall River and the Attorneys General also recognized the primacy of the safety issues. Rather than await discharge by the Commission of its responsibility to develop a complete decisional record, they asked experts to address those issues. To address, among other matters

- the threat of terrorist attack;
- the ability successfully to prevent such attack;
- the magnitude of a potential release of LNG from such an attack;
- the human consequences of such a release; and
- the capacity to deal with the resulting public emergency.

What the experts concluded, in sworn testimony providing full support for their conclusions, is

- that the presence of the terminal within the heart of Fall River and the presence of tankers in the congested, narrow inland waters in close proximity to population centers, would make the threat of a terrorist attack a risk that cannot be discounted;
- that because of the precise nature of the terminal location and of the waterway route, a fully protective security plan for the prevention of terrorist attack could not be developed;
- that the consequences of an attack could easily result in a containment breach and rate of release far more significant than assumed in the FEIS;
- that because of local geographic characteristics, resource limitations, and the rapidity of exposure consequences, effective emergency evacuation is not possible;
- that the human toll, both the number of fatalities and the number that sustain agonizing life-altering impairments, could exceed the number of those killed and injured in the 9/11 attacks; and
- that the region does not have even a fraction of the emergency response and long-term medical care capacity necessary to deal with those human consequences

The Majority's response was to shut its eyes; to shield itself from the judgments of experts. The Commission chose not even to look at those expert presentations as part of its "paper" review. Order at ¶ 25. The Commission chose conscious avoidance. Relevancy was never questioned. Instead, the Commission chose to limit its consideration to information filed prior to release of the FEIS – weeks before the issuance of the Order and, incredibly, weeks before the announcement of the cut-off date. *Ibid.*

Even if the applications before the Commission did not raise such uniquely serious issues, the arbitrary and retroactive cut-off date would be impermissible. The intent of the FEIS is to provide a foundation for the sound exercise of judgment. The ultimate decision is to await completion of the FEIS so that the decisional record might include both the information provided in the FEIS *and challenges to that information.*⁷

The testimonial submission was proffered within days of issuance of the FEIS. It should not have come as a surprise. On September 16, 2004, Fall River filed its first request for an adjudicatory hearing, supporting that request with reports from some of the very experts whose testimony was filed on June 9th. In that initial filing, Fall River made clear its desire to support

⁷ The decision to cut off all comment at the date of issuance of the FEIS – announced for the first time in the Order issued on July 15, and therefore retroactive instead of prospective – is particularly perplexing (and arbitrary, capricious, and not in accordance with law) in light of the CEQ's NEPA regulations. Those regulations clearly contemplate that there may be comments on the FEIS. In fact, the FEIS itself implicitly acknowledges that the public is to have a final opportunity to refute the assertions and conclusions contained therein. *See* FEIS at p. 1-18.

The CEQ's regulation, 40 CFR § 1506.10, provides for a 30-day period between issuance of the FEIS and the issuance of an order based on that FEIS. The rules create an exception to that timing requirement, but that exception clearly demonstrates that the public must be given an effective means to have their view on the content of the FEIS made known to the agency, and *considered* by the agency:

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, *where a real opportunity exists to alter the decision*, the decision may be made and recorded at the same time the environmental impact statement is published. (*emphasis added*)

Whatever the permissibility of the Commission's failure to consider the testimony prior to the issuance of the Order, the Commission *must* now consider the testimony in its decision on this application for rehearing.

its contentions in testimonial form. The Commission's response was to say and do nothing. Fall River and the Attorneys General persisted. On May 11th, prior to issuance of the FEIS, they again filed a request for an evidentiary hearing and they again summarized the expert testimony they were prepared to offer. The Commission, again, did nothing. Fall River and the Attorneys General were pro-active. They chose to file the testimony, even though the burdens of going forward and of persuasion rest with the applicants.

Back as early as September, 2004, if the Commission had questions about the need for an evidentiary hearing, it could have invited Fall River to submit its testimony so that the need for an adjudicatory process could better be evaluated. The Commission could at least have invited that submission for inclusion in its "paper" review. The Commission did nothing. It sat mute on the requests until authorization of the project had been granted.

It is important to recognize that while Fall River and the Attorneys General chose to be pro-active, the development of a full decisional record is the responsibility of the Commission.⁸ *See Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *accord, Greene County Planning Bd. v. Federal Power Commission*, 455 F.2d 412, 419 (2d. Cir., 1972). With security and safety issues looming so large, with the experts saying that the FEIS is predicated on factual and technical errors, and that tens of thousands of lives will be placed at risk if the project is permitted to go forward (a judgment that finds support in the most recent government-sponsored analysis, the Sandia report⁹), it was incumbent upon the Commission to consider fully the proffered

⁸ Cf. 15 U.S.C. § 717r(b) ("[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.")

⁹ Guidance on Risk Analysis and Safety Implications of a Large Liquefied Natural Gas (LNG) Spill Over Water, SAND2004-6258, December 2004, Sandia National Laboratories.

testimony, no matter how long that consideration might take. The invocation of an artificial cut-off date for Commission “enlightenment” was arbitrary in the extreme – especially so in light of Fall River’s long-pending request for the Commission to commence a hearing.

As we now discuss, the reality is that the record is not yet complete and cannot be for many months, if not for considerably longer, during which time there is yet ample opportunity to conduct and largely complete a full adjudicatory process (with the enactment of SAFETEA-LU, there might well be decades or even longer before the existing Brightman Street Bridge will be demolished).¹⁰

2. The Unresolved Issues

The Commission has chosen to rush to judgment while critical issues remain unresolved. We recognize that in a typical case it is not unprecedented to leave matters for future determination and approval. It is understandable, for example, that archaeological and geological issues may not be resolved fully prior to ground being broken for a new pipeline or even for the construction of an LNG terminal. But the character of the issue that remains unresolved is determinative of the propriety of deferral. In the case of the Weaver’s Cove proposal, the information gaps not only are staggering, they relate to the very issues that the Commission properly identified as central to its public interest determination. For example, evacuation and emergency response plans have yet to be developed.¹¹ Order at ¶¶ 34, 67.

¹⁰ Our emphasis here on all that the Commission has excluded must not obscure the fact that the Record (even with the retroactive cut-off date announced in the Order) demonstrates that there are material facts in dispute, and that the conclusions reached by the Commission are not the product of reasoned decision making, and are not supported by substantial evidence.

¹¹ These are but a few of the information gaps that remain. The Order, Appendix B, and the FEIS, identify almost two dozen more.

Informed decision-making requires the availability of all pertinent information. If pertinent information is yet to be developed, the exercise of decisional judgment must await its development. If that means that the initiation of a project must be deferred, even to the point of sacrificing the targeted in-service date, then deferral is the only permissible action. To permit an applicant's schedule, even if set in response to an identified need, to drive (and to limit) the time available for the development of the necessary record, is to make a mockery of informed decision-making.

Until the Commission is in a position to evaluate the evacuation and emergency response plans, and until it does evaluate the security plan to carefully consider the level of residual risk remaining, it absolutely lacks the capability to reach any reasoned judgment whatsoever about the acceptability of residual risks or the remaining adverse consequences to human health and safety. Until the Commission is in a position to evaluate the environmental remediation plans, it does not even know what prejudice to the natural environment will be unavoidable.

In the section that follows we discuss the impermissibility of deferring conclusively to the judgments of other agencies, even as to matters within their jurisdictional expertise. It is appropriate, of course, to solicit and await those judgments.¹² But once rendered, the Commission must still discharge two non-delegable responsibilities: (1) it must determine the adequacy of those judgments in the context of the proposal that the Commission is being asked to authorize and (2) it must evaluate the consequences that will remain and determine whether, in light of those consequences, the statutory public interest standard is satisfied.

¹² As we explain below, if the Commission is disinclined to wait, it must itself consider each issue and its implication for the public interest determination, with the caveat that the Commission may never require less than is ultimately required by the authority with direct responsibility for the specific aspect of the project (*e.g.*, the Army Corps of Engineers has direct responsibility for the dredging activities through its permitting authority under both § 10 of the Rivers and Harbors Act, and § 404 of the Clean Water Act).

As an example, LNG vessel tanker safety is the responsibility of the Coast Guard. Consistency of the Weaver's Cove project with the public interest is the responsibility of the Commission. Confronted with the need to address vessel security and safety generally, the Coast Guard has promulgated rules of general applicability. It should do more. Presumably, confronted with the vessel traffic that will be associated with the Weaver's Cove proposal, it will impose restrictions reflective of local conditions – safety zones, navigational limitations. In short, the Coast Guard will be expected to do all that is reasonable *given the reality of the tanker traffic*.

The Commission, however, must do more. The Commission must determine whether the safety rules that apply are good enough to meet the public interest standard of Section 3 (*e.g.*, *KeySpan*); it must determine whether the “residuals” that would remain permit a finding that the project is consistent with the public interest; and it must determine whether the impact of the measures necessary to reduce risks are themselves consistent with the public interest.

It is not now possible to make an affirmative finding of consistency with the public interest or, in the context of Section 3, to now find the absence of “inconsistency.” It is necessary, first, that those other agencies speak.

3. Decision-Making Responsibilities Have Impermissibly Been Delegated

The need to make the required Section 3 “not inconsistent with” determination is the non-delegable responsibility of the Commission. In violation of this responsibility, the Order is premised on impermissible delegations: (1) to other agencies (and indeed to the applicants) and (2) to the Director of the Office of Energy Projects (“OEP”).

Inter-agency consultation is to be lauded. It goes to the essence of what NEPA requires. What it cannot do, however, is alter a statutory assignment of responsibilities.

In other contexts, the Commission has recognized this non-delegability. For example, in *KeySpan, supra*, because of its independent responsibility to assure consistency with the public interest, the Commission declined to authorize a project notwithstanding its apparent acceptance of the applicant's argument that its proposal was in conformity with DOT LNG siting regulations. As the Commission there expressed:

58. In reaching our decision, we are mindful that the DOT has adopted and enforces federal standards for the design and operation of onshore LNG facilities. As part of its regulatory scheme, the DOT decided that facilities constructed before March 31, 2000 were not subject to its current construction standards – a decision upon which KeySpan relies to support its position that the current safety standards do not apply to its existing storage tank. Nevertheless, under our regulatory scheme, the Commission must determine if LNG construction proposals are consistent with the public interest. As part of our determination, we must examine safety issues. We have the authority to apply terms and conditions to ensure that the proposed construction and siting is in the public interest and the discretion to, instead, deny an application where we determine that it is not in the public interest to approve it. Here, we find that approving KeySpan's proposal to construct a new LNG import facility utilizing portions of an existing LNG facility that does not meet current safety standards is not in the public interest.

That was the required response. It was, moreover, an unexceptional response, doing no more than necessary under the applicable Interagency Memoranda of Understanding.¹³

The 1985 MOU “acknowledges DOT’s exclusive authority to promulgate Federal safety standards for LNG facilities used in the transportation and associated storage of LNG in or affecting interstate or foreign commerce.” It then immediately adds this key qualification:

¹³ Memorandum of Understanding Between the Department of Transportation and the Federal Energy Regulatory Commission Regarding Liquefied Natural Gas Transportation Facilities (“1985 MOU”).

In fact in *KeySpan* the Commission reached its negative determination without first pursuing the inter-agency consultation contemplated in the 1985 MOU. We do not take issue with that curtailment of process. We cite it only to emphasize the importance of the Commission’s independent, non-delegable, public interest responsibility.

However, under the Natural Gas Act, the FERC exercises the authority to impose more stringent safety requirements than DOT's standards when warranted by special circumstances at any LNG facility within FERC's jurisdiction.¹⁴

The requirements of other safety and environmental agencies are, therefore, the *starting point*. They constitute the *absolute minimum* of what is necessary should the project be authorized to go forward. It is still left to the Commission to determine whether, conditioned as others may prescribe, the project should be permitted to go forward at all, or should be subject to more demanding requirements.

The Order recognizes that before the project may go forward a wide range of safety and environmental issues must first be addressed. The Order then *assumes* that whatever may be prescribed with respect to those issues will suffice. That abdication of responsibility is flatly at odds with the MOUs, with Section 3, with the Commission's own construction of its statutory responsibility, and with the Commission's responsibilities under NEPA.¹⁵

The Commission has two alternatives: (1) it can await the determinations of DOT, of the Coast Guard and of the plethora of involved environmental agencies, and then conduct its own sufficiency review of the conditions imposed or (2) it can itself convene a process for fashioning

¹⁴ The more recent MOU among the Commission, DOT and the Coast Guard ("2004 MOU") explicitly preserves the vitality of the 1985 MOU.

¹⁵ As the DC Circuit has explained:

NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values.

* * * *

Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. ... It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action – the agency to which NEPA is specifically directed.

Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109, 1123 (DC Cir. 1971).

the necessary conditions (providing they are no less stringent than required by the authority with direct permitting responsibility for the specific aspect of the project). Only at the conclusion of either of those paths can the Commission arrive at a point that permits exercise of its Section 3 judgment.

Compounding its inexcusable rush to judgment, the Commission has delegated a broad array of unresolved matters for review and approval by the Director of OEP. As a theoretical matter, delegations of decisional authority are not *per se* unlawful. Legality turns on the nature and the manner of the delegation. The Commission could not, for example, have turned the Weaver's Cove applications over to the Director at the outset, leaving it to the Director to determine consistency, or not, with the Section 3 standard. The public interest determination is for the Commission alone to make.

To be clear, if the Commission had itself resolved all subsidiary issues bearing on the public interest determination, it might then be appropriate to delegate the approval of implementation, but even then the Commission would be obligated to specify the standards to be employed in the review and approval process. What the Commission may not do is grant unfettered discretion and it certainly may not insulate itself from the facts. There is nothing that remains for the Commission itself to do. There is no process established for the mounting of challenges by those who may wish to contest what the applicants file or propose.

This is not an academic grievance. Among other issues, the Order delegates to the Director the authority to sign-off on

- emergency response plans (App. B, ¶ 67);
- emergency evacuation plans (App. B, ¶ 34);
- plans for prevention of vapor drift offsite;

- assurance that safe shutdown of critical terminal components can be achieved in the event of earthquake; and
- the manner of disposal of more than 2.5 million cubic yards of dredging spoils (App. B, ¶18).

These are not “implementation” issues. They are issues that go to the very core of consistency with the public interest. If the best practical emergency response plan leaves scores, or hundreds, or thousands without rapid and effective assistance, should the plan be approved, and more importantly should the project be allowed to go forward? If the best practical emergency evacuation plan leaves scores, or hundreds, or thousands without a realistic way to evacuate their homes and businesses, should the plan be approved, and more importantly should the project be allowed to go forward? These are, in short, issues that the Commission itself must grapple with, and must do so as a condition precedent to the approval of a project under the Commission’s Section 3 jurisdiction.

* * * * *

As a matter of procedure, because the Commission is not yet in a position that enables it to make an informed decision, the premature authorization of the project was arbitrary and capricious and not in accordance with law. Nor is the Commission on firmer ground on the merits, the subject to which we now turn.

B. On The Merits, The Order Is Arbitrary and Capricious and Not in Accordance with Law

On the merits, the Order falls far short of the statutory standard. We begin with the context. What the Commission was called upon to determine was, after all, a unique application, presenting issues that, in terms of their public significance, may well go beyond anything that the Commission has been called upon to confront throughout its entire history. The Commission has

not approved the location of an LNG terminal in a populated urban setting for well over 30 years – long before the prospect of terrorism was perceived as a threat within the United States. The Commission has never approved an LNG project that necessitated tanker traffic through so many miles of narrow, congested waterways; through waterways that serve as one of the Nation’s premier recreational areas and as home to world-renowned sailing communities.

With tens of thousands of people living in close proximity to the proposed terminal site and in communities lining the shores of the waterways in Massachusetts and Rhode Island, the Commission necessarily was confronted with novel, sobering questions:

- notwithstanding the historic safety of LNG terminals, would it be in the public interest, post-9/11, to site a terminal in a populated urban environment;
- notwithstanding the safety record of LNG tanker transport, would it be in the public interest, post-9/11, to sanction LNG tanker traffic through narrow, populated, densely utilized recreational waterways.

Those questions necessarily raised, and required the resolution of, a host of difficult issues which, for the most part, go well beyond the Commission’s experience or base of expertise:

- what is the likelihood of a successful terrorist attack directed at either the terminal or a tanker;
- in the event of an accident or attack, what magnitude of spill might be encountered;
- would evacuation of the population at risk be feasible;
- would emergency response resources have the capacity to deal with the aftermath;
- indeed, what may be the aftermath and is it a price that can be justified.

By no means is this the totality of what the Weaver’s Cove applications required the Commission to confront. There are a host of additional issues, from the complications and consequences of the enormity of the dredging that would be required, to the consistency of tanker traffic with the continued use of the waterways for their highest and best purposes – as amenities uniquely capable of promoting the quality of life of an entire region. But the security and public safety issues dominate and they, in turn, are dominated by the ever present cloud of 9/11. This was the context that defined what was required of the Commission as it exercised its Section 3 jurisdiction. This was the context that framed the exercise of judgment and infused the public interest standard with a new awareness of its fuller breadth.

Put to the test, the Commission failed. Not only did it consciously avoid exposure to relevant information, it failed to reach sound judgments.

1. A Breach of Containment, Accidental or Intentional, Would Have Devastating Human Consequences

Paragraphs 83 and 84 of the Order set out the linchpin of the Commission’s decision. Speaking first to LNG releases that are the result of accidents, the Commission opines that “risk to the public . . . is negligible.” Order at ¶ 83. Turning to the more serious issue of intentional attack, the Commission theorizes that (Order at ¶ 84):

While the risks associated with the transportation of any hazardous cargo can never be entirely eliminated, we are confident that they can be reduced to minimum levels and that the public will be well protected from harm.¹⁶

In all respects, those statements are fundamentally wrong and at odds with the weight of the evidence that was available to the Commission.

¹⁶ It is well to remember that reducing the risk of attack does nothing to protect the public *in the event of attack*.

There have been accidental breaches of LNG containment in the past at both terminals and vessels, and there could be accidents in the future. To date, there have been no intentional attacks on a domestic LNG installation, but here past history largely is irrelevant. (In the section that follows, we discuss the inappropriateness of dismissing the significance of that possibility.) In any event, while a high probability of accidental release presumably would require rejection of the Weaver's Cove proposal, even a low probability of an accident dictates that result where the resulting consequences would be highly prejudicial. Further, it is in no way defensible to consider the threat of a terrorist attack as having any relation to measures of accident experience.

As will be described presently, the Weaver's Cove proposal presents the paradigm of a high-consequence event. First, however, we must express disagreement with the Commission's dismissive attitude toward the expression of Congressional intent in the Pipeline Safety Act of 1979, 49 U.S.C. §§ 60101 *et seq.* In its declaration, articulated decades before the threat of terrorist attack was a credible concern, the Congress did not simply instruct DOT "to consider" remote sites for LNG facilities when promulgating "minimum" safety regulations, it talked of the "need to *encourage* remote siting." 49 U.S.C § 60103(a)(6) (*emphasis added*). It also admonished that consideration be given to the "population and demographic characteristics of the location;" to "existing and proposed land use near the location;" and to "medical, law enforcement, and fire prevention capabilities near the location that can cope with a risk caused by the facility." 49 U.S.C. § 60103(a). As discussed below, each of these considerations is implicated by the Weaver's Cove proposal.

It is not possible to read that litany of concerns without concluding that it is the intent of Congress that authorities exercise extreme caution before sanctioning the location of an LNG facility in an urban environment. As the Commission correctly notes, DOT's response was to

adopt regulatory standards, not to preclude absolutely urban locations. We will discuss shortly the application of those standards to the Weaver’s Cove proposal. Our point here is more general. It relates to the Commission’s failure itself to come to terms with the consistency of the proposal with the articulated Congressional concerns.¹⁷ As the Commission notes, Fall River has petitioned DOT for revised regulations that would be responsive to the “need to encourage remote siting,” and the Attorneys General filed a similar petition as well. The Commission takes DOT’s continued unresponsiveness to date as confirmation that it too need do no more. That is wrong under Section 3; it is wrong under the 1985 MOU.

In the Pipeline Safety Act of 1979, Congress required the Secretary of Transportation to “prescribe minimum safety standards for deciding on the location of a new liquefied natural gas pipeline facility....” 49 U.S.C. s. 60103(a). The Department of Transportation has not done so. Instead, the Department adopted regulations that require thermal radiation and vapor cloud dispersion exclusion zones. 49 CFR §§ 193.2051 *et seq.* These regulations affect the design and size of LNG facilities but not their location. Congress, however, required design standards *in addition to, not in place of*, location safety standards. 49 U.S.C. s. 60103(b). Neither the Department nor the Commission has set “minimum safety standards” which would exclude some locations as too dangerous for LNG facilities based on the factors enumerated in the Act by Congress. In the absence of such “minimum safety standards” the Commission lacks the yardstick Congress has required “for deciding on the location of a new

¹⁷ While this list of concerns was enacted more than 25 years ago, they remain as the current expression of Congressional intent – as evidenced clearly by new NGA § 3A(b), added just days ago by the Energy Policy Act of 2005. That provision contains a list of concerns practically identical to the list in the Pipeline Safety Act of 1979, including “population and demographic characteristics of the location;” the “existing and proposed land use near the location,” and “the need to encourage remote siting.”

liquefied natural gas pipeline facility.” The Commission’s decision approving the Weaver’s Cove facility therefore violates the Pipeline Safety Act.

We are told that “[i]n addressing the remote siting issue in its rulemaking proceeding, DOT recognized the difficulty in predicting whether a remote location would remain remote during the operating life of an LNG facility.” Order at fn. 22. It is one thing for new development *knowingly* to move into an area following the location of an LNG facility in what previously had been a remote area; it is quite another thing to impose an LNG facility within an already densely populated area.¹⁸ To that extent, the “difficulty in predicting” future density is irrelevant. Congress has already made clear its intent and it is up to the Commission to ensure that it is honored. There is no need to await DOT clarification to reach the judgment that Fall River and the inland waters of Massachusetts and Rhode Island are the antithesis of “remoteness.” Indeed, even if the DOT chose not to carry out Congressional intent, the Commission, as in *KeySpan*, would remain obligated to consider the sufficiency of mere compliance with existing, applicable standards to its own public interest determination – particularly in light of Congress’s express interest in the encouragement of remote locations.

As an absolute minimum, that Congressional expression must guide the Commission’s evaluation and influence the ultimate public interest balancing.¹⁹ It has not.

Further, the Commission has failed to apply to the Weaver’s Cove project itself the criteria it purported to apply to the various alternatives for purposes of assessing whether they offered “significant environmental advantage.” These criteria, listed in the FEIS at pages 3-32 to

¹⁸ Offshore locations, of course, will remain remote.

¹⁹ As the D.C. Circuit stated in *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991): “an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency’s statutory authorization to act, as well as in other congressional directives.” The Commission here has ignored the views of Congress clearly expressed in the Pipeline Safety Act.

3-34, include several that are essentially the same as Congress listed in the Pipeline Safety Act – for example, preferring areas “not in close proximity to population centers,” and where “existing land use, zoning, coastal zone management guidelines, or development plans were consistent with an LNG import terminal” *Compare with* 49 U.S.C. §60103(a).

Even prior to 9/11 there were fundamental reasons why it would be unacceptable to sanction the location of an LNG terminal in the heart of an urban center with tanker traffic required to traverse narrow, congested waterways. After 9/11, it would be pure folly.

The release of LNG carries with it two principal dangers: pool fires and vapor cloud fires.²⁰

Pool fires result when LNG is spilled, forms a pool, immediately begins to evaporate forming a gas/air mixture which, in the presence of a source of ignition, ignites. If there is no source of ignition near the point of release, a vapor cloud will form and be carried down-wind. If any portion of the vapor cloud which is in the flammable range comes into contact with an ignition source, a fire will result.

Whether the precipitating cause is a pool or a vapor cloud fire, the peril to the public is the same: direct human contact with the fire itself, or exposure to the radiant heat (or thermal

²⁰ There is a third danger, and it is not even mentioned by the Commission, and only discussed dismissively in the FEIS (at 4-231/232), the potential for explosion. It is a lower probability occurrence than either a pool or vapor cloud fire, but it is a risk that cannot entirely be discounted and one that could produce profoundly prejudicial consequences should it occur near a populated area. The Commission would have recognized the significance of this risk had it chosen to review the testimony of Dr. Havens. As he points out (Havens at 20-21), there have been hydrocarbon gas/air mixture explosions in unconfined areas “with devastating damage.” LNG is not immune from this risk, for two reasons: LNG obtained from some international sources may contain a sufficiently higher level of heavier hydrocarbons (so-called “hot gas”) to present this threat; and, even leaner mixtures could present this risk if, following a spill, vaporization results in enrichment of the heavier components which could readily occur during the latter stages of boil-off (due to the fact that heavier components have a higher boiling point than do the lighter components, so that the lighter components will tend to vaporize first). Havens at 28. In addition, there is a clear danger of confined space explosions. Given the numerous buildings close to the terminal and close to the LNG carrier route, the risk that gas from a vapor cloud would enter confined spaces is very high, in which event the risk of explosion would be high.

The point is that there is a risk of explosion and it was not addressed.

radiation exposure).²¹ If the release is of significance (well below the “credible” release postulated in the FEIS), the resulting fire will be so intense that it could not be extinguished; it would have to be allowed to run its course. More to the point, the thermal radiation would be of such heat intensity that persons well removed from the situs of the fire, could sustain near-immediate, life-threatening injuries. There is a necessity, therefore, for thermal exclusion requirements and, to a limited and unsatisfactory extent, they have been adopted. But an exclusion zone, at best, is a blunt instrument. While lightly populated areas beyond the borders of an exclusion zone may require no special protections or consideration (and therefore are properly not within the scope of an exclusion zone), heavily populated areas need far more protection, for two reasons. First, as discussed in Section 2, below, the very presence of a substantial population in the vicinity of the LNG terminal makes that terminal a far more likely target of an intentional act.²² Second, the presence of a large population will make it far more difficult for authorities to evacuate those in harm’s way and to respond effectively to the consequences of any attack. Exclusion zones do not have the flexibility to be tailored to site-specific circumstances and conditions, and for the FERC to rely on exclusion zones as if they fully account for the risks to surrounding populations is arbitrary and capricious and not in accordance with the expert testimony. Further, the thermal protection standards that do exist, apply *only* to the LNG terminal itself. In the context of the Weaver’s Cove applications, this a very significant deficiency. As will become clear, the probability of either an accidental or intentional release may be far greater during the tanker passages. Moreover, releases from the

²¹ Because of the thermal intensity of an LNG fire, either through direct contact with nearby flammable objects (*i.e.*, buildings, chemical plants) or through exposure to the radiant heat, secondary fires are highly likely in a congested environment.

²² This is because the consequences of an attack would be more “spectacular” if the attack is in an urban area, compared to the consequences of an attack in a rural area.

breach of tanker containment could result in pool or vapor cloud fires that are in close proximity to congested areas. In fact, in the event of a release, this is all but inevitable in view of the usage density of the waterways and the close proximity of population centers to the navigational channel.

There are added complexities associated with releases on water: they cannot be contained and the resulting fire could be quite significant, larger even than the fire that could accompany what the FEIS describes as the “credible” terminal release. As Dr. Havens has postulated (Havens at 5-6):

Finally, and perhaps most sobering, very serious questions have been raised regarding the vulnerability of LNG carriers to the damaging environment that the ship would experience as a result of the half-tank spill and ensuing fire described above. Good engineering practice as well as scientific analysis suggest that total failure of an LNG ship, so severely exposed, with eventual burning of its entire contents, is not only possible, it must be considered likely. It is important to state here also that such fires as are being considered (a pool fire following spillage over water of one half of a single tank, or approximately 3,000,000 gallons, from an LNG carrier) would be hopelessly beyond any current capability to extinguish or even contain. But a typical LNG carrier in service today may have as many as five tanks, each containing approximately 6,000,000 gallons. Furthermore, ships currently proposed would carry up to twice that amount, or approximately 65,000,000 gallons. However, little or no attention, much less analysis, has been focused on the implications that are suggested by the possibility of the loss and burning of an LNG ship’s entire cargo.

Dr. Havens is not alone in suggesting the possibility of a fire that consumes the entire contents of a tanker. His concerns are corroborated by the Sandia Report (though the Sandia Report without explanation states that the cascading failures will somehow be self-limiting, so that “only” three of the 6,000,000 gallon tanks would be lost). Havens at 38.

If thermal exclusion zones are a necessary safety precaution with respect to LNG terminals, and they are, no less is true of LNG tankers. If a pool or vapor cloud fire occurs due to a release from an LNG tanker, the risks are similar, but taking into account the impossibility of containment on the water, the much more rapid evaporation rates that would occur on water, and the possibility of rapid phase transition (RPT) explosions leading to cascading failures and further LNG release, the consequences of a spill from an LNG carrier must be expected to be even greater. We do not know why the Coast Guard has not corrected this deficiency. Perhaps it is because, prior to the submission of the Weaver's Cove (and KeySpan) proposals, no applicant even suggested the movement of LNG tankers through comparable waterways.²³ Whatever the Coast Guard's reasons for not having yet completed action, it does not give the Commission a free-pass.

In determining appropriate exclusion zones, whether for a spill at the terminal or during transit of a tanker, the starting point of analysis must be recognition of the risk that requires protection. That should not have been either perplexing or difficult: exposed humans (that is, persons out-of-doors and not wearing special purpose protective clothing), are at risk whenever they are exposed to a thermal radiation level higher than 1.5 KW/m². Havens at 25. This is, to

²³ Perhaps the recently issued Navigational and Vessel Inspection Circular No. 05-05 (June 14, 2005) represents the Coast Guard's recognition that certain waterways are unsuitable for LNG tanker traffic. *See, infra*, pp. 53-54. Further, the Coast Guard did issue regulations establishing safety and security zones applicable to LNG vessels traversing the Narragansett Bay and the Taunton River. Those regulations were promulgated on September 3, 2002, and were intended as at least a partial response to the events of September 11, 2001. *See 67 Fed. Reg.* 56224 (Sept. 3, 2002). Indeed, the regulations were initially adopted as emergency regulations on December 12, 2001, as a direct response to the events of September 11. *66 Fed.Reg.* 64144. In addition, the Coast Guard is actively engaged in the consideration of a petition filed by the City of Fall River requesting the Coast Guard to promulgate regulations establishing thermal and vapor dispersion exclusion zones for maritime spills of LNG. As recently as June 23, 2005, the Coast Guard extended the public comment period until August 22, 2005, to ensure that the public has an adequate opportunity to consider and comment on the Richard Clarke report, "LNG Facilities in Urban Areas." *See 70 Fed.Reg.* 36363 (June 23, 2005).

be sure, lower than the DOT prescribed standard, but Dr. Havens discussed that standard and explained why it is inadequate to satisfy the public interest standard (Havens at 23-25):

Regarding thermal exclusion zones, although there are several criteria designed to protect property as well as people, the exclusion zone which precludes public occupancy is generally delineated in the LNG safety regulations by the distance from the fire, at ground level, at which thermal radiation fluxes of 5 KW/m^2 could be experienced. This is the heat flux level at which persons would be expected to experience second degree burns to unprotected skin in about 30 seconds. This thermal radiation flux is often expressed as $1600 \text{ Btu/ft}^2\text{-hr}$.

Regarding vapor cloud dispersion exclusion zones, the exclusion distances are delineated by the downwind distance at which the model-predicted gas concentration level falls below one-half of the lower flammability level ($lfl/2$), the one-half factor accounting for gas concentration fluctuations expected within the cloud.

* * * * *

I regard the $lfl/2$ criteria for vapor cloud exclusion distance as being generally sufficient, based upon my experience and study of fluctuations in gas concentration that can be expected in such a vapor cloud.

However, I believe that the criterion of a 5 KW/m^2 flux level merits further consideration, because exposure at this intensity to persons could result in serious burns within time periods which would not be sufficient for evacuation or escape. Further, although fire fighting personnel equipped with protective gear could work in such an environment for considerable time, they would not be able to provide evacuation or removal of unprotected persons in time to prevent injury. This is especially true where the numbers of people that would need evacuation would number in the hundreds if not the thousands, and they would be scattered in scores or even hundreds of separate structures. Further, a large LNG fire could not be extinguished; it would simply continue to burn until the LNG is exhausted. It is known that the flux level would have to be reduced to about 1.5 KW/m^2 before unprotected persons could be exposed continuously without thermal radiation damage [this corresponds to a level of $480 \text{ Btus/ft}^2\text{-hr}$]. Consequently, I believe that serious consideration should be given to defining exclusion zones to protect the public from thermal radiation hazards using

such a lower ($\sim 1.5 \text{ KW/m}^2$) thermal radiation flux criterion. However, whether or not DOT defines the exclusion zone using such a lower thermal radiation flux criterion, I believe that FERC should use the lower thermal flux criteria in order to protect the public from such very large fires. It is very important to recognize that a policy which prevents public presence [only] where there would be exposure to 5 KW/m^2 [and above] is not consistent with the public interest, because the public could receive serious injuries at lower flux levels if exposed for longer time periods (including time periods that would still be insufficient to provide for sheltering or evacuation). That is why I suggest the consideration of the lower value of 1.5 KW/m^2 as the “safety” criterion – this value is widely recognized as being the highest value of thermal radiation exposure from which the public would not receive serious injury even if exposed for long time periods.

The judgments of Dr. Havens should at least have given the Commission pause – made it inquisitive. Dr. Havens is, after all, the Nation’s foremost expert on the subject of modeling the consequences of LNG releases. He was the principal architect of the DEGADIS model and it was in the laboratory that he directs that the FEM3A model principally was validated. They are the only approved models for the determination of vapor cloud exclusion zones under the DOT regulations.

Fall River and the Attorneys General did not, however, rest on the views of Dr. Havens alone. The judgments of Dr. Harry West were also provided in testimonial form. Not only did Dr. West, who also has a long-history of distinguished involvement on LNG-release safety issues, support fully the judgments offered by Dr. Havens, he demonstrated the inadequacy of the DOT exclusion requirements by contrasting them with those of other domestic and international authorities. West at 9-12.

For example, rules issued by the Department of Housing and Urban Development (“HUD”) require an “acceptable separation distance” from the site of a “hazard” (which means any stationary container which stores, handles, or processes hazardous substances of an

explosive or “fire prone nature” [specifically including LNG]. The standard to be used in calculating the “acceptable separation distance” for “unprotected facilities or areas of congregation shall not exceed 450 BTU/sq.ft. per hour.” 24 CFR §51.203(a)(2). As stated in the preamble to those rules, 49 Fed. Reg. 5100 (February 10, 1984):

People in outdoor areas exposed to a thermal radiation flux level of approximately 1,500 Btu/ft² hr will suffer intolerable pain after 15 seconds. Longer exposure causes blistering, permanent skin damage, and even death. Since it is assumed that children and the elderly could not take refuge behind walls or run away from the thermal effect of the fire within the 15 seconds before skin blistering occurs, unprotected (outdoor) areas, such as playgrounds, parks, yards, school grounds, etc., must be placed at such a distance from potential fire locations so that the radiation flux level is well below 1500 Btu/ft² hr. An acceptable flux level, particularly for elderly people and children, is 450 Btu/ft² hr. The skin can be exposed to this degree of thermal radiation for 3 minutes or longer with no serious detrimental effect. The result would be the same as a bad sunburn. Therefore, the standard for areas in which there will be exposed people, e.g. outdoor recreation areas such as playgrounds and parks, is set at 450 Btu/hr. sq. ft. Areas covered also include open space ancillary to residential structures, such as yard areas and vehicle parking areas.

The Society of Fire Protection Engineers, as reported by Dr. West, “recommends a level of 800 Btu/hr-ft² (2.5 KW/m²) as a public tolerance limit for exposure to radiant heat” and the European Code prescribes a thermal radiation limit of 1.5 KW/m² for “critical areas.” West at 10. In 1988, the World Bank selected a level of 1.6 KW/m², the same level recommended by the American Petroleum Institute “at any location where personnel are continuously exposed.” West at 11. Moreover, Dr. West, who agrees that the exclusion rule must be extended to the tanker route, calculated that the recent ABS Group and Sandia Reports would translate into danger zones extending from 2 to 4 miles from the point of a tanker spill. West at 12.²⁴

²⁴ Dr. Havens’ testimony supports this view. As he explained (Havens at 40-42):

Dr. West's conclusions, like those of Dr. Havens', were unambiguous (West at 13-14):

The clear intent of Congress to protect people from a major LNG release requires the consideration of a lower thermal hazard criteria (such as the 1.5 kW/m² value used by the Europeans or the 1.4 kW/m² value used by HUD) for areas adjacent to the facility and along the LNG tanker route which are inhabited by sensitive populations or critical facilities.

Therefore FERC should consider the areas that may be subjected to the 1.5 kW/m² thermal radiation flux level following a major LNG spill, either from an LNG terminal or an LNG tanker.

* * * * *

Clearly the 5 kW/m² (1600 Btu/hr-ft²) thermal flux level can not be considered a "safe level of exposure."

But, let me dwell for the moment on what we know. The Sandia report suggests clearly that rapid release of half of one tank of LNG from a "typical" carrier is credible, and that a terrorist attack could therefore result in the release onto water of approximately 3 million gallons of LNG. I agree with this finding. Sandia further states that the pool fire that could result from such a major spill, if the LNG were ignited immediately, could cause second-degree burns to persons with unprotected skin in about 30 seconds out to a distance of at least 1 mile. I agree with this estimate also. However, as I have stated earlier, I believe that consideration should be given to the need to lower the thermal radiation flux criteria, which currently reflects the assumption that people without protection could receive second degree burns in about 30 seconds, to a value which would more appropriately delineate the zone beyond which the public would not be seriously impacted. It is well known and established that maximum thermal radiation flux levels which would allow exposure without serious injury are approximately equal to 1.5 KW/m². Using well established, 49 CFR 193 approved, methods for determining distances to specific thermal radiation flux levels, it can be anticipated that the approximately one mile distances cited above for the exclusion zones around a half-tank ship spill pool fire on water would approximately double if the 1.5 KW/m² level were adopted. Whatever the exclusion zone under 49 CFR 193 might be, I believe that there could be a serious impact on the population in the entire area within two miles from the site of a half-tank ship spill pool fire on water.

Sandia states that if the spill were not ignited (upon spillage), a flammable vapor cloud could extend downwind to distances exceeding 2 miles. I believe this estimate may be somewhat low, but my best guess would be that the distance would probably not exceed 3 miles.

* * * * *

Given the above facts, I think that in order to provide an estimate of the extent of a zone surrounding an LNG tanker from which the general public should be prohibited, if possible, I would be remiss, considering the uncertainty involved, if I were to suggest a minimum distance less than two miles. As I have stated above, this two mile separation distance would reflect the assumption of the release being limited to approximately one-half of one LNG ship tank onto water. I continue to believe the potential for greater consequences that could follow such a release need to be most carefully considered.

It would not be possible to authorize Weaver's Cove, to find that it would be consistent with the public interest, if the consensus (or HUD) minimal safety requirement applied. It would not be possible to authorize Weaver's Cove if the Commission were to do no more than apply the existing DOT requirement to the tanker traffic. There is, in short, no way to authorize Weaver's Cove and still protect "existing and projected population and demographic characteristics of the location." 49 U.S.C. § 60103(a)(2).

Because of the threat posed to the population of Fall River, and to the users and shoreline inhabitants of the waterway, it was incumbent upon the Commission to deal fully and frankly with these concerns. In failing to do so, it was arbitrary and capricious, and failed to engage in reasoned decision making.

2. **The Presence of the Weaver's Cove Project Would Invite A Terrorist Attack that it is Impossible to Ensure Would be Prevented**

The Commission's dismissal of the threat of terrorism is on no firmer ground, nor is its assumption that the threat could be managed. To the contrary, the record that was available to the Commission *compels* the conclusion that the presence of the Weaver's Cove terminal and the associated tanker traffic, would offer terrorists precisely the type of targets they favor.

As a preliminary matter, it was reasonable to expect that with terrorist threats foremost in national consciousness, and with a coordinated attack having only just occurred in an urban center of our country's closet ally, the Commission would have left no stone unturned in its quest for relevant input. Instead, it ignored the testimony addressed to these very issues. With its acknowledgment that the consequences could well be high, even if there was a valid basis for

minimizing (but certainly not trivializing) the risk, it would be expected that the balance would be struck in favor of caution. Instead, we are offered unsupported conclusions (Order at ¶ 84):

Unlike accidental causes, historical experience provides little guidance in estimating the probability of a terrorist attack on an LNG vessel or onshore storage facility. For a new LNG import terminal proposal having a large volume of energy transported and stored near populated areas, the perceived threat of a terrorist attack is a serious concern of the local population and requires that resources be directed to mitigate possible attack paths. While the risks associated with the transportation of any hazardous cargo can never be entirely eliminated, we are confident that they can be reduced to minimal levels and that the public will be well protected from harm.

We are told that the problem can be addressed by the commitment of resources (*ibid*), and presumably it is intended that we take comfort from some inchoate obligation of reimbursement (Order at ¶ 95),²⁵ without acknowledgment of the testimony that establishes the problem to be insoluble. For the Commission to take comfort from the recognition that similar risks may “apply to many other liquid or gaseous fuels and chemicals” (Order at ¶ 89) is, frankly, inexplicable. We agree that there are many threats already in our midst. Fall River and the Attorneys General are fully cognizant of the strain those risks already place on security resources. But, we are at a loss to understand how the existence of risks that pre-dated 9/11 justify the imposition of yet another risk, particularly as there is good reason to be concerned that

²⁵ That the Commission would think the security challenges that would be imposed by Weaver’s Cove with its 21 mile tanker route through narrow, congested waterways, adjoining numerous jurisdictions in two States, bears any resemblance to the situation confronted at the Distrigas facility, corroborates how little attention has been given to the complexity of the security problems posed by Weaver’s Cove. Environmental condition 42 imposes an obligation on Weaver’s Cove to provide a “comprehensive plan identifying the mechanisms for funding,” but no where is there an explicit requirement that the funding not come from the communities or the States. The funding plan is subject to the approval of the Director of OEP, but what is the standard that the Director is to apply? Further, there is a huge difference between a “plan” identifying funding mechanisms, and genuine protection for the communities and the State that they will not be saddled with any part of the huge costs necessary to provide the best practical (but, we and the law enforcement officials most knowledgeable about local conditions believe, entirely inadequate) security. It would be arbitrary and capricious to fail to protect the communities and the States from the huge security costs (both direct and capital costs) that will be imposed by the Commission’s approval of the Weaver’s Cove project.

the new risk presented by Weaver's Cove would assume a position of prominence on the wish-lists of terrorists.²⁶

We also are perplexed by the following criticism of the Clarke Report (Order at ¶ 89):

There also is no support in the Clarke Report for the conclusion that terrorist organizations will be more interested in attacking LNG terminals as LNG imports become a more important sector of the economy. In fact, additional terminals and LNG vessels would provide redundancy in case a ship or terminal were out of service and thereby lessen the potential economic impact.

Intuitively, the contrary would seem more persuasive. As national dependence on imported LNG grows, terrorists are far more likely to appreciate the crippling consequence of a single successful strike. Surely it would raise the possibility of a nationwide shutdown of LNG

²⁶ According to the North Atlantic Treaty Organization's (NATO's) Committee on the Challenges of Modern Society:

By resorting to atrocious and often hitherto unimaginable acts of terror, terrorists aim at inflicting, simultaneously, heavy human, environmental and economic losses with world-wide consequences and thereby creating fear, chaos and despondency in the people about their future. Civilian maritime assets are considered to be attractive targets for the terrorists since world-trade heavily depends on the maritime transportation of energy and other goods which may be disrupted over long periods of time by attacks directed against high-value vessels such as cruise ships, oil and liquefied gas carriers and nuclear waste ships as well as, and perhaps more, to the so-called choke points formed by narrow waterways and straits including bridges across them and important ports and harbours especially those with densely populated areas adjacent to them. . . . Some examples of the worst kind of attack may be exploding an LNG carrier adjacent to a highly populated area, disrupting free passage in a choke point or narrow waterway or causing a major environmental disaster by exploding a vessel carrying hazardous cargo, halting the trade into a strategic port, or by using appropriate weapons destroying a bridge across a waterway thus blocking it for through and across traffic as well as causing loss-of-life and damage to property and the environment. <http://www.nato.int/ccms/pilot-studies/SNWPHAPA/snwphapa-info.htm> (accessed July 28, 2005). The minutes from a meeting of the NATO committee held in December, 2004, reflects agreement that an attack on an LNG carrier by use of standoff rockets navigating through a straight in a populated area is a "credible scenario." <http://www.nato.int/ccms/pilot-studies/SNWPHAPA/docs/050322-minutes.pdf> (accessed July 28, 2005).

Is the Commission arguing that it would be foolish to attempt to prevent a Bhopal because there could be a Chernobyl? Further, is there any analysis that stands behind the Commission's assertion of equivalence? While clearly an attack on a large tanker full of refined product could create an ecological disaster, we are unaware of any credible analysis comparable to the Sandia Report that would suggest a risk to human health and life remotely similar to the risks resulting from an attack on an LNG carrier in the type of narrow inland waterways that would have to be traversed to reach the Weaver's Cove terminal. And if the risks are comparable, the logical implication is that new refineries should be located so that large tankers need not traverse narrow inland waterways – not that we should simply throw up our hands in despair or ignore the problem out of indifference.

operations, particularly if the strike exacted a significant human toll or severely damaged bridges or other critical infrastructure.²⁷

Had the Commission elected to consider the available testimony its conclusion would – or, at least, should – have been quite different. It is not possible to read the Clarke testimony, particularly in light of the Souza testimony (and the affidavits from Chief Souza and the other local officials included with this Request) without concluding that the threat of terrorism is real and that the best efforts of the Coast Guard can not ensure success against terrorists.

Richard Clarke, one of the Nation’s preeminent security-threat analysts, based upon an “on-the-ground” study of the Weaver’s Cove proposal, offered the following judgments (Clarke at 5):

Although the implications are profound, the conclusions can be summarized quite simply. First, the location of an on-shore LNG facility in an urban environment and the passage of LNG tankers along populated in-land waterways would present an exceedingly attractive target for terrorists, the very type of target that terrorists have identified for priority consideration. Second, it simply is not possible to conclude that those types of targets can successfully be defended from terrorist attack. Third, the consequences of a successful attack could well exceed in fatalities, in the infliction of unimaginably painful life-long injuries, and in the destruction of infrastructure, even the consequences of the attacks of 9/11.

²⁷ Specifically, in the case of New England, if there is a successful attack on an LNG terminal, it would be difficult to imagine that the Weaver’s Cove facility would be allowed to continue its operations, and the same is true for the Everett facility. Weaver’s Cove would provide no redundancy that would be available when it would be most needed. By contrast, a successful attack on an LNG terminal would probably not require the closure of an offshore facility or a relatively remote onshore facility because such facilities would be substantially easier to defend, and because there would be no large civilian population put at risk; such facilities would in fact provide redundancy. Increasing New England’s reliance on urban LNG terminals would be putting the region’s eggs in one basket, increasing the region’s vulnerability and increasing the attractiveness to those who are willing to fight and die to harm our Nation.

Admittedly, probability assessments of the likelihood of terrorist attack are highly judgmental, but Mr. Clarke offers detailed support for his conclusions. For example, he points out that (Clarke at 6):

An urban LNG facility would necessarily rank high on any terrorist's list of target opportunities. This is not a matter of speculation. We know that organized terrorists groups have long identified components of energy infrastructure as desirable targets. We know that tanker traffic, and in particular energy laden tanker traffic, has similarly been identified. And we know that when it comes to identifying targets of opportunity, the ability to inflict maximum human suffering, maximum economic loss, and maximum chaos factor heavily into the terrorist mindset.

Mr. Clarke offered specifics in support of the proposition that terrorist groups have identified energy infrastructure as attractive targets for attack, including energy transports (Clarke at 7), and in his more detailed report he enumerated the numerous zones of high vulnerability through which the tankers would pass to and from the terminal. Because of the characteristics of the shoreline, the large number of marinas, and the close proximity of several airfields, he determined that it simply would not be possible to provide for the secure transit of tankers. As he observed, "the premise of a safety or security zone is that it in fact would be respected. That is fallacious when it comes to terrorists." Clarke at 8.

In the end, Mr. Clarke came to the conclusion that the Commission should, as well, have reached (Clarke at 1):

. . . following an intensive study of the situation that would exist following certification and commercial deployment, including of the attractiveness of the facilities and of their associated tanker traffic as terrorist targets, the inability to eliminate the potential for successful terrorist attack, and the horrendous consequences that would follow such an attack, I have reached the judgment that were the Commission to authorize either of these projects to go forward it would be taking actions entirely at odds with the lessons that should have been learned from 9/11 and it would be exposing

large segments of the public to horrific, but entirely avoidable, harm. I could think of few actions that our government could take that would be as prejudicial to the public.²⁸

The Commission dismissed the consequences of an attack that were postulated by Mr. Clarke, without even acknowledging that they were supported by Dr. Havens. The Commission inappropriately drew comfort from the Vessel Transit Security Plan under development by the Coast Guard without recognizing the irrelevance of that plan to the vulnerability point that was advanced by Mr. Clarke. Indeed, the Commission evinces a profound misunderstanding of the role of the Security Plan. That plan premised on the assumption that LNG vessel traffic *will occur*; it does not consider *whether it should occur*. In developing the plan the Coast Guard is functioning in its “military” role, it is not deciding the *suitability* of LNG traffic in these waters; it is endeavoring as best it can to secure traffic that it assumes will occur.

It is also flatly wrong for the Commission to suggest that “the Weaver’s Cove Vessel Transit Security Plan complies with NVIC in all material respects.” Order at ¶ 86. The NVIC referred to is *Navigational and Vessel Inspection Circular No. 05-05*, issued by the Coast Guard on June 14, 2005. It represents a major change in approach by recognizing the need to do more than simply protect security to the extent feasible; it underscores the need, post-9/11, to determine the suitability of any shipments of LNG at all through particular waters.

That suitability evaluation, together with the consultation with local officials about waterway suitability provided for in the NVIC, has never been undertaken. In anticipation of the

²⁸ A successful attack on the Weaver’s Cove facility would not only do tremendous harm to the residents in the vicinity of the attack, it would be a serious blow to the Government itself. With the benefit of hindsight, the decision to certificate the project would become “proof” to many that their Government does not care about them, particularly since the dangers imposed by the certification are so obvious in light of 9/11, and since the citizenry has been so vocal and uniform in its opposition, and indeed in its anger. Terrorists are bound to realize that attacking Weaver’s Cove would not only be a way of creating a “spectacular” terrorist event, killing and injuring thousands, but also a way of eroding confidence in and the legitimacy of the institutions of American government.

contention that it is now too late, it should be noted that the Coast Guard recommended application of NVIC 05-05 to the already approved *Cameron* project.²⁹ When we requested comparable treatment, Weaver's Cove had not yet been authorized.

In any event, the ultimate obligation rests with the Commission. Just as the NVIC recognizes that certain waterways might not be suitable for LNG vessel traffic, the Commission, as part of the public interest balance, must itself reach a judgment on suitability. This the Commission has not done, and on this record it cannot do.

Richard Clarke was not alone in proclaiming unsuitability; so too did John Souza, Fall River's Chief of Police. Chief Souza detailed why it would not be possible to prevent attack on a tanker simply through water-based surveillance and protection activities. And, he detailed why, because of the "pinch" points along the tanker route (areas that are "high risk" because they would permit terrorists to be positioned within 500 yards of a passing tanker, and therefore well within range with obtainable, destructive armament), it is infeasible to provide land-based protection. Souza at 11-12. The waterways not only are narrow with clusters of dense population spread throughout, they are home to perhaps the highest per acre density of marinas and recreational vessels in the United States. Recreational vessels offer the potential for U.S.S. Cole-type attacks and the proclamation of a security zone will not keep away a determined terrorist willing to sacrifice his life.

If NVIC 05-05 means anything, and if it is applied to the Weaver's Cove project, the waterways from the Narragansett Bay through the Taunton River could not be found suitable for LNG tanker traffic. Whether or not it is applied, the Commission must reach the same judgment under the public interest standard.

²⁹ Document 20050516-0043, filed in CP02-378.

One final point on the Coast Guard effort from which the Commission draws comfort and to which it is eager to defer. The Order implies that the workshops conducted by the Coast Guard in connection with preparation of a *security*, not *suitability*, plan, achieved consensus with local safety officials. Nothing could be further from reality. Chief Souza makes this clear in his testimony. Souza at 6, 11-12. Moreover, both Chief Souza and Captain John Solomito of Somerset, participants at those workshops, contemporaneously expressed their absolute disagreement with the notion that adequate security would be achievable. If the Commission entertains any remaining doubts as to the position of local officials – the very officials who know the area best and who will shoulder much of the security responsibility – those doubts are dispelled by the affidavits appended to this pleading. Attachments 1 and 2.

3. The Consequences of a Spill Could Not Be Handled by the Local Communities

Although the Commission has yet to see evacuation or emergency response plans – indeed the Commission may never see them as preparation has been left to the applicants and review and approval to staff – it is content to *assume* their adequacy. In fact, that is an entirely arbitrary assumption. The evidence establishes conclusively that, in light of the unique circumstances that prevail, it is pure fiction to assume that evacuation and emergency response resources would be capable of dealing with a spill, whether accidental or intentional. Had the Commission given even cursory consideration to that evidence, it would have had to conclude that the Weaver’s Cove project would be inconsistent with yet another stated Congressional objective: assurance that “medical, law enforcement, and fire protection capabilities near the location . . . can cope with a risk caused by the facility.” 49 U.S.C. § 60103(a)(5). They would not be able to “cope.”

We quote at some length because it is so very important that the Commission hear directly from the people who will have to endeavor to “cope.” They will be dealing with *realities*, not *assumptions*. We begin with the words of Chief Souza (Souza at 14-16):

Let me start by first addressing the complexities of evacuation in the event of a “pool fire” and begin with the terminal location. To assist the Commission’s understanding of those complexities it is important that I first describe for you both the population that would be within the area of heightened concern, and the difficulties associated with the available evacuation routes. Approximately 9,000 residents live within a mile of the proposed terminal location with the closest residence only 1200 feet away. I have attached to this testimony as Exhibit A, a map of the terminal and the surrounding area. A new middle school with approximately 800 students is planned for the area. There is a Kidney Center within the area, a large number of business establishments, and a high rise apartment complex containing 82 units occupied by elderly and disabled residents. Moreover, as should be clear from the attachment, the area that houses a majority of the population that would be most affected has extremely limited “escape” routes available to it and what is most critical is that for a large segment of that population in order to gain access to an exit route it first would be necessary to head into the area of paramount danger. Many of the side streets are dead ends, requiring egress to be in the direction of the likely area of conflagration. To imagine that persons living in those areas and seeking to expedite their evacuation would then have available to them adequate protective gear, or if they did have such gear that they would locate it and put it on in less than 30 seconds, is foolhardy. Imagine the sheer terror that would then confront a mother as she struggled to round up her children, and cloak them with protective gear, *all in 30 seconds*. How would the elderly or the infirm cope? Even if it were assumed that it would be possible to supply every local resident with protective gear, are they to carry it with them as they carry on their daily lives within the zone of maximum danger? And what is to become of the transients? Are they to be issued protective gear as they enter the zone? The very idea that the permanent and the transient population can be given any modicum of assurance that they will be safe, *when life-threatening danger is but 30 seconds away*, is ludicrous.

Now consider the difficulties that would be confronted along the approximately 5 mile tanker transit zone that lies within

Massachusetts. The one-mile minimal evacuation zone, with the associated 30-[second] limitation, would extend along that entire route. As a result, thousands of additional people would now find themselves to be residents of the zone of heightened danger with countless thousands of transitions [sic] in attendance at any point in time. Even if it were assumed that we could provide protective equipment for the permanent residents around the terminal, are we to do that for the population along that route? And must everyone traveling that route, whether a resident or not, always have at their fingertips protective gear? Even assuming that we could conduct regular evacuation drills for residents contiguous to the terminal, are we to do that for everyone who may at some point find him or herself traversing the shoreline? How do we do that? How do we even get there in time to facilitate the evacuation that must be completed within 30 seconds?

Finally, there is the added complications that would be associated with the secondary fires that could be ignited as the LNG fire comes into contact with other flammable sources.

As Chief Souza went on to explain, there is a further level of complexity that would arise if the spill were from a tanker while in transit, or if any spill (even one at the terminal) were to result in a vapor cloud the movement of which would be affected by the atmospheric conditions then prevailing (Souza at 18):

How do you plan for evacuation when the location of the occurrence is subject to such uncertainty? How do you marshal and get adequate evacuation people at the required location when that location cannot be identified in advance and when the escape window shuts in 30 seconds? It simply cannot be done, even if we had available to us endless financial resources, and that is one thing that Fall River surely lacks.

Next, we turn to the views expressed by the local fire chiefs, Chief Thiboutot of Fall River and Chief Rivard of Somerset. Chief Thiboutot described the fact that because of the thermal intensity levels that would exist, “firefighters, even with protective clothing, would be unable to get close enough to allow their effects at extinguishment to be effective.” Thiboutot at 4. He explained how evacuation efforts and emergency response needs would be at odds,

hindering access to the areas of conflagration – which, he indicated, are likely to be multiple as fire is spread to secondary locations – and making it difficult for neighboring towns to offer much, if any, assistance. Thiboutot at 4-5. He explained the unavailability of necessary equipment, the added complexity of fire fighting and evacuation efforts due to the protective gear required, and the total inadequacy of local medical facilities which “would be quickly overwhelmed.” Thiboutot at 5-6, 8. Finally when asked whether, assuming that every member of the rescue contingent, and all of their equipment including ambulances, were readily available at the site of an LNG conflagration at the precise moment of ignition, they would be able to “cope” successfully with the aftermath, he responded (Thiboutot at 7):

Of course, you are asking that I address the most unrealistic hypothetical. Nonetheless, the answer is no. At most our available rescue personnel could administer aid to a group of eight but any number beyond that would sacrifice the care to all. Keep in mind that the rescue personnel would be required to work in an exceedingly hostile, dangerous environment. In a normal conflagration situation the injured can be removed to a nearby area of safety and administered to there. In the case of an LNG conflagration, there are no nearby areas of safety. As a consequence, emergency personnel would themselves have to be burdened with the need to wear protective gear making their activities that much more difficult. Our ability to move people would also be limited by the fact that those people would themselves require full protective equipment.

I must also address the unrealistic assumption included in your question. I recognize that it was included to make the point that even assuming an ideal set of circumstances that consequences to human health and suffering could be cataclysmic. What the Commission must understand is that, precisely because of the mass exodus that would be occurring across a broad geographic area, it would be highly unrealistic to assume that even most of the available emergency medical resources would be able to get to the scene of the conflagrations in sufficient time to do much immediate good.

Chief Rivard of Somerset agrees. If anything, he tells an even more frightening story. The Town of Somerset is across the river from the proposed LNG terminal location. The only local hospital facilities are on the Fall River side of the Taunton River. Assuming that the bridges remain open and that traffic was not hopelessly snarled – assumptions that are unreasonable, at best – injured persons in the Somerset area would have to head toward the area of maximum danger in their efforts to reach medical help. Rivard 5-6. In fact, even without an incident, the mere fact that tanker traffic would require bridge closures would place those on the Somerset side of the Taunton River who are in need of medical attention at imminent peril (Rivard at 2-3):

. . . I also found that the population of Somerset would be at risk each and every time that a tanker is traversing the Taunton River, either on its way to or from the Weaver's Cove site, whether or not there is an incident at the site or at a tanker. A study undertaken by the Southeastern Regional Planning and Economic Development District ("SRPEDD") reaches the conclusion that as the result of the closing of the Braga Bridge, the time that it would take to transport a person from within Somerset to the nearest hospitals, both of which are located within Fall River, could be extended from 5 or 10 minutes to, in the words of the Report, "30 minutes or more." Report at 18. It is important to recognize that the 30 minute estimate assumes the continued availability of the Brightman Street bridge as an alternative route between Somerset and Fall River. That is probably an erroneous assumption. Security and safety considerations could require the simultaneous closure of both bridges. If there were an inability to cross the bridges that would provide access to the Fall River area, it would be necessary to transport injured or ailing individuals far greater distances to hospitals in the Providence area.

As Chief Thiboutot concluded, if there were to be a breach of containment either at the terminal or at a tanker (Thiboutot at 6):

The adverse consequences would be well beyond anything in our experience and well beyond our capability to manage. The

potential for the loss of thousands of lives could not be ruled out, with thousands more exposed to life-altering injuries.

The Commission should find Chief Rivard's testimony particularly sobering, and compelling. Much of the Commission's justification for authorization is the assumption that breaches of containment are unlikely. What the Chief has made clear is that, even absent an LNG "incident," the mere presence of tanker traffic and the need to close bridges (even *if* the closure of Braga and Brightman Street are not simultaneous), necessarily will place lives on the Somerset side of the river in danger (Rivard at 5):

Lives would be at peril. In a chronic emergency situation even seconds often count. The SRPEDD Report so states. Unfortunately, I know it only too well from my own experience. If the Commission entertains any lingering doubts about the criticality of seconds when it comes to the preservation of life surely those doubts are laid to rest by the testimony that it has been provided from Dr. Bruce Auerbach, the Chief of Emergency Services at Sturdy Memorial Hospital.

That, indeed, is the view of Dr. Auerbach. He, too, has endeavored to inform, to warn, the Commission. He, too, has been ignored. Fortunately, the Commission can yet look at his testimony. When it does, surely it will share the concerns that have been foremost in the minds of Mayor Lambert, of Attorneys General Reilly and Lynch, and of the citizens they here represent. Dr. Auerbach not only is one of the region's principal experts in emergency medicine, he is an active member of regional emergency planning efforts, including those dealing with the Weaver's Cove proposal. Auerbach at 5. He confirmed fully Chief Rivard's concerns about the dangers of prolonged response time, agreeing that seconds do count, especially when dealing with burn victims. Auerbach at 11-12. Dr. Auerbach then described the total inability of available medical resources to "cope" with what easily could be the aftermath of an LNG incident (Auerbach at 7-9):

When one examines the population densities along the proposed navigation route, in particular along areas where the federal channel is in close proximity to densely populated areas of Fall River, it is reasonable to expect that the number of injured sustaining second and third degree burns could easily be in the thousands. These numbers are simply mind-boggling to anyone experienced with and knowledgeable about the medical and emergency response community in the southeastern New England region.

If considering the entire 13 hospital consortium in all of what is considered Southeastern Massachusetts, and including all available acute care hospitals in Rhode Island (approximately 10 that routinely offer the type of care that victims of this type of event would require), I would estimate that there are less than 4,500 beds. However, virtually every hospital in the region is running between 85% and 100% capacity, not to mention the hospitals that would be within the red and orange zones of the LNG fire event, and would be, therefore, unusable. As part of our work in emergency preparedness, we have look carefully at the issue of surge capacity and the best we can stretch to is about 300-500 beds, across the entire region. In addition, Dr. Ken Williams, principal investigator for the Rhode Island Disaster Initiative, reported to me that one of the deliverables from this federally-funded initiative was to perform a vulnerability analysis of how the entire State of Rhode Island would handle the influx of only 500-1000 severely injured or ill persons and they determined that this number would completely incapacitate the entire system in Rhode Island, both hospital and EMS.

Clearly, the capacity to deal with the consequences of a LNG fire is grossly inadequate. Moreover, it must be emphasized that the victims of such an event will have suffered extensive burn injuries that must be treated at hospitals that have burn units. There are few hospitals in the region that have such units. There are really only two such hospitals that actually have ABA-certified burn beds. Moreover, there is little, if any capacity to handle acutely burned victims within the hospitals in Southeastern Massachusetts. The “potential” Boston area hospital beds are as follows (quotes are used around potential because the beds listed are not all specifically burn beds, but rather beds in surgical intensive care units that might be able to be converted to accommodate acute burn patients): MGH, 44 of which 4 are ABA certified Burn Beds; BIDMC, 33; B&W, 40, of which 10 are ABA certified Burn Beds; NEMC, 20; BMC, 28; Lahey, 12. RIH has 13, UMMC, 50. This

means the total beds available to accommodate patients with second and third degree burns within a 60 mile radius are only 240, clearly an inadequate number for the predicted critically burned victims. And of course, this in no way means that all these beds would be immediately available, as our institutions are constantly running their intensive care units at very close to capacity.

The region, moreover, has experience from which to draw (Auerbach at 10-11):

A good example of a major emergency response event occurred in February of 2003 when the Station Nightclub caught fire in West Warwick, Rhode Island. That fire resulted in 100 deaths and hundreds of burn victims. The Station Fire tragedy was one of the worst fires in the nation's history, yet it represents only a fraction of the consequences that would occur when compared to the potential consequences of a LNG fire.

* * * * *

If the fire occurred in the densely populated areas in proximity to either the LNG terminal or along the tanker navigation route, it is undisputed that the regional resources would be rapidly overwhelmed to an unimaginable degree. During the Station fire, which produced victims in the hundreds, every burn bed for about a 50 mile radius was consumed. EMS and other services responded from an equally far distance. Given the population density of the areas in consideration, a pool fire of this magnitude would result in thousands, not hundreds of victims and be totally beyond our capabilities.

As we indicated at the outset, and as should now be clear, “medical, law enforcement, and fire prevention capabilities near the location” *cannot* “cope with a risk caused by the facility.”³⁰ 49 U.S.C. § 60103(a)(5).

³⁰ See also the Minutes of the Rhode Island Emergency Management Advisory Council, May 10, 2005, and in particular the reported comments of General Centracchio, the Adjutant General of Rhode Island. The Minutes are available at <http://204.17.96.6/omfiling/pdf/files/minutes/82/2005/2025.pdf> [accessed on August 9, 2005]. Summarizing General Centracchio's comments, the Minutes state: “An attack on a tanker ... would immediately exhaust consequence capability in all of our hospitals, as well as our ability to evacuate on the highway and air. ...[I]t would be absolutely irresponsible to locate this facility in an urban area.” The affidavits from James R. Bryer, Jr., Fire Chief for the Town of Jamestown, and from Clement Napolitano, Director of Emergency Medical Services for Jamestown, provide further compelling evidence of the inadequacy of local emergency response capabilities to handle the consequences of any significant accidental or intentional spill of LNG. Attachments 3 and 4. LNG

4. The Proposal is Inconsistent with Regional and Local Economic Development Plans and Would Be Incompatible with the “Demographic Characteristics” and the “Natural Physical Aspects Of The Location”

Congressional intent as expressed in the Pipeline Safety Act of 1979 requires consideration of such matters as the socio-economic impact of placing an LNG terminal squarely in the middle of Fall River’s waterfront redevelopment area, and of the impact of tanker traffic on the Massachusetts and Rhode Island communities along the waterway route whose development depends on preservation of open access to these unique recreational waterways. Consideration of these matters were required, as well, by the public interest standard. Again, the facts were laid before the Commission. It had only to look. The Mayor, city councilors of Fall River, and the town councils and boards of selectmen of Swansea, Somerset, Newport, Bristol, and several other towns along the ship route have said the proposal would be inconsistent with regional and local development plans. Commission staff claims to know better (FEIS at E-6; *id.* at 4-137) and the Commission itself says nothing.³¹

carriers would traverse the federal channel abutting Jamestown for approximately 11 miles, and yet Jamestown only has two ambulances, each capable of transporting two people, and six fire trucks. And, if the Pell Bridge is closed as a result of an LNG spill, then the trip to a hospital for the few residents of Jamestown who would be lucky enough to get into an ambulance would take about 35 minutes.

³¹ The FEIS seems to make much of the fact that the site of the proposed terminal is a “designated port area” (*see* FEIS at p. 4-133) while ignoring the fact that the City has long been developing specific land use plans for this area. For example, the “Designated Port Area Bulletin” of March, 1999, published by the Commonwealth of Massachusetts Office of Coastal Zone Management, discusses plans for the Fall River designated port area:

Key elements of the plan include about 40 specific actions broken down into immediate, short-term, mid-term, and long-term categories. Some of the specific ideas are: a hotel complex along the waterfront; expansion and reorganization of the tourism sector to achieve a critical mass of uses; a performing arts facility and park on the State Pier; highway relocation in conjunction with expansion of office-type development along the waterfront; improved signage and waterfront connections; waterfront walk and bikeway; and many others.

<http://www.mass.gov/czm/dpab3-99.htm> (accessed July 28, 2005). Principles of comity, respect for different levels of government, and federalism should counsel the FERC against dismissing the concerns of local and state governments in general, and their concerns over the effects on land uses in particular. Land use is a particularly central function of local governments, and it is an area in which the FERC has no special expertise.

The fact is that the proposal would devastate waterway development. The fact is that the proposal would destroy the plans already in place for the economic revitalization of Fall River. And the fact is that the project, at the location proposed, would violate principles of Environmental Justice that are to be respected as provided in Executive Order 12898.

As a general matter, the percentage of the Fall River population with household incomes below the poverty level is substantially higher than the state-wide average, as is the percentage of households receiving public assistance. FEIS at 4-195. In terms of the area immediately contiguous to the terminal, and well within the area of danger by even the least conservative estimate in the record, the population (Lambert at 3):

. . . is home to a densely populated neighborhood, with a significant representation of immigrant and working class families in census tracts that are among the most economically challenged in our city, including the residents of two public housing developments that are located within approximately ½ mile of the proposed site.

In direct contravention of Executive Order 12898, minority and lower-income populations would be exposed to unique and disproportionate risk.

The fact that Fall River, a working class community, has suffered so substantially from the loss of its manufacturing base, including loss occasioned by off-shore relocation, has made it so imperative that the community assess its resources and marshal them for economic revitalization. That is precisely what has and is occurring. Mayor Lambert, and Kenneth Fiola, Jr., the Executive Vice President of Jobs for Fall River, Inc., discussed those plans, and discussed the centrality of waterfront and shoreline redevelopment, in testimony provided to the Commission. It was ignored.

They discussed the plans to create waterfront amenities that would be the cornerstone of the City's effort to promote its attractiveness to the new business promotional efforts that are underway; plans to build hotels, restaurants and other amenities along the waterfront so that it would become a magnet attracting both visitors and residents. They described plans to do precisely what other cities fortunate to have similar waterfront attributes have successfully accomplished. And they described how all of that would be sacrificed if the City were to be saddled with Weaver's Cove.

The Commission staff professes to know better. It points to the classification of the waterfront site for light industrial and commercial development and shouts out "gotcha." It fails to recognize that the *character* of light industrial and commercial development makes a difference. It fails to appreciate that some industrial development is compatible with nearby tourist amenities – Battleship Cove, the already heavily visited USS Massachusetts and the destroyer Joseph P. Kennedy, the parks, museum, and the soon to be constructed Iwo Jima Memorial – while other development shouts "stay away." Why would a hotel operator or restaurant entrepreneurs take the gamble that patrons would be as sanguine as is the Commission staff from its vantage point some 500 miles away? And why would the cruise ships that the City has been courting schedule visits when their schedule would be subject to the vagaries of LNG tanker traffic? They simply would not come.

Fall River and the communities up and down the affected waterway are absolutely dependent on access to and utilization of those waterways and waterfront. It is, after all, one of our Nation's premier recreational waterways. Staff may think interruptions of 60 minutes or more of little consequence to recreational sailors, but delays of that magnitude are enough to destroy the attractiveness of an area with devastating ripple effects throughout the local

communities – to residential development, marinas, support services, etc. The affidavit of Evan E. Smith, President and CEO of the Newport County Convention and Visitors’ Bureau, Attachment 5, discusses the likely impact on one of those communities along the waterway route. He notes that Newport is “the sailing capital of the world.” Enforcement of the Coast Guard’s safety and security zones would put that status, and the millions of dollars generated by sailing and the associated tourism, at severe risk.³² Further, closure of the Pell Bridge for LNG carrier transits would also jeopardize the tourist industry.

In direct contravention of the Pipeline Safety Act, the “demographic characteristics of the location,” the “existing and proposed land use near the location,” and the “natural physical aspects of the location,” have either been ignored or treated dismissively.

5. All of the Aforementioned Prejudice Is Avoidable

Even if there were no feasible alternative to the Weaver’s Cove proposal, the character and degree of prejudice that it would impose on the human and natural environment would be enough to require the Commission to say “No.” That there are alternatives that eliminate these prejudicial consequences in their *entirety* compels rejection.

In a later section we discussed the legal inadequacies of the analysis of alternatives (*infra* at pp. 90-100). The point here is directed to the Commission’s obligation under the Section 3

³² The right solution to this problem is not to eliminate or eviscerate the safety and security zones. As explained by the Coast Guard in the preamble to the temporary final rule promulgated on December 12, 2001: Due to the highly volatile nature of the high interest vessels covered by this rule and the potential catastrophic impact of an attack on a high interest vessel, this rulemaking is urgently required to prevent possible terrorist strikes against high interest vessels within and adjacent to Rhode Island Sound, Narragansett Bay, and the Providence and Taunton Rivers. ...

... National security and intelligence officials warn that future terrorist attacks are likely. Due to these heightened security concerns, safety and security zones are prudent for vessels which may be likely targets of terrorist acts. ... These safety and security zones are needed to protect high interest vessels, tir crews, and the public, from harmful or subversive acts, accidents or other causes of a similar nature. 66 *Fed.Reg.* 64144, 64145 (Dec. 12, 2001). The right solution, rather, is to withdraw the Commission’s approval of the Weaver’s Cove project.

standard, informed by the Pipeline Safety Act, to analyze whether the potential exists to avoid prejudice by favoring an alternative. It is not simply a question of NEPA compliance – it is a question of keeping faith with the public interest.

The Order fails to do so because it proceeds from an erroneous decisional model. We pick, as an example, the issue that the Commission identifies, correctly, as central – safety (Order at ¶ 32):

The primary consideration before us here is whether the proposed Weaver’s Cove facilities can be constructed and operated safely. We can evaluate the safety of this project by examining the project on its own merits because the safety of a project stands on its own, not necessarily in relation to other projects which may or may not satisfy the proposed objectives. NEPA’s requirement that the Commission look at alternatives does not call for a comparative hearing, and we do not believe that a comparative hearing is necessary to carry out the Commission’s safety responsibilities.

This is fundamentally wrong. It is wrong not simply under NEPA (dealt with *infra* at pp. 98-100), it is wrong under Section 3.

The safety of an LNG project is not subject to a litmus test. A project does not either “pass” or “fail.” Safety is not an absolute. The Commission acknowledges as much. It notes that notwithstanding all feasible security and remediation, *risks will remain*. The safety question is a *comparative* one. It requires comparison of the risks and the benefits and it requires comparison of the risks of Weaver’s Cove as against the alternatives to Weaver’s Cove – *i.e.*, to off-shore alternatives and pipeline expansions. That would be required even if no such projects had been announced. Of course they have, as Commissioner Kelly notes in her dissent.

Would any of those alternatives avoid the threats to public health and safety that are unavoidable in the case of Weaver’s Cove? Would any of those alternatives avoid destruction of a unique waterway and the sacrifice of its centrality to regional economic development? Would

any of those alternatives avoid the need to dredge and to dispose of more than 2.5 million cubic yards of spoils? The answer to each of those questions is a resounding “Yes.”³³

The Commission would have leapt to this conclusion if it had utilized an appropriate decisional model. It chose instead a constrained model, one which deprived it of the ability to see what the public interest required.

6. Approval of the Weaver’s Cove Project Is Predicated on a Misreading of Applicable Coast Guard Regulations

The Commission predicates its ultimate “public interest” finding on the critical determination that “the project would meet federal safety standards.” Order at ¶ 112. In point of fact the project *cannot* meet existing federal safety standards, a fact that the FEIS acknowledges. In light of this “harsh” reality, the FEIS proceeds on the assumption that, accordingly, federal safety requirements will be modified to conform to what the project can accommodate. There is no way that this approach can be reconciled with the public interest; there is no way that it can be reconciled with the Commission’s responsibility under the MOU or with its action in *KeySpan*.

The FEIS states that (FEIS at 4-270):

The Coast Guard would establish a safety and security zone around the Weaver’s Cove Energy marine terminal when an LNG vessel is at the dock. The Coast Guard has not defined the size of a restrictive zone around a docked LNG ship but has stated that it would make every effort to minimize disruptions to other waterway users. The Coast Guard security zones for this project would not be treated as exclusion zones that would preclude

³³ As we explain *infra* at pp. 91-94, this conclusion is not vitiated by the Commission’s undue emphasis on the LNG trucking attributes of Weaver’s Cove. The issue is not trucking; it is satisfaction of peak management needs and that is not dependent on the availability of an additional terminal from which trucks could be supplied. See Affidavit of Bruce Oliver, Attachment 6.

As Richard Clarke testifies, while security could not effectively be provided in connection with Weaver’s Cove, it could be provided for an off-shore project, which, in any event, would be a much less likely terrorist target. Clarke at p. 13.

all other vessel movements. Rather, other commercial and recreational vessels may be allowed to transit through the security zones with the permission of the Captain of the Port.

This is wrong. Safety and security zones *have* been established for the terminal site and for the associated tanker route. They are enumerated in the very regulation cited in the FEIS. As prescribed in 33 CFR 165.121(a)(3), the safety and security zone extends for 3,000 feet in any direction from a “high interest vessel³⁴ moored at a waterfront facility....” As distinguished from the safety and security zones that pertain to the tanker traffic, the zones referenced in (a) (3) apply to “[a]ll waters and *land* within a 1000-yard radius”(emphasis added). Within that safety zone around the terminal “access is limited to authorized persons” (33 CFR 165.20), and no “vehicle, vessel, or object” may either be brought into or allowed to remain without the authorization of the Captain of the Port or of the District Commander. 33 CFR 165.23. See 33 CFR 165.33 for similar restrictions applicable to security zones.

As the following depiction of a 3000-foot security and safety zone around where large LNG carriers would moor at the Weaver’s Cove facility shows, application of the *existing* Coast Guard regulatory limitation would bring a significant number of homes and businesses within the area access to which “is limited to authorized persons.” 33 CFR 165.20. It also shows that while a tanker is at the terminal – for the 24-hour period of unloading – the entire width of the Taunton River would be within the safety and security zone. This means that marine traffic could not pass through this section of the River without first obtaining specific authorization from the Captain of the Port, a requirement that we will expand upon presently.

³⁴ The regulation specifically defines “high interest vessels” to include “barges or ships carrying ... liquefied natural gas (LNG)” *Ibid.* at 165.121(b).



In the FEIS, the response to the inability of the project to be approved under current safety and security zone requirements is to assume that those requirements will be sacrificed (FEIS at 4-270):

With respect to a 3,000-foot “land and sea” security zone around an LNG vessel at the dock, the Coast Guard has developed a vessel transit security plan that provides the desired level of security without creating unnecessary restrictions (i.e. closing the waterway and evacuating all persons within a 3,000-foot radius would not be acceptable procedures).

What the FEIS is saying is that, since the Weaver’s Cove project cannot pass muster under current safety and security requirements, those requirements will have to be revised to accommodate the project; it is saying, and by its action the Commission is agreeing, that those requirements will have to be weakened to the extent necessary to permit approval. What this

ignores is that these requirements were promulgated *for these specific waters* as the *minimum* size of the required protection zone. *See* 67 Fed. Reg. 56222, 56223 (September 3, 2002).

The illegality inherent in this approach is compounded by the treatment accorded the zones that would apply to the tankers during their transit of the waterway. The FEIS mistakenly assumes that the safety and security zones would extend 1,500 feet from either side of the tanker. (FEIS at 4-270) The regulation prescribes a *minimum* zone “extending 1000 yards [3,000 feet] on either side of” an LNG tanker. 33 CFR 165.121 (a). Not only is entry into the zone, without first obtaining specific authorization, prohibited (and subject to severe civil and criminal penalties, *see* 67 Fed. Reg. at 56223), it is not even permissible to be on vessels that are moored or berthed within the zone. This places tens of thousands of vessels already within the prohibited zone, not to mention the already planned development of thousands of additional slips.³⁵

The possibility that exceptions might be obtained is recognized. But it may not be a “blanket” exception. Rather, a request for an exception that would permit entry into the zone (or, presumably, permission to allow a vessel already berthed within the zone to remain there) must be made to, and considered by, the Captain of the Port “on a case-by-case basis.” 67 Fed. Reg. at 56223. This is entirely understandable. Issuance of a blanket exception would be a green light to terrorists. They simply would have to select a conforming vessel in order to evade the protections supposed to be provided by the safety and security zones.³⁶

It is not the case, therefore, that the Weaver’s Cove proposal can go forward in conformity with current safety requirements. We recognize that the Commission has “invited” the Coast Guard to relax those requirements. But even if the Coast Guard were to succumb, the

³⁵ See, for example, the affidavit of Scott Travers, the Portsmouth Harbormaster, Attachment 7.

³⁶ This is why the assumption (FEIS at 4-170) that the needs of local boaters, and particularly of recreational boaters, can easily be met, is fallacious at best.

Commission will still be confronted with its own rationale for concluding that it had to reject the KeySpan proposal. No less is required here both because there can be no justification for deviating from the *KeySpan* precedent and because it is not possible to rationalize the sacrifice of safety and security requirements with the public interest standard, particularly in the face of alternatives that require no similar sacrifice.

7. The Commission Misapplied the Department of Transportation's Regulations on Siting of an LNG Terminal

The FEIS assumes that the terminal impoundments will be sufficient to contain the entire contents of any containment breach and that vapor clouds are unlikely to drift off the site (FEIS at p. 4-249 to 4-251). In the testimony of Dr. Havens, he points out that incorrect modeling was utilized and that properly analyzed the impoundment will not prevent the dispersion of a LNG vapor cloud off-site. While we believe that the selection of the “design spill” was itself arbitrary, the discussion in this section will deal only with how the FEIS, and ultimately the Commission, deals with the calculation of the vapor dispersion exclusion zone based on the design spill selected by the Commission.

The Commission has determined flammable vapor exclusion zones by assuming that spills of LNG will largely stay put in impounding areas, until the liquid plus pure, unmixed vapor fills up the impounding area. It then applies the DEGADIS model only to the calculated overflow of the unmixed LNG vapor from the impounding area, rather than to the full vapor volume, including entrained air. This, as Dr. Havens has testified, is not consistent with the experimental testing that has been performed and it is not a reflection of physical reality. Moreover, it simply is not consistent with regulatory requirements.

49 CFR 193.2059(a) provides that each LNG transfer system “must have a dispersion exclusion zone” based on the DEGADIS model “or another model approved by the authority”; however, “in order to account for additional cloud dilution which may be caused by the complex flow patterns induced by tank and dike structure, dispersion distances may be calculated in accordance with the model” FEM3A, or equivalent. Since an “impounding area” is defined in 1.7.17 of NFPA 59A as “an area defined through the use of dikes or the site topography for the purpose of containing any accidental spill of LNG,”³⁷ if an applicant desires to take into account the effect that an impounding area may have on the calculation of a flammable vapor exclusion zone, it must use FEM3A or some equivalent model.³⁸ If the applicant, or the FERC, chooses not to use FEM3A, then it must apply DEGADIS (or the authorized equivalent, for which DOT has never set up an approval procedure) to the spill – which includes the full volume of vapor generated from the spill *into* the impounding area itself, with no retention of vapor within the impounding area.³⁹ While there is some language in NFPA 59A ¶¶ 2.2.3.3 and 2.2.3.4 that could

³⁷ Note that this definition treats the release of LNG *into* an impounding area as an “accidental spill” of LNG. It appears that the Commission in effect only treats releases *from* the impounding area as a accidental spill. As discussed in more detail below, this would be technically appropriate if the Commission properly determined the rate and extent of the release of vapors from the impounding area, but it has not done so.

³⁸ While the regulation states that FEM3A “may” be used, it also states that the “use of alternate models which take into account the same physical factors and has been validated by experimental test data shall be permitted, subject to the Administrator’s approval.” In other words, FEM3A must be used if the effects of impoundments are to be taken into account, unless the Administrator (and not the Commission) specifically approves an alternative model that has been validated by experimental test data.

³⁹ DEGADIS is to be applied to the vapor generated from a spill. The applicant and the FERC, however, have been applying DEGADIS only to the vapor generated that they calculate leaves the impoundment. This would be technically appropriate if they properly calculated the rate of release of the vapor from the impoundment, but the failure to take into account the mixing of the vapor with air within the impoundment, and the warming of the vapor within the impoundment, mean that they have greatly underestimated the rate at which the vapor generated from the spill is released from the impoundment. In some cases, the applicant and the FERC have assumed that no vapor is released from the impoundment after a spill, because the volume of the impoundment is greater than the volume of vapor (unmixed with any air, and at the extreme cold temperatures at which the vapor boils from the spilled LNG). This example clearly illustrates the absurdity of the method that has been broadly applied by applicants and the FERC alike. The regulatory requirement of 49 CFR 193.2059(a) is that FEM3A be used to account for the effects of dikes and other obstructions. If the applicant and the FERC choose not to employ FEM3A, they do not have the

be stretched into a justification for failing to apply DEGADIS to the full volume of the spill,⁴⁰ there is nothing in the regulatory language of 49 CFR 193.2059 that would permit such a result, and as provided in 193.2051, “[i]n the event of a conflict between this part and NFPA 59A, this part prevails.”

Instead of either applying FEM3A or applying DEGADIS to the full volume of the spill (and not just to the improperly calculated overflow from the containment), the FEIS states that “the actual ability to apply the model [FEM3A] at this time is the subject of an ongoing technical dispute in this proceeding.” FEIS at p. 4-250. Even if it were true that FEM3A is not available, that would not justify the failure to apply DEGADIS to the full volume of the spill. The regulation is clear that the only way to take into account the effect of the impounding area is to use FEM3A or an equivalent, and that was not done in this case.

Further, if the “dispute” over whether FEM3A is in fact available were important, then the Commission should have resolved it. We note that Mayor Lambert of Fall River sent the Commission a copy of a letter from the Gas Technology Institute dated March 7, 2005, clarifying that the FEM3A model is available for licensing. The letter from the Mayor and the attachment are included in the Docket, with an accession number 20050415-0097.

The FEIS also states that “issues have been raised” concerning validation of the model. The model has been accepted by the Department of Transportation, and incorporated into the

option of applying DEGADIS only to some subset of the vapor released from the spilled LNG (that subset that they calculate overflows the impounding area).

⁴⁰ For example, 2.2.3.4(c) provides that the “computed distances shall be based on the actual liquid characteristics and the maximum vapor outflow rate from the vapor containment volume (the vapor generation rate plus the displacement due to liquid inflow).” There is identical language in 2.2.3.3. Perhaps it could be argued that the “maximum vapor outflow rate” is not the actual vapor outflow rate, but rather is defined by the parenthetical to mean only that pure and unmixed vapor that would be forced out of the impounding area by the displacement due to liquid inflow, ignoring all the vapor mixing with air that would occur in the impounding area and ignoring the effect of the vapor rising in temperature beyond its boiling point of -260°F (and therefore expanding). There is absolutely nothing about this language that compels such a strained result that is, as Dr. Havens has shown, demonstrably wrong as a matter of fact. In any event, the language of 49 CFR 193.2059(a) does not permit such a result.

applicable regulation. If there were a claim that FEM3A was not adequately protective, then the Commission would have to deal with those claims in order to fulfill its obligations under Section 3 of the NGA, but no one in this proceeding is making such a claim. The Commission cannot avoid the minimum siting requirements of Part 193 because “issues have been raised;” the regulatory requirements apply, and the Commission’s failure to follow those regulations make its approval of the Weaver’s Cove application not in accordance with law.⁴¹

As a substitute for the lawful process, the Commission staff “performed a supplementary vapor dispersion analysis for the design spill by conservatively assuming no earthen structure on the plant perimeter.” While this supplementary analysis contained one assumption that might be conservative, there is absolutely no basis for assuming that this one assumption compensated for the Commission’s failure to apply the regulation as written, or for its failure to pay attention to the laws of physics. The Commission staff continued to ignore that the vapor coming off the [LNG in the](#) impoundment would mix with air within the impoundment, and it continued to ignore the fact that the vapor would not remain at 260 degrees below zero. The mixing of the vapor with air within the impoundment (or any additional volume intended to contain the vapor), and the warming of the vapor would both cause the mass of natural gas overflowing the impoundment/vapor containment to substantially exceed the estimated mass used by the

⁴¹ The FEIS states: “While the issues concerning the model may ultimately be resolved in the proper forum of the technical standards committee or the DOT regulatory process, the model should be viewed as a potential long-term solution, rather than in timeframe of this project.” FEIS at p. 4-250. However, the “issues concerning the model” were resolved by the DOT regulatory process when the regulation was amended to incorporate FEM3A, and require its use whenever the effects of impounding areas are to be taken into account. Weaver’s Cove or anyone else is free to seek to reopen the DOT regulatory process, but unless the DOT changes the regulations the Commission is obligated to apply them as minimum standards. Of course, the FERC is free to go beyond those minimum standards, and may be required to do so in order to meet its obligations under the Section 3 public interest requirement.

Commission staff in its “conservative” analysis, and it results in a substantial underestimation of the flammable vapor cloud exclusion zone.

* * * * *

Taken separately or in combination, the above discussion makes evident that the Commission not only deprived itself of the ability to engage in reasoned decision-making, its decision on the merits is unsupportable. It, too, is arbitrary and capricious, and not in accordance with law.

IV. THE COMMISSION MUST SET THE WEAVER’S COVE APPLICATION FOR FULL EVIDENTIARY HEARING

As early as September, 2004 and repeatedly since, Fall River and the Attorneys General have pressed for a full adjudicatory process, including discovery and an evidentiary hearing with full rights of cross-examination.⁴² They repeat that request yet again.

There does not appear to be any dispute about the applicable standard. We accept the Commission’s formulation: “Trial-type evidentiary hearings are required only where there are material issues of fact that cannot be resolved on the basis of the written record.” Order at ¶ 25, *fn omitted*.

As we have previously stated to the Commission (Motion, May 11, 2005, at 14), we have found no instance where an evidentiary hearing was declined where intervenors placed into contention “material issues of fact.” Judicial acceptance of refusals to hold evidentiary hearings has been dependent on the Commission’s ability to establish the absence of disputed material facts. *See New England Fuel Inst. v. ERA*, 875 F.2d 882, 886 (D.C. Cir. 1989); *Panhandle*

⁴² On June 16, 2005, the EFSB filed a response in support of the motion of Fall River and the Attorneys General for an evidentiary hearing.

Producers v. ERA, 822 F.2d 1105, 1113-1114 (D.C. Cir. 1987). See also, *Michigan Consolidated Gas Co. v. Federal Power Commission*, 246 F.2d 904 (3rd Cir., 1957) (where all that was involved was a pipeline expansion and the export of traditional natural gas via pipeline, and where the controversy was limited to the question of whether those exports, which were to be made on an interruptible basis, would reduce the reliability of domestic supply. An evidentiary hearing was held before a Hearing Examiner and the reviewing Court applied the “substantial evidence” standard); *Moreau v. FERC*, 982 F.2d 556 (D.C. Cir. 1993); *General Motors v. FERC*, 656 F.2d 791 (D.C. Cir. 1981).⁴³

On its face, the Order makes clear the need for a full adjudicatory process. The Commission itself did not agree on resolution of critical factual issues. The dissent makes this abundantly clear. In her opinion, Commissioner Kelly, for example

⁴³ We are perplexed by the citation of cases upon which the Commission relies in justification of its refusal to invoke an adjudicatory process here. *Southern Union Gas v. FERC*, 840 F.2d 964 (D.C. Cir. 1988), was a challenge to the Commission’s refusal to exercise what the Court characterized as “prosecutorial discretion” to launch an investigation looking to reopen a settlement to which petitioners had agreed and from which they had benefited. In approving the refusal to hold a hearing, the Court observed “that section 5 never mandates a hearing, unless material issues of fact are raised.” 840 F.2d at 970 (emphasis in original). Apart from the absence of facts having been raised, the Court noted that alternate avenues of relief were available to the petitioners, including avenues that could result in a hearing. In *Weaver’s Cove*, the *unless* has been more than satisfied.

Nor is *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124 (D.C. Cir. 1982), supportive of the Commission’s decision here. The issue in *Cerro* was whether a pipeline had sufficient capacity so as to be able to avoid the curtailment of interruptible load. At an informal conference the Commission confirmed that the capacity situation justified curtailment and “that no actual dispute existed as to Transco’s claim of insufficient capacity.” 677 F.2d at 129. In upholding the Commission, the Court observed (*Ibid*):

. . . mere allegations of disputed facts are insufficient to mandate a hearing; petitioners must make an adequate proffer of evidence to support them.

There is no way for the Commission to draw comfort from *Cerro*. In contrast to the situation there, Fall River and the Attorneys General made specific offers of proof beginning in September, 2004 and, as we discuss presently, as a result of those offers there are critical, material issues of fact are in dispute.

Finally, *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969), offers no support for the Commission’s position. The Court there reluctantly upheld the absence of an evidentiary hearing addressed to the propriety of the disposition of a municipal electric system because the sale was supported by the municipality and ratified by the voters, and because “no proffer has been made to the agency or this court either in the form of a motion for leave to file additional evidence or otherwise.” In direct contrast here, Fall River and the Attorneys General did far more: the testimony itself was filed.

- expresses “significant concern” about the safety hazards that would confront shore based communities, concluding that “the length of these exposures to the people along the transit route and the vicinity of the dock to be unacceptable.” Dissent at ¶ 4.
- expresses concern about the consequences of a “fire associated with a potential spill in the vicinity of the Weaver’s Cove dock” to nearby infrastructure and to the contiguous population. Dissent at ¶¶ 4-5.
- expresses concerns about the feasibility of effective evacuation and emergency response plans. Dissent at ¶¶ 3, 5.
- expresses concerns about the “significant adverse environmental impacts due to dredging and LNG ship ballasting.” Dissent at ¶ 5.
- expresses concern over the absence of resolution of how dredge spoils will be disposed. Dissent at ¶ 6.
- expresses concerns over impacts on “important winter flounder spawning and juvenile development habitat” and on the entrainment and/or impingement of “larvae and eggs.” Dissent at ¶ 6.
- expresses concerns about the socio-economic impacts that will be imposed on the communities. Dissent at ¶ 6.
- points out the existence of alternatives that would avoid these prejudicial impacts. Dissent at ¶¶ 2-3.
- and concludes, based on all of the above, including the “unresolved safety issues” that “this project raises,” “that the Weaver’s Cove project is not consistent with the public interest under NGA section 3.” Dissent at ¶¶ 3, 7.

Commissioner Kelly is correct on the merits both as to the ultimate Section 3 determination and as to each of the subsidiary issues that are so central to that public interest determination. We are prepared to establish the correctness of her conclusions at an evidentiary hearing. What the Commission may not lawfully do is deny us that opportunity. In the face of disagreements at the Commission-level itself as to the appropriate disposition of central factual

and technical questions (as contrasted with policy disputes), an evidentiary evaluation is imperative.

In the Motion filed on May 11th, we detailed the substantial material conflicts that then existed. Those focused on conflicts with the positions that had been advocated by the applicants. We cited, as support, both the views of our experts, and the expressed views of federal and state agencies in areas that fall within their subject matter expertise. We incorporate that discussion by reference herein. We also incorporate by reference the full testimonial submission filed on June 9th. That submission, and the earlier September 2004 filing of expert views, is but added confirmation that even after the premature publication of the FEIS, and its incorporation into the Order, material issues of fact remain in substantial dispute.

For ease of consideration, we group the material factual disputes in subject areas. Any one of the conflicts would be sufficient to trigger the requirement for adjudicatory hearings. The magnitude, and centrality, of the conflicts are staggering. We frankly doubt that the Commission has ever had a case that presented a broader range of significant conflict, particularly as to matters outside of the Commission's expertise⁴⁴ and where the need to judge the depth of knowledge and the credibility of experts is so important.

A. The Threat of Terrorist Attack

- The Commission and the FEIS conclude without evidentiary support that the risk of terrorist attack can be managed and reduced to acceptable levels (Order at ¶ 84; FEIS at ES-10); Clarke and Souza have testified that the probability of attack could well be high and that effective prevention is not possible

⁴⁴ We note that, while outside consultants were used extensively in the preparation of the FEIS, they were not used on safety issues. Rather, that appears to have been the responsibility of a single staff member whose expertise is in civil and mechanical engineering. As the Commission surely knows, vapor cloud formation, dispersion and ignition are complex fields of science requiring far different training and experience that is acquired in the specialties of civil and mechanical engineering.

- The Commission and the FEIS conclude without evidentiary support that an adequate security plan can be developed (Order at ¶¶ 85-86; 89-91); Clarke and Souza have testified that there is no effective way to prevent successful attacks directed either at the terminal or at the tankers considering the characteristics of the route⁴⁵
- The Commission and the FEIS conclude without evidentiary support that the Coast Guard and local safety officials reached consensus on what they consider to be an adequate security plan (Order at ¶ 85; FEIS at 4-268 to 270); participating local safety officials disagree (Affidavits of Souza and Solomito)⁴⁶
- The Commission assumes that Coast Guard NVIC 05-05 has essentially been applied (Order at ¶ 86) but no waterway suitability analysis has been undertaken and local and national safety and risk assessment experts contend that the waterways are unsuitable

The Commission does concede that a successful terrorist attack on an LNG carrier within the narrow waterways leading to the Weaver’s Cove terminal would be a “high consequence event” [Order at ¶ 94], but it appears to assume away any significance to these consequences by adopting the assumption of perfect security. The factual dispute over the adequacy of the security, even if it might be as good as it could be given practical limitations, is absolutely central to Commission’s determination that the project is not inconsistent with the public interest. In light of the fact that this factual dispute is not within the area of the Commission’s expertise, given that it clearly is within the expertise of the local law enforcement officials whose affidavits

⁴⁵ The Affidavit of Dennis Canario, a member of the Portsmouth Town Council and a recently retired Detective Inspector in the Portsmouth Police Department, describes wooded shorelines and abandoned bunkers in proximity to the federal channel. Attachment 8.

⁴⁶ Chief Souza actively participated in the security workshops held by the Coast Guard. In his affidavit, Attachment 1, he states clearly that “[b]ased on my training and experience, my study of the security issues and my familiarity with locale, it is my opinion that the only way to secure this area is a complete evacuation of the public, which is practically impossible.” He concludes by noting that “aside from the protest of Fall River and Somerset, those workshops considered only how best to provide security given practical restraints, and not whether the level of security that could be provided would be adequate to ensure the safety of the large population near the proposed terminal and along the waterways that would be traversed.” Captain Solomito of the Somerset Police Department participated in several of the workshops as well. He agrees with the position taken by Chief Souza, and in fact he submitted a letter to the Coast Guard Captain of the Port on March 17 “protesting” the security plan as being “inadequate.” Solomito Affidavit, Attachment 2.

we submit with this Request for Rehearing, and given the location-specific nature of the question (*i.e.*, the question depends on facts specific to the particular waterways that would be traversed in order to reach the Weaver’s Cove terminal), a careful and detailed exploration of this question is essential, and it must involve those, like Chief Souza, Captain Solomito, and Councilman (and former Detective Inspector) Canario, with the appropriate expertise and local knowledge. However, due to the vitally important security issues that would be addressed during a hearing on this issue, Fall River and the Attorneys General would readily agree to holding a hearing subject to all appropriate protections.

B. The Adequacy of the Safety Analysis and of Safety Standards

- The Commission and the FEIS conclude without evidentiary support that existing DOT and Coast Guard safety requirements will provide adequate protection (Order at ¶¶ 82-91; FEIS at 5-1); Drs. Havens and West testify that they are inadequate to protect health and safety in the contexts of the Weaver’s Cove setting⁴⁷
- The Commission and the FEIS conclude without evidentiary support that adequate safety can be provided without the establishment of thermal exclusion zones in connection with the marine transport of LNG (Order at ¶¶ 84-87; FEIS at 4-276 to 4-280); Dr. Havens testifies that the extension of such zones to the marine traffic is critical and the absence of zones will place thousands at risk
- The Commission concludes without evidentiary support that all “credible” spills have been analyzed (Order at ¶ 80); Dr. Havens testifies to the contrary
- The Commission concludes without evidentiary support that in the event of an attack against a vessel, the damage will be limited to a single tank (Order at ¶ 92); Dr. Havens testifies to the contrary and

⁴⁷ We already have discussed one serious shortcoming: the assumption that an exposure limitation predicated on thermal radiation fluxes of 5 KW/m² would provide adequate protection. As both Drs. Havens and West testify, it must be set at a substantially lower level if protection against life-threatening burns is to be provided. Dr. West further shows that the 5 KW/m² level is well above the exposure limits used by other federal agencies, by international bodies, and even above that recommended by an energy trade group.

demonstrates why the threat of a cascading failure, consuming the entire ship (and all of its contents), cannot be ruled out

- The FEIS concludes without consideration of all relevant facts that explosion is not a credible threat and is dismissive of the possibility of explosion “in unconfined open spaces” (FEIS at 4-232); Dr. Havens explains why it is a credible threat and explains the science that supports the possibility of even unconfined explosions
- The Commission concludes without reasoned consideration that the FEIS correctly calculates the credible spill in the event of a breach of containment either at the terminal or at a tanker; Dr. Havens testifies that the FEIS fails to account for far more significant credible breaches and spills
- The FEIS concludes without reasoned consideration that the terminal impoundment will be sufficient to contain the entire contents of a containment breach and that vapor clouds are unlikely to drift off the site (FEIS at 4-250 to 4-251); Dr. Havens testifies that incorrect modeling was utilized and that properly analyzed the impoundment will not prevent the dispersion of a LNG vapor cloud off-site⁴⁸
- The Commission concludes that the risks to the public would be negligible (Order at ¶ 81); Drs. Havens and West testify that the risks would be substantial, placing tens of thousands of persons at risk

C. The Feasibility of Evacuation and Emergency Response

- The Commission and the FEIS acknowledge that “there remain a number of issues concerning the viability of emergency evacuation that have not yet been satisfactorily resolved.” Order at ¶ 98. Police Chief Souza, Fire Chiefs Thiboutot and Rivard, and Dr. Auerbach testify that safe evacuation cannot possibly be accomplished. This is a highly material fact, critically important to the determination of whether the project is consistent with the public interest, that the Commission agrees is in dispute and that it cannot resolve

⁴⁸ As explained at length in Section III.7 in this Request for Rehearing, the FEIS seems to acknowledge that there are outstanding material issues of fact yet to be resolved, but that resolution of those issues should take place sometime in the indefinite future, and not be applied to the Weaver’s Cove application. *See* FEIS at p. 4-250. The question of whether the Weaver’s Cove facility would meet the siting requirements of Part 193.2059 is too fundamental and central an issue to be evaded on the grounds that it is just too hard to figure out. Further, the Commission has seriously misread the applicable regulations, resulting in a decision that is arbitrary, capricious, and not in accordance with law.

- The Commission acknowledges as well that there is a need “to ensure that a viable [emergency response] plan is possible for the project” and that this need has not yet been met. Order at ¶ 99. Police Chief Souza, Fire Chiefs Tiboutot and Rivard, and Dr. Auerbach testify to the total inadequacy of local and regional emergency response capability and to the impossibility of effective emergency response even assuming the absence of capacity limitations. Again, this is a highly material fact, critically important to the public interest determination, and the Commission has not been able to resolve it
- The FEIS acknowledges that local hospitals will not be capable of coping with an LNG emergency, but dismisses the significance of this recognition, stating that “other medical facilities throughout the region would be called upon for assistance” (FEIS at p. 4-181); Dr. Auerbach testifies that not only are local hospitals inadequate, but that the entire region lacks adequate capacity, and Chief Rivard testifies that the extensive population of Somerset, which is within the zone of danger, would not even have access to local hospitals
- The FEIS concludes that bridge closures will not significantly impact the affected communities (FEIS at pp. 4-183 to 4-186); local officials testify to the contrary, including the fact that closure of either the Braga or Brightman Street bridges, even if not simultaneous, will place persons on the Somerset side of the river who are in need of medical attention at risk even absent a breach of containment.

D. The Impacts on Local Planning and Economic Well-Being and on Factors Bearing on Environmental Justice

- The FEIS concludes that the Weaver’s Cove proposal would be consistent with local planning objectives (FEIS at pp. 4-136 to 4-140); Mayor Lambert and Kenneth Fiola, Jr. testify to the contrary
- The FEIS concludes that the project will provide economic benefits to Fall River, though it does acknowledge that the very few permanent jobs that would be created would have no meaningful impact (FEIS at pp. 4-144, 4-178); the Lambert and Fiola testimony is that the project would have a significant adverse effect on the local economy
- The FEIS concludes that the Pell and Mt. Hope Bridges will not close, and the impact of any closures would, in any event, be minor. (FEIS at p. 4-183) The Rhode Island Turnpike and Bridge Authority has stated to the contrary, and therefore the FEIS’s assumptions about both

closure⁴⁹ and impact are unsustainable. In addition, Councilman (and former Detective Inspector) Canario of Portsmouth, and Diane C. Mederos, Town Administrator of the Town of Bristol, describe the impact of closure of the Mount Hope Bridge, a 75 year-old two lane bridge, Attachments 9 and 10; and Evan Smith, President and CEO of the Newport County Convention and Visitors' Bureau, describes the impact of the closure of the Pell Bridge, Attachment 5.

- The FEIS concludes that the project would be consistent with the continued use and development of the waterfront and of the waterways, including recreational uses (FEIS at pp. 4-144; 4-170 to 4-171; the testimony of local official is to the contrary
- The FEIS concludes that the project would not disproportionately prejudice populations as proscribed by Executive Order 12898 (Environmental Justice) (FEIS at pp. 4-195 to 4-197); the testimony of Mayor Lambert is to the contrary

E. Environmental Effects and the Consideration of Alternatives

- The Commission concludes that the project would have limited environmental effects (Order at ¶ 112); the comments of federal and state environmental agencies, and the testimony of Carol Wasserman, stand in sharp disagreement with the Commission's conclusion
- The Commission and the FEIS conclude that the impacts of the substantial amount of dredging that would be required would not have significant adverse effects, including on fishery and marine resources;⁵⁰ the comments of federal and state agencies⁵¹ and the testimony of Ms. Wasserman is to the contrary

⁴⁹ The Authority adopted a resolution on June 14, 2005, stating "[t]he movement of tankers carrying large amounts of liquefied natural gas under or in proximity to the bridges will require the closure of the structures" A copy of this resolution was appended to the filing of the Attorney General of Rhode Island in this docket on June 16, 2005. The Commission appears to ignore the fact that the bridges will close, whether or not the Commission or the Coast Guard believe closure is necessary, if those with the responsibility (and liability) for safe operation of the bridges believe that closure is the responsible course. The Affidavit of Peter M Janaros, the Director of Engineering for the Authority, discusses the concerns of the Authority that led to its adoption of the resolution, and underscores the intent of the Authority to close both the Newport/Pell Bridge and the Mount Hope Bridge "before, during and after each tanker passes by and through the bridges." Attachment 8. The closure will be just as real whether it is ordered by local police, the State police, the applicable bridge authority, or the Coast Guard, and the Commission is not free to ignore the costs and consequences to the people of Rhode Island and Massachusetts that would be the direct result of the approval of the Weaver's Cove project.

⁵⁰ The Order's discussion on this point is confusing. The Order adopts part of the NOAA Fisheries recommendation for time of year restrictions on dredging, from January 15 through May 31, but it does not adopt NOAA Fisheries' further recommendations that would prohibit dredging through October 31. Further, the discussion in the Order appears to base its decision to adopt any restriction on dredging only on the consistency in

- The Commission concludes that the NEPA review was complete (Order at ¶ 27); the testimony is to the contrary
- The Commission concludes that the consideration of alternatives was sufficient (Order at ¶ 27); the testimony of Ms. Wasserman and the affidavit of Bruce Oliver make plain that it was grossly deficient and that it was based on an erroneous limitation (*i.e.*, limiting full consideration to projects that could be a new source of trucked LNG to supply the satellite storage facilities)

F. The Ultimate Conclusion

- The Commission finds that “approval of the Weaver’s Cove LNG facilities will be consistent with the public interest” (Order at ¶ 51); the sworn testimony of more than a dozen experts demonstrates why that conclusory finding is arbitrary and capricious, and not in accordance with law.

It is not simply that material issues stand in substantial dispute, the complexity of the issues, the importance of being able best to evaluate the depth of knowledge and the credibility of those offering conflicting viewpoints (not to mention the absence of the requisite expertise within the Commission itself), demands invocation of the fullest possible adjudicatory process. The conclusions reached by the Commission in the Order are based on assumptions that find

the construction timing that would result from the limited suspension of dredging (January 15 to May 31) and the Commission’s understanding that the existing Brightman Street Bridge would be demolished in 2010. *See* Order at ¶ 108. With the enactment of SAFETEA-LU, the dredging could be permanently prohibited without affecting the project, since no vessel requiring the dredging can go through the existing Brightman Street Bridge, and as a result of the enactment of SAFETEA-LU, that bridge will not be demolished as contemplated by the Commission.

⁵¹ The Comments of EPA Region I on the FEIS are particularly powerful. Those comments, dated June 28, 2005, note that EPA rated the DEIS as “Environmentally Unsatisfactory – Inadequate Information,” and requested that the Commission issue a supplemental EIS. After reviewing the FEIS, EPA remains “concerned about the nature and extent of potential project impacts and [it] believe[s] that measures beyond those recommended in the FEIS will be necessary to adequately protect the environment.” Specifically, it discusses the special regional value of the Taunton River and Mount Hope Bay, and it concludes that “significant conditions are warranted for any new project in this system.” Those restrictions, it “strongly” recommends, should include full adoption of dredging restriction windows, extending from January 15 through October 31. EPA Region I carefully considered the measures called for in the FEIS, and concluded that those measures would be inadequate. The Commission should reconsider the adequacy of the conditions imposed on dredging in the Taunton River and Mount Hope Bay, and it should adopt the conditions recommended by EPA. The Commission’s failure so far to adopt more protective conditions is arbitrary and capricious.

little or no support in the record, and on a lack of reasoned decision making. The conclusions reached, therefore, do not resolve the substantial disputes over material facts that exist.

In recent years, the Commission has increasingly relied on “paper” hearings. In *Sound Energy Solutions*, the Commission referred to that practice, and stated:

While the CPUC suggests that a trial-type hearing before an administrative law judge is necessary to adequately air the issues, no material issues of fact have arisen to warrant the Commission's ordering such a hearing. We routinely decide complex and controversial cases on the basis of the record in a paper hearing and expect to be able to do so here. Thus far, we have no indication that proceeding in this manner will produce a less well reasoned result. (*footnote omitted*)

Sound Energy Solutions, 107 FERC ¶61,263, at 62,165. Here, there is *every* indication that the failure to hold an evidentiary has resulted in a “less well reasoned result.” Further, the numerous material issues of fact that have arisen make it abundantly clear that process employed by the Commission so far have been inadequate to enable the Commission to engage in reasoned decision making.

Moreover, as we stated in the Motion filed on May 11th, an evidentiary hearing will allow FERC not only to assess the credibility of the witnesses, but also to ensure that the various experts address head on the points made by opposing experts and do not simply “talk past” each other. The FERC has long recognized the essentiality of this process even in areas that unquestionably fall within its expertise, for example to disputes about matters as mundane as the constituents of cost of service ratemaking. We doubt that FERC would claim equivalent expertise with respect to the threat analysis that is so central to its judgment here.

Even if an evidentiary hearing were not compelled under established precedent, and it is, it is an abuse of discretion for the Commission not to invoke an adjudicatory process under its broad Section 3 authority. *Distrigas, supra*, 495 F.2d at 1064. In light of the enactment of SAFETEA-LU, there is no date in the foreseeable future when the terminal could possibly go into service, and even if there were inadequate time before there certainly is more than enough

time now to accommodate full evidentiary review. Certainly the Commission has not offered a reasoned explanation for its refusal to follow what has been its long established practice.

IV. THE COMMISSION MAY NOT PROCEED WITH AUTHORIZATION OF THE WEAVER'S COVE PROPOSAL PENDING COMPLETION OF THE WILD AND SCENIC RIVERS REVIEW PROCESS

The Comments on the FEIS submitted by the Department of Interior by letter dated July 5 preclude issuance of the Order.

As noted in those comments, section 7(b) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1278(b) provides: “[N]o department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river might be designated, as determined by the Secretary responsible for its study or approval” As discussed in the FEIS, the Taunton River down to its confluence with Mount Hope Bay is currently under study for inclusion in the Wild and Scenic River Program, and “the protections of the Wild and Scenic River Program are in effect on an interim basis during the study period and for up to 3 years afterward.” FEIS at p. 4-167.

The FEIS states that “we do not believe that construction or operation of the proposed project would have a substantial adverse affect [sic] on the Taunton River’s potential designation as a Wild and Scenic River.” FEIS at p. 4-168. However, as the FEIS itself recognizes, it is not the Commission’s judgment on this issue that matters, but rather that of the Department of the Interior. *Id.* In the words of the statute, whether the project “would have a direct and adverse

effect on the values for which such river might be designated” is to be “determined by the Secretary responsible for its study or approval”

The Department of the Interior’s comments on the FEIS make the Secretary’s views clear:

It does not appear that the conditions proposed as a part of the FEIS adequately address protection of the fishery resource. Of particular concern to the NPS, the failure to require recommended dredging time of year restrictions to protect anadromous fish resources could result in a direct and adverse impact to the values for which any portion of the Taunton River would be designated as Wild and Scenic. ...

In the absence of satisfactory fishery resource protection, we will not be able to provide the statutorily required affirmative statement of no adverse impact to the values for which the Taunton River may be included in the National Wild and Scenic River System.

In addition to the Department of the Interior’s grave concerns about the impact of the proposed project on fishery resources, particularly the impact on anadromous fish resources – a concern strongly pressed in the comments of NOAA Fisheries on the FEIS (filed on June 28) – the Department stated that “[d]evelopment of this site would foreclose opportunities for the City [of Fall River] to connect a significant portion of their waterfront to the Taunton River through redevelopment, emphasizing public access and recreation as an important aspect of economic revitalization and quality of life improvement.” While it might be possible to address the Department of the Interior’s concerns about the impact of the project on fish resources, with the adoption of substantially expanded restrictions on dredging beyond those suggested in the FEIS and adopted in the Order, there is no way to make the project compatible with the goal of expanding public access and recreation.

And the Department of Interior concludes:

For these reasons, we do not feel that the proposed development can be made compatible with Wild and Scenic River designation of the lower Taunton River in vicinity of the project area.

We must therefore disagree with FERC's tentative conclusion that the proposed project is compatible with the Taunton River's potential designation as a Wild and Scenic River.

In light of this clear statement of the Department of Interior's determination, the FERC cannot "assist by ... license, or otherwise in the construction" of the proposed LNG terminal at the Weaver's Cove site.

As the Interior letter notes, not only does the prospect of designation have broad support, "[t]he NPS's draft report will be issued later this summer." In view of the imminence of that report it was inappropriate for the Commission to act now for two reasons: (1) inconsistency with the prohibition against "otherwise" facilitating action inconsistent with a designation, and (2) inability to assess the findings offered in the NPS report as part of the Section 3 determination. That is, even if the report decides against certification, it remains incumbent upon the Commission to assess independently the value of preservation. Where a designation process has reached this level of seriousness, it suggests that the waterway enjoys aspects that warrant preservation. The Commission is obligated to consider them and to factor that consideration into the public interest determination. The Order is devoid of the required discussion.

VI AS A MATTER OF PROCESS AND SUBSTANCE THE COMMISSION VIOLATED NEPA

As was the case with the Commission's ultimate determination, the manner by which the Commission discharged its responsibilities under NEPA was infused with procedural and

substantive irregularities. As explained below, the Commission Majority erred when it did not undertake a comprehensive and systematic alternatives analysis under NEPA, and in fact placed undue limitations on the scope of its analysis, thereby limiting its ability to reach an informed decision on the project under Section 3. The Commission further erred when it did not follow appropriate procedures to compile full information and public input under NEPA, as necessary to ensure an informed decision-making process under Section 3.

A. The Analysis of Alternatives Was Unlawfully Constrained And Unsystematic

As stated in the CEQ regulations, the alternatives section is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. It "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice." *Ibid.* "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985).

1. An Unduly Narrow Definition of Project Objectives Was Used to Discount Alternatives.

A fundamental error permeated the Commission's NEPA process, unlawfully constraining its consideration of alternatives and contributing to the illegality of its determination: the Commission (and its staff in the preparation of the Draft and Final EIS) discounted the significance of any alternative that was incapable of satisfying an unduly narrow definition of the project objectives. As instructed by the Seventh Circuit in *Simmons v. Untied States Army Corps*, 120 F.3d 664, 666 (1997):

No decision is more important than delimiting what these "reasonable alternatives" are. ... To make that decision, the first thing an agency must define is the project's purpose. ... One

obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing “reasonable alternatives” out of consideration (and even out of existence). The federal courts cannot condone an agency frustration of Congressional will. If the agency constricts the definition of the project’s purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act.

Similarly, the D.C. Circuit has cautioned that “an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality.” *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (DC Cir. 1991).

In the FEIS for the proposed project, the alternatives analysis was framed to compare the relative merits of alternatives, taken individually, in meeting gas supply needs based entirely on objectives established by the proponent for its own project. The Order and the FEIS then were dismissive of any alternative proffered, if that alternative left even one of the proponent’s objectives unsatisfied.

However, it is not for project sponsors to define the necessary characteristics of alternatives, but for the Commission to make this determination. While careful consideration is to be given to the sponsor’s specification of the purposes a project is designed to serve, the analysis of alternatives must be appropriately framed to ensure that all methods of meeting underlying gas supply needs are fairly considered.

For example, among project objectives identified by the proponent was that of increasing capacity available to supply LNG for truck transportation. The Commission deemed that objective “an important and appropriate goal of the proposed project that must be considered in

evaluating the ability of alternatives to satisfy a purpose of the project proposed by the applicant.@ Order at ¶ 32. When none of the identified alternatives satisfied this objective, the Commission considered the proposed project preferable to all such alternatives based on ability to satisfy gas supply need.

The error was the Commission's unquestioning acceptance, as a litmus test that would in turn govern the acceptability of any proposed alternative, of the applicants' designation of truck deliveries of LNG as a project need. The limiting attribute – ability to offer truck deliveries of LNG – was accepted without analysis. Had the Commission focused on the issue, it would have recognized that the real issue is the ability of the region to meet peak demands. Truck delivery of LNG is clearly very important in New England as a current means of meeting peak demands, but it is far from clear that the ability to satisfy the region's peak demands would be augmented by the construction of new capacity to fill trucks with LNG. Even if providing new capability for truck deliveries would contribute to meeting peak demands, it would still be but one option.⁵² Expanded base load supplies and expanded pipeline capacity would clearly contribute to the ability to meet peak demand. The off-shore project already proposed for New England would contribute toward meeting that need⁵³ without imposing the enormous security and safety

⁵² The Affidavit of Bruce R. Oliver, Attachment 6, provides a comprehensive discussion of the alternative ways of addressing the need for natural gas at periods of peak demand.

⁵³ The Commission questions the "reliability" of off-shore projects (Order at ¶¶ 101-102) but any concerns were put to rest by the analysis included in the FEIS (at pp. 3-15 to 3-16), not to mention in the comments filed by the sponsor of the Northeast Gateway project. However, there is a serious question of the reliability of the proposed Weaver's Cove project itself. While wave height will not be an issue, fog and wind could make navigation through the narrow inland waterways (and in the narrower still Federal channel) problematic, particularly navigation underneath the new Brightman Street Bridge. The clearance for an LNG carrier would be approximately 27 feet on either side of the new bridge's abutments. To avoid the potential for substantial damage to the bridge, and possible damage to the LNG carrier, operations in the vicinity of the bridge are likely to be suspended during bad weather – just when additional supplies of natural gas are most needed. This genuine issue of reliability of the Weaver's Cove project was not examined by the Commission. Of course, the new circumstance arising out of the enactment of SAFETEA-LU, that the existing Brightman Street Bridge will not be demolished, means that even in the best of weather, LNG carriers simply cannot fit through the abutments of the existing bridge. Since the Commission

concerns previously described in this application for rehearing, and in the many previous submissions made by the City of Fall River, the Attorneys General, and by many others. The announced pipeline expansions from Canada surely would contribute as well, and might fully satisfy the need for increased peak capacity for many years in the future. And the Report prepared for the New England Governors Conference,⁵⁴ [New England Governors Report] which the Commission embraces, establishes that the gas peaking problem can most economically be addressed by taking advantage of but a modest percentage of the fuel-switching capability that already exists at gas-fueled regional power plants.⁵⁵

The Commission ignores this last – and most economic – option. It was driven to ignore it by its erroneous decisional model: the assumption that any alternative had to be capable of satisfying each of the project objectives as they are articulated by the applicants.

recognizes reliability as a significant factor in its section 3 determination, (and with no means to receive deliveries of LNG by means of the LNG carriers that will be blocked by the continued existence of the existing Brightman Street Bridge, Weaver’s Cove will not be “reliable”) the Commission must grant rehearing and reject the application. Failing to do so would be arbitrary and capricious.

⁵⁴ A Report to the New England Governors on Meeting New England’s Future Natural Gas Demands: Nine Scenarios and Their Impact by the Power Planning Committee of the New England Governors’ Conf. (March 1, 2005).

⁵⁵ The fuel switching scenario considered in the New England Governors Report involved the switching from natural gas to oil of only 1,000 MW of the 6,000 MW of electric generating capacity that is both dual fuel capable and permitted for oil use. As discussed in the Oliver affidavit, the actual capacity of dual fuel facilities in New England during the wintertime is approximately 7,000 MW. Since electric generators typically contract for *interruptible* supplies of natural gas, interrupting at least some of the gas supply to electric generators during the relatively brief periods of maximum demand for natural gas must be considered. Further, imposing the high societal costs on the people of Fall River and the residents along the 20-plus miles of inland waterways leading to Fall River through the approval of the Weaver’s Cove terminal in order to avoid what at worst would be the necessity of occasionally interrupting interruptible supplies of natural gas is utterly irrational, arbitrary, and capricious. That the electric utilities presumably would prefer not to be subject to interruption hardly justifies the burdens that would be imposed. Those burdens include the increased cost burdens on natural gas consumers in order to secure the increase in gas supplies that could be needed to meet interruptible loads on a non-interruptible basis. The Commission failed to consider the ongoing efforts of the ISO-New England to expand the opportunities for dual fuel use, targeted specifically at peak demand hours. See “Dual-Fuel General Capacity and Environmental Constraints Analysis, Interim Report,” prepared for ISO New England, April 1, 2005 [accessed at http://www.iso-ne.com/pubs/spcl_rpts/2005/cld_snp_rpt/index.html on August 7, 2005]. Further, ISO-New England has recently called for the exploration of a new on-site gas storage approach, which, like fuel switching, would not be dependent on LNG. See “Assessment of ‘Peaking Gas’ Service for New England’s Quick-Start Generators,” April 1, 2005, p. 4 [accessed at http://www.iso-ne.com/pubs/spcl_rpts/2005/cld_snp_rpt/6_peaking_gas_service_assessment.pdf on August 6, 2005].

Again, it is not at all clear that providing an additional source for trucked supplies of LNG would even address the legitimate concerns about the adequacy of peak supplies of natural gas in New England. The Commission does not claim that the Distrigas facility is incapable of adequately supplying the needs of existing satellite storage facilities. It does not claim that additional satellite facilities are needed, and even if additional satellite storage facilities are needed the FEIS does not state or even imply⁵⁶ that the Distrigas facility would be incapable of meeting the needs for the truck shipments necessary to supply any such additional facilities.

The only passing reference to the need for an alternative truck delivery capability is the desirability of introducing competitive pressure to constrain Distrigas prices. But there is no effort made to quantify the economic benefits likely to be realized by ultimate consumers, nor to compare those benefits against the human and environmental costs of proceeding with the Weaver's Cove project. Further, although recognizing that several of the satellite facilities have the capability to liquefy off of pipeline supplies, FEIS at p. 3-6, there is no discussion at all as to why this does not suffice as a competitive brake constraining Distrigas' ability to price-gouge.⁵⁷ Moreover, the Commission has made clear that, in the event of inappropriate pricing activities, it already has the ability to step in and rectify any abuse under its plenary Section 3 authority. *See, e.g.,* Order at ¶ 49.

⁵⁶ As noted in the FEIS, the Distrigas facility has the capacity to fill 100 trucks per day. Each truck holds the equivalent of approximately 1 MMcf of natural gas, and the total satellite storage capacity in New England is currently approximately 15 bcf. In 2003, the equivalent of approximately 14 bcf of natural gas was trucked from the Distrigas facility to the satellite storage facilities. New England Governors Report at p. 6. This means that it would take 140 days to deliver LNG by truck to meet the needs of the existing storage capacity. This suggests that there is substantial additional capacity available at Distrigas for added truck deliveries should that prove necessary or desirable. Indeed, it appears that somewhat less than 40% of the existing capacity is being utilized.

⁵⁷ The FEIS states that it is "it is frequently not economical" to liquefy natural gas off the pipeline compared to the cost of obtaining LNG from the Distrigas facility by truck. FEIS at p. 3-6. However, the ability to liquefy natural gas off the pipeline for storage limits the ability of Distrigas to charge excessive prices for trucked LNG. Moreover, if obtaining LNG from the Distrigas facility by truck has been less expensive than utilizing existing liquefaction capability, then there must be competitive forces already at work limiting Distrigas's ability to set prices.

The alternatives analysis also relied on a specification of project objectives by the applicants that was unclear as to the timing of gas supply needs. In the FEIS and the Order, the Commission does little to clarify ambiguities as to when gas supply needs will arise and how projects compare as to their availability for timely meeting those needs. For example, the FEIS states that “by 2009 there will be demand for an additional 500 MMcfd of natural gas above what the current infrastructure is able to provide during peak periods of use ...” FEIS at 3-10; 4-312. Ironically, this identified need cannot be satisfied by the Weaver’s Cove project, since that project cannot begin operation until the existing Brightman Street Bridge is demolished, and with the enactment of SAFETEA-LU there is no date in the foreseeable future when that will occur.⁵⁸ Clearly now, the Weaver’s Cove will not be able to meet gas supply needs arising by 2010 or earlier, and it will not be able to meet gas supply needs anytime in the foreseeable future. Even before the enactment of SAFETEA-LU, the Order relied on the proponent’s specification of objectives, and the Commission ignored the availability disadvantage of the proposed project in comparing it to alternatives with respect to the ability to meet project needs.

Even assuming the legitimacy of each of the project objectives as set forth in the FEIS and the Order, the alternatives analysis was unlawfully constrained in the manner that these objectives were used to dismiss alternatives. The Commission was obligated to consider whether any *combination* of alternatives would meet those objectives with the imposition of less human and environmental costs. NEPA requires consideration as to whether the significance of

⁵⁸ While it is unclear, the Order could be read as suggesting that the need for extra peak capacity will not arrive until 2010. The unexplained possible shift from 2009 to 2010 seems to have more to do with what the Commission believed the Weaver’s Cove project could achieve than with the actual needs of the people of New England. Cf. *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir., 1991) (“Deference, however, does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them.”) With the enactment of SAFETEA-LU, there is no longer any basis for believing that the Weaver’s Cove project could become operational by 2010, or by any other date in the future.

not meeting an objective under a particular alternative could be outweighed by possible other advantages of that alternative, not only with respect to meeting other gas supply criteria, but also with respect to satisfying criteria unrelated to gas supply needs, such as environmental or human impact considerations.

What the Commission did here is similar to the mistake the Corps of Engineers made in *Simmons*:

From the beginning, Marion and the Corps have defined the project's purpose as supplying two users (Marion and the Water District) from a single source--namely, a new lake. Accordingly, when the Corps prepared an environmental impact statement, it confined the analysis to single-source alternatives. And therein lies the difficulty. At no time has the Corps studied whether this single-source idea is the best one--or even a good one. Marion and the Lake of Egypt Water District share a common problem, a thirst for water. From this fact the Corps adduces the imperative for a common solution. We disagree. A single source may well be the best solution to the putative water shortages of Marion and the Lake of Egypt Water District. The Corps' error is in accepting this parameter as a given. To conclude that a common problem necessarily demands a common solution defies common sense. We conclude that the U.S. Army Corps of Engineers defined an impermissibly narrow purpose for the contemplated project. The Corps therefore failed to examine the full range of reasonable alternatives and vitiated the EIS.

Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 667 (7th Cir., 1997). Here, the Commission simply assumed that each potential alternative would have to meet both the purpose of supplying additional baseload supplies of natural gas, and the irrationally narrow purpose of being an alternative source of LNG for truck delivery. Here, as in *Simmons*, the agency failed to examine the full range of reasonable alternatives, and thereby vitiated the EIS.

Had the Commission not improperly constrained its assessment of alternatives, had it fully and fairly compared the Weaver's Cove proposal against *real* alternatives⁵⁹, it would have

⁵⁹ The Commission incorrectly creates the erroneous impression that many of the alternatives cited by Fall River and the Attorneys General are speculative. Order at ¶ 30. The facts (including already filed applications) are to the contrary.

been driven to the conclusion that Weaver's Cove could not be approved consistent with the public interest.

2. Alternatives Were Not Systematically Compared

The overall conduct of the alternative analysis, even when presented in its entirety for the first time in the FEIS, was seriously flawed in that it lacked a consistent or systematic approach to analyzing different alternatives. While identifying a broad range of possible system alternatives, the FEIS did not evenly address the merits of all alternatives using a complete and common set of issues. Further, the FEIS did not consistently reach conclusions as to whether the proposed project or an alternative was preferable, or how alternatives ranked, regarding the respective issues in the EIS scope. Finally, the FEIS did not address how conflicting project advantages across the range of issues were to be balanced to determine which project was preferable overall.

In the Order, the Commission Majority discussed only one alternative in any detail, yet concluded that the analysis in the FEIS was sufficient to establish that no alternative was clearly preferable to the Weaver's Cove project. Order at ¶¶ 100, 101, 102, 105. The Commission Majority explained that, as part of the FEIS analysis, alternatives were analyzed to the point where it was clear that an alternative was not reasonable or would result in significantly greater environmental impacts that cannot be readily mitigated. Order at ¶ 104.

The overriding flaw in this approach is that the FEIS did not set forth in any systematic way conclusions as to the relative merits of the proposed project, compared to each alternative, and the basis for determining that each alternative, overall, lacked sufficient advantages to outweigh those of the proposed project (or entailed such disadvantages that they were not outweighed by those of the proposed project). Rather, the FEIS simply discussed alternatives to

the point of identifying, describing or highlighting various impacts, and concluded its consideration of each alternative without explicitly relating the extent of its impacts to those of the proposed project.

In short, because the alternatives analysis was not systematic in the manner outlined above, the FEIS failed to explicitly present even the Commission's disposition of the alternatives considered much less the reasons therefor. While the FEIS identified the drawbacks of each alternative, it did not actually weigh the disadvantages or potential disadvantages in question against the principal disadvantages or potential disadvantages of the proposed project -- the safety considerations, the dredging issues, and the various unknowns as to even the proposed project's impacts.

Given the lack in the FEIS of any issue-by-issue findings as to the relative merits of the proposed project and alternatives, the Commission's determination that no alternative is preferable is conclusory. As such, the Commission's alternatives analysis furthered the pattern of avoidance of relevant issues-- most notably the issue of the relative importance to be placed on the project's safety impacts -- that are most critical for making the public interest determination required by Section 3, a pattern that is replete throughout the analyses underlying the Commission Majority's overall decision.

3. The Commission Has Abdicated its Responsibility to Apply an Alternatives Analysis

The Commission disclaims all responsibility for applying an alternatives analysis, essentially arguing that the comparison of different approaches to fulfilling the need is beyond its role. In the Order, the Commission stated that it was Commission policy:

to permit the market to decide which projects are best suited to serve the infrastructure needs of an area. The Commission believes that approach best serves the public interest

and allows for the most efficient, cost effective, and timely development of energy infrastructure. Approval of a variety of projects benefits the public by allowing it to choose which proposals offer the most attractive and timely service.

Order at ¶ 31.

Putting aside the Agency's responsibilities under NEPA, this approach might make sense if each project either fully internalized the costs the project imposes, or if the project simply did not impose costs onto the public. Here, the project imposes enormous costs – in terms of the imposition of controls over the use of the waterway and controls over the use of at least one of the bridges (the new Brightman Street Bridge will be a draw bridge [as is the existing bridge], and it will have to be opened to allow ships to go through); in terms of the potential for development of the waterfront and as an engine for the revitalization of the city; in terms of the introduction of a new and at least perceived substantial hazard to the public in the vicinity of the terminal, and along the entire route of the LNG carriers serving the terminal through the inland waterways [as discussed elsewhere, we believe that the risk is real and substantial, but for purposes of this point, there would be substantial costs imposed on the public whether the risks were real or only perceived]. The public has no opportunity to escape from these external costs, and thus the public has no ability “to choose which proposals offer the most attractive and timely service.” The Commission's rationale for its abrogation of its responsibilities makes no sense, and therefore is arbitrary and capricious.

Moreover, the Commission has a responsibility under NEPA that it cannot simply decide not to exercise. In NEPA, the

Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter

NEPA § 102. The alternatives analysis is at the heart of how NEPA works to bring important information to the decisionmakers' attention, so that "the policies, regulations and public laws of the United States" *can be* "interpreted and administered in accordance with the policies" of the Act. In other words, the alternatives analysis has a purpose, and the Commission has disclaimed all responsibility for acting on that purpose.⁶⁰ The Commission is obligated to exercise its Section 3 authorities consistent with the direction in NEPA to act "in accordance with the policies" set forth in NEPA.

The alternatives analysis must not be a mere paperwork exercise, as the Order appears to make it.⁶¹ Once the Commission corrects the fatal flaws in the analysis it performed, it must consider that analysis, and explain how its decision on the Section 3 application of Weaver's Cove is "in accordance with the policies set forth" in NEPA.

B. The Procedure Followed Permitted Neither Informed Comment Nor An Informed Decision

As the FEIS states at the outset (ES-1):

The purpose of this document is to inform the public and the permitting agencies about the potential adverse and beneficial environmental impacts of the proposed project and its alternatives;

The objectives are two-fold: to permit the Commission ultimately to discharge its obligation of informed decision-making, and to enable other authorities and interested members

⁶⁰ This abdication of responsibility is stated by then-Chairman Wood during the Commission's meeting during consideration of the Weaver's Cove project: "we will probably be approving more LNG plants than get built. But I don't want to get the Commission back into the business ... of picking through the government agencies, picking the winner and the loser." Transcript of June 30, 2005 Meeting of the Commission, at pp. 45-46.

⁶¹ The Order declares: "We can evaluate the safety of this project by examining the project on its own merits because the safety of a project stands on its own, not necessarily in relation to other projects which may or may not satisfy the proposed objectives." Order at ¶ 32. Standing on its own, it is clear that the project imposes risks on the public. That does not end the inquiry; the public interest might well be served by a project that imposes risks, but in deciding whether that is the case it is necessary for the Commission to consider whether the public benefits to be conferred by the project can be secured by another project or projects, or other methods, that carry with it or them less risks to the public. This the Commission so far has not done.

of the public a meaningful opportunity to contribute to the Commission's informed decision-making. The latter requires, at the outset, a complete DEIS; one that at least deals with major factors bearing on significant components of the ultimate decision. The former requires that the FEIS contains a full discussion of all pertinent issues; it requires, accordingly, that the relevant information be available.

As we now discuss, because information central to the most critical judgment that the Commission would have to make did not become available until after publication of the DEIS, a supplemental DEIS was required. Second, because so much information critical to an assessment of the project's consequences to the human and natural environments is not yet available, it was premature to rush completion of the FEIS.

1. A Supplemental DEIS Was Required

The DEIS was issued on July 30, 2004. At that time, the Commission knew that the Department of Energy had contracted with the Sandia National Laboratories to undertake a comprehensive reevaluation of the potential safety consequences of a spill of LNG on the water as a result either of an accidental or intentional breach of containment. The Sandia evaluation was necessary because of the inadequacies of prior assessments and, most importantly, because of the need to consider the post-9/11 implications of a terrorist attack. Sandia, thus, was to address safety – the issue the Commission accepts as central – and, particularly, Sandia was to address the threat of intentional attacks on tankers, the issue that Fall River, the Attorneys General, the Governors, the Congressional delegations, and countless others have identified as most troubling from almost the date that the Weaver's Cove project was announced.

It is hard to imagine any single body of information more essential for a meaningful public discourse, the discourse that is to be encouraged by the DEIS and that is to inform the

ultimate preparation of the FEIS. Clearly, the issuance of the Sandia report triggered an obligation on the part of the Commission to supplement the DEIS, setting out the important new information and explaining the Commission's views on how that new information should be taken into account (or not) in the certification of the Weaver's Cove project.

The Commission's order asserts that there was no duty to supplement, because "[t]he new material included in the FEIS does not result in any significant modification of the project that requires additional notification to the public and revision of the DEIS for further public comment." Order at ¶ 36. The duty to supplement is not limited to situations where the project scope changes, though that is one factor that would trigger an obligation to supplement. The CEQ's regulations present an additional basis for a required supplement:

[Agencies] [s]hall prepare supplements to either draft or final environmental impact statements if:

- (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 CFR 1502.9(c)(1).

The Sandia report addresses the most important considerations presented by the Weaver's Cove applications, and the role of the EIS process to inform the public and to allow the public to participate meaningfully in the decisional process is not satisfied by the expanded material contained in the FEIS. As noted by the First Circuit,

[T]he EIS helps satisfy NEPA's "twin aims": to ensure that the agency takes a "hard look" at the environmental consequences of its proposed action, and to make information on the environmental consequences available to the public, which may then offer its insight to assist the agency's decision-making through the comment process. *See Robertson*, 490 U.S. at 350, 356; *Baltimore Gas*, 462 U.S. at 97. The EIS thus "helps insure the integrity of the process of decision," providing a basis for comparing the environmental problems

raised by the proposed project with the difficulties involved in the alternatives. *Silva v. Lynn*, 482 F.2d at 1285.

Dubois v. United States Dep't of Agric., 102 F.3d 1273, 1285-86 (1st Cir., 1996).

While the project scope did not change as a result of the new information contained in the Sandia report, by waiting until the issuance of the FEIS to reveal how reluctantly and superficially it would deal with the implications of the dramatic information⁶² contained in the Sandia report, the Commission gravely wounded “the integrity of the process of decision.” Meaningful public input required that the public first be told – in a supplement to the DEIS – how the Commission then evaluated the significance of the Sandia report to the decision it yet had to make on the Weaver’s Cove application.

It is important to note that there is a substantial question whether the horrendous consequences of an LNG spill on water set out in the Sandia report fully captures the adverse consequences. For example, Professor Havens believes the risk of a cascading failure of an entire tanker to be a far more credible risk than Sandia suggests. While acknowledging the risk of cascading failure, the Sandia report suggests that no more than a total of three of the 5 or 6 large tanks on an LNG carrier are at risk. Dr. Havens argues that once the possibility of any cascading failure is acknowledged, as it has been, there is a need to explain by what mechanism the cascade would cease. In other words, if the fire and heat resulting from the breach of one LNG tank on a vessel could be enough to result in the failure of another tank, there is nothing to stop the process from continuing, resulting in the catastrophic loss of the entire vessel and all the

⁶² The Sandia Report stated that “[a] cascading failure that involves damage to adjacent cryogenic tanks on the ship from the initial damage to one of the LNG cargo tanks is a possibility that cannot be ruled out.” Sandia Report at p. 50. There is no similar recognition in the DEIS. The Sandia Report indicates that an intentional breach could result in a hole in an LNG cargo tank as big as 12 meters in diameter, and it then considered the effects of a nominal breach size of 5-7 meters. *Id.* By contrast, the DEIS considered the effects of substantially smaller breaches, only 1-2.5 meters. *See* DEIS at 4-218.

LNG contained in the vessel. The Commission's apparent effort to sidestep such issues by failing in its obligation to supplement the DEIS and to make that supplement subject to notice and comment should be corrected by the Commission.

A Supplemental DEIS also was required to present the substantial portions of the NEPA alternatives analysis that were developed following issuance of the DEIS. As indicated by annotations contained in the FEIS, much of Section 3.0 of that report consisted of new or substantially modified material. Prominent among the added analyses were: (1) in Section 3.1, updated discussions of gas supply needs under the alternative of No action or postponed action; and (2) in Section 3.2, new and greatly expanded discussions of system development alternatives, for example the alternatives of expanding the Distrigas facility in Massachusetts, constructing onshore LNG projects in Maine or Canada, or south of New England, or constructing offshore LNG facilities in Massachusetts or Long Island. In addition, at the end of the section 3.2, the FEIS presented a new tabular summary of the ability of Weaver's Cove and six system alternatives to meet each of Weaver's Cove's project objectives.

The FEIS also presented substantial new information about certain impacts of the proposed project that were of significance to the alternatives analysis requirement under NEPA. Foremost amongst the information so presented was the analysis of DOE's Sandia Report, cited above, which evaluated the consequences of an LNG spill on water. This new FEIS analysis, including estimated impact zones for accidental and intentional cargo tank breach scenarios extending to a maximum distance of nearly a mile, clearly altered the basis for evaluating project safety concerns to a degree significant for purposes of comparing the proposed project to system alternatives.

As a result of their first appearing in the FEIS, neither the added alternatives analyses nor the new safety analysis developed from the Sandia Report were presented for public comment prior to issuance of the Commission Majority's Order allowing the project. Several comments filed on the DEIS had pointed out the inadequacy of the alternatives analysis presented therein, and the need to analyze additional alternatives as part of a Supplemental DEIS. MA Attorney General comment on DEIS at 10. *See Weaver's Cove's and Mill River's Responses to Comments on DEIS at Attachment 5.* In later justifying its determination that a Supplemental DEIS was unnecessary, however, the Commission Majority fully ignored the contentions that specifically related to the need for more analysis of alternatives to the Weaver's Cove project.

Moreover, in rejecting requests for a Supplemental DEIS, the Commission Majority appeared to focus on the relevance of NEPA review to a decision-making process that included both the review leading up to its decision regarding whether to approve the project and post-Order requirements such as follow-up plans and later permitting by other agencies. The Commission Majority stated, for example, that one purpose of an EIS is to Aguarantee@ that the relevant information is available to Alarger audiences that may play a role in both the decision-making process and the implementation of that decision.@ The Commission Majority further noted that, besides adding to its knowledge of certain project impacts, the new material included in the Weaver's Cove FEIS Aenable[d] the Commission to refine its conditions mitigating those impacts on the environment.@

While the Commission may have maintained that the additional analysis in the FEIS was principally useful in supporting project implementation, this analysis should have been part of baseline information in support of its decision on whether to approve the project. The

Commission Majority's reliance on post-Order processes to respond to project issues, while potentially a concern for various facets of the Order, clearly was misplaced as it related to the analysis of alternatives which, by its nature, had no further applicability once the decision to approve the project had been made. The Commission Majority therefore plainly erred in not preparing a Supplemental DEIS to present the substantial added analyses of alternatives.

2. The FEIS Was Completed Prematurely

Earlier, in Section IIIA, *supra*, we discuss the significant information gaps that still remain. As there described, those informational deficiencies, which bear on critical safety issues and significant impacts on the natural environment, deprive the Commission of its ability now to make the required Section 3 determination. They also make publication of the FEIS premature.

The FEIS is intended to facilitate informed decision-making. Not only must it therefore be complete as a condition precedent to Commission action, it must be complete in order to permit meaningful public input into that ultimate determination. For the public, however, to be able to contribute intelligently, it must know the consequences of a proposed action.

Yet even at this state – after the “long” process that Weaver’s Cove bemoans – there is more unknown than is known about this project and its consequences.

- Basic questions of safety remain (i.e., operating procedures at the terminal, vessel security plans, evacuation and emergency response plans)
- Basic questions of environment consequences remain (i.e., dredging procedures and disposition of spoils, impacts on fisheries and aquatic resources, consistency with wild and scenic river designations)

There simply was no way, as of July 15th, for the Commission to have met its “informed decision-making” responsibility under NEPA. The Commission acted prematurely. At most, it

should have reissued what is labeled the FEIS as the required Supplemental DEIS and withheld issuance of the FEIS until all of the important outstanding issues are resolved.

VI. THE COMMISSION'S APPROVAL OF THE WEAVER'S COVE PROJECT VIOLATES SECTION 401(a)(1) OF THE CLEAN WATER ACT

Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), prohibits any federal agency from issuing any federal license or permit to “conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters,” unless the State certifies that the discharge would comply with State water quality standards, among other requirements. This requirement may be deemed waived if the State “fails or refuses to act ... within a reasonable period of time (which shall not exceed one year) after receipt of such request” However, where, as here, the applicant has consistently failed to provide all the necessary information requested by the State, and has not yet completed its submission of such information, the “clock” for State action does not begin to run until the submission is complete. Only then has there been “receipt of such request” within the meaning of the statute.

VII. THE COMMISSION PURPORTS TO ASSERT PREEMPTION OVER VALID EXERCISES OF STATE AND LOCAL AUTHORITY IN AN OVERLY BROAD AND SWEEPING MANNER THAT IS BOTH LEGALLY UNTENABLE AND UNRIPE.

None of the parties to this request for rehearing, including the Massachusetts Energy Facility Siting Board, has asserted jurisdiction over the siting of LNG import terminals in general, or over the Weaver's Cove facility in particular. As the Commission itself recognizes, however, there are many other aspects of the proposed project that are subject to generally-

applicable environmental and land-use laws. In fact, the Commission expressly conditioned its authorization of this facility on Weaver's Cove's obtaining numerous state and local approvals. Order, ¶ 112; App. B, ¶¶ 6, 9, 10, 12, 15, 18, 20-21, 23-24, 28, 34, 42, and 67. In so doing, however, it also stated:

Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions in this order. We encourage cooperation between Weaver's Cove, Mill River, and local authorities. However, this does not mean that state and local agencies, through application of state and local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.

Order, ¶ 113 (footnote omitted). To the extent that this language purports to assert sweeping and unbounded Commission jurisdiction over valid exercises of state or local authority to regulate the environmental and land-use issues implicated by this project, it is legally untenable.

The parties hereto acknowledge that state and local permitting agencies must act in accordance with the statutory and regulatory authorities that establish and govern the exercise of their decisionmaking powers, including any prohibitions against unreasonable delays. Moreover, if and when Weaver's Cove believes that a state or local entity unreasonably or unlawfully denied, conditioned, or delayed state regulatory action, it will then be able to pursue any available state law remedies. Neither the Commission's enabling legislation nor the NGA gives the Commission jurisdiction over disputes arising from a state or local entity's exercise of its valid statutory or regulatory authority. Rather, such disputes must be resolved in accordance with standard procedures and remedies available under state law.

Because no challenge to the exercise of state or local authority presently exists, and the Commission has offered nothing more than hypothetical allegations of potential future conflicts, the sweeping language of Paragraph 113 is overly broad and cannot lawfully do what it purports

to do. Thus, it is premature for the Commission to assert such preemption or conflict now in the abstract.⁶³

For the reasons explained below, if the Order somehow survives rehearing, the sweeping assertions set out in Paragraph 113 should be struck or, at the very least, modified to recognize the limitations of any preemption under the NGA.

A. There is a Strong Presumption Against Preemption of State Exercises of Police Powers.

A presumption of validity generally applies to state laws concerning matters of traditional state concern. *See California v. Arc America Corp.*, 490 U.S. 93, 101 (1989) (“When Congress legislates in a field traditionally occupied by the States, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 US 707, 719 (1985) (regulation of health and safety matters are primarily and historically matters of local concern); *Great Atlantic & Pacific Tea Co, Inc.. v. Cottrell*, 424 U.S. 366, 371 (1976) (states retain broad power under constitutional scheme to legislate protection for their citizens in matters of local concern such as public health). The objectives of the outstanding state or local environmental approvals to which Paragraph 113 refers involve protection of traditional matters of state concern such as the health, safety or welfare of its citizens. As the Commission has provided no grounds in its Order to rebut this presumption, it stands.

B. Section 3 of the NGA, as Recently Amended, Does Not Preempt the Outstanding State Approvals.

⁶³ Petitioners reserve all rights to challenge the Commission’s actual assertion of preemption in particular situations that may arise in the future in relation to the Weaver’s Cove project.

Turning to the statutory language, recent amendments to Section 3 of the NGA were signed into law on August 8, 2005, *see* Section 311 of the Energy Policy Act of 2005, P.L. 109-____, and they provide further support for our position that the outstanding state approvals are not preempted.

First, Section 311(c)(2) of the Energy Policy Act of 2005, adds a new Subsection 3(d) to the NGA, which provides: “Except as specifically provided in this Act, nothing in this Act affects the rights of States under– (1) the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 *et seq.*); (2) the Clean Air Act (42 U.S.C. §§ 7401 *et seq.*); or (3) the Federal Water Pollution Control Act [or Clean Water Act] (33 U.S.C. §§ 1251 *et seq.*).” Far from implying preemption of state regulatory authority, this language expressly preserves the power of states to regulate activities under each of these complex, dual federal and state regulatory schemes.⁶⁴

In addition, Section 311(c)(2) of the Energy Policy Act of 2005, also adds two other new provisions with potential relevance here. New Subsection 3(e)(1) to the NGA provides the Commission with “the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG Terminal.” Within the context of these amendments, it is clear that any exclusive jurisdiction given to the Commission under this new Section 3(e)(1) is meant to be balanced by a new NGA Section 3A, which formally requires that the Commission conduct a state consultation process. Specifically, Section 311(c)(2) of the Energy Policy Act of 2005, amends the NGA to include a new Section 3A that requires the

⁶⁴ Notably, states’ roles within such joint regulatory schemes may well include exercises of power derived from state law. For example, prior to Weaver’s Cove receiving federal approval to conduct dredging, the federal Clean Water Act requires Weaver’s Cove to obtain a Water Quality Certification, which would be issued by the Massachusetts Department of Environmental Protection pursuant to state law (*see* 314 C.M.R. § 9.09). There is nothing in NGA § 3, as amended, that curtails the Commonwealth’s power to issue or deny such a certification in accordance with the applicable state regulations, nor is there anything that expands the powers of the relevant federal agencies (FERC and the COE) to permit or license a project without receiving such a certification.

Commission to consult with a state agency designated by the Governor “regarding State and local safety considerations prior to issuing an order pursuant to section 3.” As noted above on p. 38, new Section 3A highlights specific state and local issues of significant concern that must be considered as part of a the new consultation process, including, for example, “the need to encourage remote siting” and “emergency response capabilities near the facility location.”

This new requisite consultation process between the Commission and the state clearly is intended to temper any exercise of exclusive jurisdiction over siting of LNG facilities: these two new provisions go hand-in-hand. Thus, the Commission may not assert any exclusive jurisdiction over the Weaver’s Cove project under NGA § 3(e)(1) because it has obviously not complied with the new Section 3A. Not only is it uncontested that FERC has not gone through the particular consultation process mandated by the NGA § 3A, but as fully demonstrated throughout this Request, FERC has given no serious consideration to either “the need to encourage remote siting” or “emergency response capabilities near the facility location.”

However, even if the Commission inappropriately attempted to apply the new Section 3(e) to the Weaver’s Cove project even though a Section 3A consultation did not take place, by its own language, the scope of any preemption under Section 3(e)(1) is limited. The starting point for any statutory construction is the plain meaning of the words used. Here, by the express terms of Section 3(e), any preemption is restricted to the approval or denial of an application for the siting, construction, expansion, or operation of an LNG terminal. But, as previously noted, no such state or local authority here asserts jurisdiction over the siting of this facility. Similarly, no such state or local authority here asserts jurisdiction over construction or operation of the proposed LNG terminal.

Moreover, regulation of aspects of LNG terminals other than their “siting, construction, expansion, or operation” is beyond the limited scope of any preemption under Section 3(e), which is the case regarding the outstanding approvals Weaver’s Cove still needs to obtain here. The outstanding approvals involve the need to comply with requirements of generally-applicable state laws and regulations that are directed at the protection of the environment, natural resources, and the public health, safety and welfare. They are not laws or regulations directed at natural gas companies or at the siting or operation of LNG terminals. Even to the extent that the construction of an LNG terminal, for example, may trigger the need for a permit under such a generally-applicable environmental law or regulation, such a required permit is not an approval or denial of an application to construct the terminal, and, therefore, is not within scope of the statutory language.

This analysis is completely consistent with that used by the Supreme Court in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), to evaluate and determine the scope of field preemption under Section 7 of the NGA. Although *Schneidewind* is not controlling because any preemption under Section 7 does not apply here since the Commission’s approval was issued under Section 3. Nevertheless, to the extent that the plain meaning of statutory text should be construed holistically, in the context of the statute as a whole (*Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S.Ct. 460 (2004)), it makes sense for construction of the scope of any preemption of Section 3 to involve consideration of the same factors identified as significant by the Supreme Court in *Schenidewind*. In fact, despite the fact that the Commission relies upon *Schneidewind* as support for the sweeping language of Paragraph 113, that case actually supports our position that the outstanding state and local approvals are not preempted.

In *Schneidewind*, the issue was whether Section 7 of the NGA preempted a Michigan law that required a public utility transporting natural gas in Michigan to obtain an approval from the Michigan Public Service Commission before the company could issue long-term securities. The Supreme Court concluded that the NGA created a “comprehensive scheme of federal regulation” that occupied “the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce.” *Schneidewind*, 485 U.S. at 305. It held the Michigan law to be preempted because it reasoned that the objectives of the Michigan act amounted to “a regulation of rates and facilities,” which it noted were within the field occupied by the federal regulation and would be achieved through the Commission’s express regulatory responsibilities under the NGA. *Schneidewind*, 485 U.S. at 307-09 (the state law’s regulatory ends of assuring the natural gas companies’ capital structures would be protective of the interests of investors and ratepayers were within the Commissions’ direct area of concern: “the regulation of rates and facilities” of natural gas companies).

Notably, in so holding, the Supreme Court expressly distinguished the preempted Michigan law – which it noted applied only to utilities – from states’ traditional securities regulations or “blue sky” laws, which are aimed more broadly at protecting against fraudulent or deceptive securities issues and, thus, which were “not FERC’s direct concern.” *Schneidewind*, 485 U.S. at 308, n.11. The Supreme Court noted that not every state law that had some “indirect effect” on “rates or facilities of natural gas companies” was preempted. *Schneidewind*, 485 U.S. at 308. Rather, the pertinent question was whether the central purpose or objectives of the state law would be accomplished by operation of the NGA.

The outstanding state and local approvals here are analogous to the generally-applicable “blue sky” laws the Supreme Court distinguished from the specific state law at issue in

Schneidewind. As noted above, the outstanding approvals seek to regulate generally-applicable laws directed at the protection of the environment, natural resources, and the public health, safety and welfare and are not limited to utilities. As such, the “central purposes” of these laws are not within “FERC’s direct concern.”

This is well-illustrated by way of example. One of the state regulatory issues left open by the Order is the issue of disposal of “spoils” of dredging. One possible disposal option favored by Weaver’s Cove is on-site disposal, which would potentially require numerous approvals under various state regulatory authorities, depending on the proposal-specific factors (*e.g.*, the volume of dredged materials to be disposed of on-site; the levels of contaminants in such dredged materials; and the intended use of such dredged materials on-site). Potentially, Weaver’s Cove may need multiple approvals under the Massachusetts solid waste regulations, 310 C.M.R. §§ 19.000, *et seq.*, the Massachusetts Contingency Plan or MCP, 310 C.M.R. §§ 40.0000, *et seq.*; and the Massachusetts dredging regulations, 314 CMR §§ 9.00, *et seq.* While the state regulatory schemes implicated are potentially numerous and varied, none of them governs siting of the terminal. Rather, they govern peripheral issues, the negative determination of which would not be inconsistent with the Commission’s approval. Instead, such negative determinations would merely mean that Weaver’s Cove must pursue a different disposal option, such as off-site disposal.

Thus, the outstanding permits are simply outside the scope of any preemption effectuated by the newly-amended Section 3.

C. No Actual Conflicts Exist that Would Warrant Implied Preemption of the Outstanding Approvals.

Finally, the Commission purports to assert that Section 3 may give rise to implied preemption based on inconsistencies that may arise in the application of state and federal laws. Order, ¶ 113. This assertion fails for two simple reasons.

First, it is untimely. Because no challenge to the exercise of state or local authority presently exists, it is premature for the Commission to assert such implied preemption now in the abstract.

Second, not all inconsistencies between applications of federal and state laws would necessarily amount to “actual conflicts” that would demand preemption. Such “actual conflicts” only occur in circumstances where it is impossible to comply with both federal and state law or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. Certainly there may be inconsistencies that do not meet either of these standards.

CONCLUSIONS

For the foregoing reasons, the Commission should grant rehearing. In addition, the Commission should direct the Weaver’s Cove applicants to establish why, in light of the passage of SAFETEA-LU, their applications should not be dismissed as moot. If the Commission determines that the applications are not moot, the Commission should determine on rehearing that approval of the Weaver’s Cove applications would be “inconsistent with the public interest” and must therefore be dismissed. In the event that the Commission is not disposed to grant the relief requested on the basis of this written filing, it should provide an opportunity for oral argument before the full Commission before acting on rehearing.

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served a copy of the foregoing on all persons designated on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C. this _____ day of August, 2005.

Robert S. Taylor