

INTRODUCTION

The City of Fall River (Fall River), as a preface to its comments, is providing a Chronological Summary of the Weaver' Cove, LLC and Mill River Pipeline, LLC proposed project ("WCE" or the "Project") as presented to the Massachusetts Environmental Policy Act Office ("MEPA") and to the public, from the June 2003 articulation of Project Purpose to the Project as it is described in the October 31, 2005 Second Supplemental Draft Environmental Impact Report. Fall River believes that the most effective way to assess the Project is within this context. The extent to which this Project has materially changed since 2003 and the full scope of issues identified between December 17, 2004; the date of issuance of the Secretary's Certificate on the Supplemental Draft Environmental Impact Report; and the submission of the Second Supplemental Draft Environmental Impact Report, stand out in sharp relief against this timeline.

Despite the direct impacts on the citizens of the Commonwealth of Massachusetts and the larger southeast region that flow from the Project, most of the issues raised and the significant Project changes that have occurred have been considered only within the federal forum directed by the Federal Energy Regulatory Commission ("FERC" or "Commission"). Notwithstanding the Commission's scope and authority, the need to disclose these issues as matters subject to state inquiry and consideration and to afford the public its absolute right to meaningfully participate in the review process is undeniable.

Chronological Summary

In June 2003, the Project filed its initial Environmental Notification Form ("ENF"). At that time, it defined the Project Purpose as meeting, by Q4 2007, an imminent and dangerous shortfall of natural gas anticipated in New England by 2008. The Project as described would be capable of providing 0.8 Bcfd of LNG to New England by shipping it to an import terminal proposed to be located in the City of Fall River, on the site of the former Shell Oil marine petroleum terminal (the "Fall River Site"), within ½ mile of 300 residences and 2,140 people.¹ The terminal would include a new dock, LNG transfer piping, a 200,000 cubic meter LNG storage tank, vaporization equipment, pipeline interconnections, and truck loading stations. LNG tankers would provide natural gas that was readily interchangeable and compatible with current pipeline standards by safely traversing seven miles of the Taunton River, passing under the Pell Bridge, the Mount Hope Bridge, the Braga Bridge, and the Brightman Street Bridge. **See Attachment 1: Proposed LNG Ship Route.**

¹ Final Environmental Impact Statement: May 20, 2005; Table 3.3.3-1.

On August 28, 2003, the Secretary of the Executive Office of the Environmental Affairs (“Secretary”) issued a Certificate requiring the preparation of an Environmental Impact Report (EIR) and a Certificate Establishing, with the consent of the Project, Special Review Procedures.

On August 25, 2004, WCE submitted a Draft Environmental Impact Report (“DEIR”) to the MEPA Office.

On October 1, 2004, the Secretary issued a Certificate requiring the preparation of a Supplemental Environmental Impact Report (SDEIR). The Certificate, which included expansive detail concerning the deficiencies of the DEIR; e.g. “The Draft Environmental Impact Report (DEIR) has not sufficiently addressed several issues critical to understanding the project design and how the project meets regulatory requirements.” (Certificate at page 1); also raised the question of the demolition schedule proposed for the Brightman Street Bridge. The DEIR did not disclose the fact that the Project’s published in-service date of 2007 had, at least by the time of this submission, radically shifted, given the Massachusetts Highway Department’s conclusion that the Brightman Street Bridge would not be demolished earlier than 2010.

On October 15, 2004, the Commission issued an Information Request to WCE concerning the demolition of the Brightman Street Bridge and the viability of the Project, stating, in relevant part, as follows:

Based on a letter we received from the Massachusetts Highway Department (Mass Highway), dated October 13, 2004, the construction of the new Brightman Street Bridge and demolition of the old bridge will not be completed until sometime in 2010. Because Weaver’s Cove Energy’s project schedule assumes completion of the new bridge in 2008, describe how this information affects the overall viability of the project and the construction and operation schedule of the project.²

On November 1, 2004, WCE submitted the SDEIR. The SDEIR failed to address the effect upon the Project occasioned by the delay until 2010 of the demolition of the Brightman Street Bridge.

² This Chronological Summary primarily addresses the state MEPA process. However, it is worthwhile to note that WCE did NOT respond to the Commission’s question. The response provided was, in relevant part, as follows:

As for overall project viability, Weaver’s Cove recognizes that it is in the best interests of the gas consumers of new England that new LNG supplies be brought to the market as early as possible to relieve regional supply and price concerns... While Weaver’s Cove ultimately may not meet its original propose schedule, that is no reason to slow down the processing of the application, or focus unduly on one single element of the project schedule when many unknowns and unknowables must by necessity be taken into account in a project of this magnitude and complexity.

On December 17, 2004, the Secretary issued a Certificate requiring the preparation of a Second Supplemental Draft Environmental Impact Report. The Secretary required WCE, in addition to responding to this latest Certificate to, "...Fully incorporate the scope for the SDEIR outlined in the DEIR Certificate issued on October 1, 2004, as amended by the following scope." (December 17, 2004 Certificate, at page 5).³

On May 20, 2005, the Commission issued its Final Environmental Impact Statement ("FEIS"), which purported to respond to many of the deficiencies determined by the Secretary to necessitate the preparation and submission of the SSDEIR.⁴

On August 10, 2005, the questions concerning the effect on the Project of the delay until 2010 of the Brightman Street Bridge demolition were resolved by federal law. H.R. 3: the Safe, Accountable, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") provides, in relevant part, as follows:

§ 1948 Emergency Service Route

Notwithstanding any Federal law, regulation, or policy to the contrary, no Federal funds shall be obligated or expended for the demolition of the existing Brightman Street Bridge connecting Fall River and Somerset, Massachusetts, and the existing Brightman Street Bridge shall be maintained for pedestrian and bicycle access, and as an emergency service route.

In response to the enactment of SAFETEA-LU, Governor Romney advised the Commission and the Secretary that, in accordance with SAFETEA-LU, the Commonwealth of Massachusetts intended to preserve the existing Brightman Street Bridge and acknowledged the provision by SAFETEA-LU of \$ 500,000 in federal funds to be dedicated to improving the existing bridge. **See Attachment 2: August 10, 2005 Correspondence from Governor Mitt Romney to the FERC.**

³ This requirement of the December 17, 2004 Certificate is important to note because, while the SSDEIR does respond to many of the issues previously raised, it fails to respond to many other, material issues.

⁴ The National Environmental Policy Act ("NEPA") review process differs in several respects from the MEPA process. Notably, in the NEPA process, it is the lead agency, not the project proponent, who prepares the FEIS.

Second Supplemental Draft Environmental Impact Report (SSDEIR)

On October 31, 2005, WCE submitted the SSDEIR.⁵

The SSDEIR raises the following new set of issues for consideration:

Material Changes to the Project: The SSDEIR describes a project that, at least as far back as October 2004, has materially changed to the extent that it cannot fulfill the original purpose addressed by the original MEPA Scope and commented on by the public; providing natural gas to the region by Q4 2007;

Material Facts Concealed from MEPA: The SSDEIR, either knowingly or inadvertently, conceals material facts concerning further extensive delays to Project completion (if the Project can be constructed at all at the Fall River Site) and viable alternatives to the Project that require consideration in light of the material change to the purpose of the Project;

Imposition of a Fatal Flaw: The SSDEIR fails to address the fatal flaws imposed upon the Project as the result of the Wild and Scenic Rivers Act and with the enactment of SAFETEA-LU on August 10, 2005, which functionally render the Project impossible to construct at the Fall River Site;

Inability to Meet State Regulatory Standards: The SSDEIR fails to demonstrate how it will meet state regulatory requirements implemented by the Massachusetts Office of Coastal Zone Management, the Massachusetts Department of Environmental Protection, and the Massachusetts Division of Marine Fisheries.

COMMENTS CONCERNING CHANGE OF PROJECT PURPOSE

Project Purpose

The Project Purpose is the justification for permitting impacts to public health, safety, welfare, and the environment.⁶ The Project must articulate how it will provide a benefit that could not be enjoyed without incurring these impacts. The balance MEPA facilitates between impacts and benefits is driven by the statutory direction that, "... all relevant agencies shall review and determine the impact of a project on the environment and shall use all practicable means and measures to minimize damage to the environment." If a project has no real, achievable purpose, the impacts to the environment simply are not justifiable under MEPA.⁷

⁵ The SSDEIR describes a project that, to its credit, acknowledges to some extent several of the profoundly negative impacts to the environment it had previously proposed and the emphatic concerns raised by the federal and state agencies. Many of those impacts have been minimized in this revision.

⁶ Unlike NEPA, MEPA does not provide an express definition of project purpose. This is not to say, however, that project purpose plays any less of a role in MEPA than it does in NEPA.

⁷ M.G.L. c. 30, § 61 – 62H. MEPA provides that "damage to the environment" shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the

The Project Purpose when first submitted to MEPA and offered to the public for review and comment in June 2003 was to QUICKLY provide a new supply of natural gas for New England and specifically for the southeastern portion of Massachusetts and Rhode Island, who would be facing a predicted increase in demand and a shortfall in supply by Q4 2007. The public benefit was obvious; new natural gas supplies to address an expanding demand in a region subject to cold snaps and sensitive to the need for cleaner fuels to generate electricity. The Project Purpose was to respond to the immediate and urgent need for additional natural gas supplies in the region WITHIN the relatively narrow window of time predicted before a shortfall was experienced. This urgency established the parameters for MEPA review.

The Project Purpose shaped the consideration of alternatives for increasing natural gas supplies by Q4 2007; e.g. greater regional planning and coordination, demand response and conservation, expanded pipeline infrastructure, offshore siting; and framed the issues needed to be considered and the values ascribed to the impacts and benefits by the MEPA review process initiated in June 2003.

The Project Purpose was what was offered up for the consideration of the Secretary and the public in June 2003. This was the subject of the Secretary's August 2003 Certificate and the WCE August 2004 DEIR.

Material Changes

The MEPA process anticipates that, over the course of project development, significant changes may occur that materially affect the ultimate design and construction of a project, that increase or decrease project impacts, or make it impossible to construct the project as proposed. In such an event, MEPA provides as follows:

301 CMR 11.10(1) Notice of Project Change for Project Change. Unless the Secretary has indicated otherwise in the certificate on a review document or as part of a Special Review Procedure, the Proponent shall, and any other Agency or Person may, file a Notice of Project Change with the Secretary if there is any material change in a Project prior to taking of all Agency Actions for the Project. ...The Notice of Project Change shall specify in detail any change in the information provided in any previous review documents.

This provision of the regulations ensures that project review incorporates such changes and considers the new issues and alternatives that may arise in the wake of such changes.

commonwealth and shall include ***but not be limited to*** [emphasis added] air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds, or other surface or subsurface water resources; destruction of seashores, dunes, marine resources, underwater archeological resources, wetlands, open spaces, natural areas, parks, or historic districts or sites.

The August 2004 DEIR failed to disclose that circumstances affecting the ability to fulfill the Project Purpose had materially changed; that the Project could not possibly supply natural gas to the region until sometime after 2010, because the Brightman Street Bridge (Route 6) spanning the Taunton River would not be demolished until 2010. This failure of disclosure deprived the Secretary of the ability to analyze the impacts and benefits of alternatives that, by 2010; not 2007; could address increasing demand for natural gas and/or provide additional supply. Such alternatives include, as we now look back in hindsight, additional pipeline capacity, regional planning, demand response and conservation aided by legislative incentives,⁸ additional sources of supply, and the ongoing progress of several offshore projects that were not seriously considered. This blatant omission also deprived the public of a meaningful opportunity to provide review and comment, which is a core MEPA requirement.

While the fact that the Project did not disclose to the public that it could not possibly import and distribute the proffered LNG supply at the Fall River Site by Q4 2007, it was raised by the Massachusetts Highway Department. On September 29, 2004 the Executive Office of Transportation and Construction submitted its comments on the August DEIR, unequivocally stating that the demolition of the existing bridge was not anticipated prior to 2010, given the schedule of the four sequential contracts executed by the Commonwealth. This information was also transmitted to the Commission and to the Project in response to a September 22, 2004 request from Commission staff. **See Attachment 3: Massachusetts Highway Department Response to September 22, 2005 FERC Inquiry.** This correspondence was not provided to MEPA by the Project.

The Massachusetts Highway Department was not alone in raising this contradiction between the stated in-service date and the reality of the Brightman Street Bridge demolition. On September 16, 2004, the Southeast Regional Planning and Economic Development District (SRPEDD) also submitted comments, stating that the DEIS/DEIR contained several contradictory schedules for demolition and construction. The SRPEDD pointed out that the DEIR provided an in-service date for the project at 2007 (DEIS/DEIR at page 2-33) while at the same time stating that completion of the new Brightman Street Bridge would not occur until 2008, with the latest demolition date for the existing bridge being 2010 (DEIS/DEIR at page 4-14).

⁸ While the enactment of Chapter 139 and Chapter 140 of the Acts of 2005 occurred on November 22, 2005, they should be afforded consideration within the course of the MEPA review process, as they provide clear incentives for residential energy efficiency and energy conservation, both of which reduce the demand for natural gas and electricity. Chapter 139 establishes new energy efficiency standards for residential heating and electrical equipment, while Chapter 140 provides tax credits for residential energy conservation efforts.

Environmental Consequences as the Result of Significant Project Delay

Significant delay in the completion of a Project is one of the circumstances anticipated by MEPA when considering the fact and effect of a material change in a project:

301 CMR 11.10(6) Secretary's Consideration of Environmental Consequences. In determining whether a change in a Project or the lapse of time might significantly increase environmental consequences, the Secretary shall consider the following factors:
(a) ...
(b) ...
(c) change in expected date for Commencement of the Project, Commencement of Construction, completion date for the Project, or schedule of work on the Project.

The material change to the Project occasioned by the 2010 demolition date of the Brightman Street Bridge; three years beyond the stated in-service date of the Project; has an undeniable environmental consequence. The failure to disclose this fact undermined the ability to consider alternatives with environmental impacts substantially less than those imposed by the Project by simply eliminating them from consideration by the Secretary and the public.

Material Facts Concealed by the SSDEIR

MEPA acknowledges the need to provide ALL relevant facts at all stages of project review for the consideration of the Secretary and the public. Selective recitation of facts so effectively compromises meaningful review and opportunity for public participation and input that MEPA requires that a new or supplemental submission be prepared:

301 CMR 11.10(5) Notice of Project Change Upon Secretary's Determination. If the Secretary determines that a Proponent has, either knowingly or inadvertently, concealed a material fact or submitted false information during MEPA review, or has segmented the Project, the Secretary may consider the determination to be a Notice of Project Change.

The SSDEIR conceals significant, material facts concerning new safety and security concerns about the preferred site for the Project, the quality of the natural gas to be imported and injected into the existing pipelines, and changes to identified alternatives as well as an expansion of alternatives to the Project. These material facts were clearly known to WCE, even if they were concealed by the SSDEIR.

There are also two additional, material facts concealed by the SSDEIR that functionally render the Project impossible to construct at the Fall River Site; the United States Department of the Interior's refusal to agree with the FERC's conclusions, as required by the Wild and Scenic Rivers Act and the enactment of SAFETEA-LU on August 10, 2005. These material facts are addressed at pages 12 - 15 infra.

National Security Concerns Raised by the United States Navy

On August 12, 2005, the Department of the Navy ("Navy") submitted to the Commission; Docket Nos. CP04-36-001, CP04-41-001, CP04-42-001, and CP04-43-001; a Motion to Intervene Motion to Reopen, and Request for Rehearing In The Application of Weaver's Cove Energy, LLC; which is included here at **Attachment 4**; in connection with the proposed siting, construction, and operation of a liquified natural gas terminal in Fall River, MA. The basis for the Navy's Motion was the adverse impacts to Navy research, development, and testing of weapons systems created by the safety and security zone required around LNG tankers transiting lower Narragansett Bay, which would undermine the Navy's mission and present a threat to national security. In its Motion and a Supplemental Filing submitted on September 7, 2005; included here at **Attachment 5**; the Navy explained that its installation on Narragansett Bay; the Undersea Warfare Center Division, Newport; had NOT been included in the Project's scoping process and had not been invited by WCE to participate in any meetings or associated Project discussions. In fact, the Navy states that it first learned of the status of the Project and the potential impacts to its operations on July 15, 2005 from the State of Rhode Island. Had the Navy been included by the Project, this clear threat would have been known much earlier in the process. The Navy's Motion is pending before the FERC, who has not yet issued any determination.

Of relevance to this review process is the fact that the Navy determined a potential threat to national security is presented by locating the Project at the Fall River Site and the fact that this new issue was concealed by the SSDEIR filed on October 31, 2005. Whatever the outcome of the Navy's Motion to the Commission, there exists no colorable justification for excluding this concern from MEPA. As the Project responded to the Navy's Motion on August 17; 2005, filing a lengthy Answer in which it urged the Commission not to consider the Navy's Motion; it can hardly be argued that the Project was unaware of this highly significant concern and the potential effect it could have on the Project.

While WCE did address the existence of the Navy's Undersea Warfare Division by redacting from the final SSDEIR the images of this Navy facility that it initially included in the draft of the SSDEIR it submitted to the Massachusetts Office of Coastal Zone Management on October 14, 2005; **see Attachment 6**; it made no reference to the national security concerns vociferously raised by the Navy to the FERC. The disingenuous nature of this action is further underscored by the manner in which the Project used national security concerns at sites housing other Navy operations as a basis to summarily exclude consideration of those sites, which is further discussed at pages 26 – 28 infra., as well as the argument made by WCE to the FERC urging it to disregard the Navy's national security concerns, at least as they existed at the Fall

River Site and to the extent that such national security concerns could place the Fall River Site in peril.

Quality of Natural Gas

On August 15, 2005, KeySpan Energy Delivery Companies submitted to the Commission; in Docket Nos. CP04-36-001, CP04-41-001, CP04-42-001, and CP04-43-001; its Request for Clarification Or, in the Alternative, Rehearing; included here at **Attachment 7**; seeking to have the Commission articulate specific requirements that the natural gas to be transported through the pipelines by WCE be "interchangeable" and conform to the physical requirements necessary to ensure that the infrastructure would not be damaged and that the safety and integrity of the system would be maintained. This concern arises from the fact that all natural gas is not the same. Depending upon country of origin, natural gas can vary significantly as to heating value and chemical characteristics. Without precise requirements for uniformity, so-called "hot gas" can cause significant damage as a result of undermining the integrity of existing pipeline systems.

As with the national security issues raised by the Navy, this issue was concealed by the SSDEIR. As with the Navy's Motion, WCE responded to KeySpan emphatically and defensively in the federal docket on August 17, 2005. While WCE may prefer to limit any consideration of public safety and security to the FERC; **see Attachment 8: Testimony of Richard Clark and June 11, 2005 Correspondence from Richard Clark to FERC Chairman Pat Wood, III**; which provides additional information excluded from the SSDEIR, MEPA, and the public who must live with them; the materiality of these issues is unquestionable and its omission from MEPA review inexcusable.

Irving Canaport Project; Bear Head LNG; Open Season Settlement; and Infra-Structure Expansion on Maritimes and Northeast Pipeline

On July 15, 2005, Repsol YPF entered into an agreement with Maritimes and Northeast Pipeline to transport 750,000 MMBtu/d from Canaport LNG by 2008. In September 2005, Canaport LNG, the LNG receiving and regasification facility proposed by Irving Oil and Repsol for Saint John, New Brunswick, Canada, commenced construction, with an anticipated in-service date of 2008; **see Attachment 9: Proposed LNG Import Terminal Projects, Northeast U.S. and Eastern Canada (as of 10-17-05); prepared by the Northeast Gas Association (October 2005)** at 4.

On July 15, 2005, Anadarko Petroleum Corp. entered into an agreement with Maritimes and Northeast Pipeline to transport 813,000 MMBtu/d from Bearhead LNG by 2008. Bear Head

LNG awarded the first construction contracts for its marine offloading, LNG storage and re-gasification project in August 2005, with an anticipated in-service date of 2007; see Attachment 9 at 4.

In September 2005, Maritimes and Northeast Pipeline submitted its pre-filing to the Commission for its Phase IV Pipeline Expansion. The expansion, which anticipates FERC approval by February 2007, would provide 1,563.00 MMcf/d of additional pipeline capacity into the New England region, with subscribed supply as described above; see Attachment 10: September 15, 2005 Request by Maritimes and Northeast Pipeline, LLC for Approval to Use FERC Pre-Filing Process for Phase IV Expansion Project; October 14, 2005 FERC Approval, Docket Number PF05-17-000. See also Attachment 11: Planned Enhancements, Northeast Pipeline and Storage Systems (as of 11-7-05) prepared by the Northeast Gas Association (November 2005).

The SSDEIR devotes less than one page (3-27) to these projects and pipeline expansions and excludes any mention of the executed pipeline settlements, the commencement of construction, or the October 14, 2005 pre-filing approval issued by the Commission, which concurs with the February 2007 date.

Northeast Gateway Energy Bridge, LLC and Neptune LNG, LLC Projects

While the SSDEIR incorporates the FEIS description of these projects, it also conceals several material facts. First, Northeast Gateway received notice, on August 19, 2005 (published in the September 2, 2005 Federal Register; **70 FR 52422**) from the Maritime Administration that its application, submitted on June 13, 2005, was deemed complete. The Deepwater Port Act of 1974 requires that the Maritime Administration issue a decision on the license application not later than July 31, 2006. The Northeast Gateway Project anticipates an in-service date by Q1 2008.

The SSDEIR also conceals the fact that the Neptune LNG, LLC project also received notice from the Maritime Administration, on September 30, 2005 (published in the October 7, 2005 Federal Register; **70 FR 58729**) that its application, submitted to the Maritime Administration on February 17, 2005, was deemed complete, requiring that a decision on the license application issue not later than September 5, 2006. The Neptune LNG Project anticipates an in-service date of Q4 2008 – Q1 2009. Both of these projects anticipate the ability to provide additional sources of natural gas to the region well in advance of the WCE Project.

One further, material fact concealed by the SSDEIR is extremely significant, as it has been relied on by the Project to summarily dismiss from real consideration the offshore projects. The Project has consistently asserted that offshore facilities cannot withstand harsh weather

conditions in New England and that only one project using analogous technology to the Northeast Gateway Project; the Energy Bridge Project located in the Gulf of Mexico; has been deployed and the technology remains untested in the face of severe storms.

Hurricanes Katrina and Rita dispelled any suggestion that offshore technology such as that proposed for the Northeast Gateway project cannot withstand severe weather. As set forth in **Attachment 12: Presentation Concerning Reliability of Energy Bridge Offshore Technology During Hurricanes Katrina and Rita**; the Energy Bridge facility not only withstood these massive storms, it did not even suffer an interruption in service, unlike many of the fixed platform facilities. This information was presented to the Northeast Energy and Commerce Association at its October 2005 Natural Gas Conference (attended by Ted Gehrig, President and Chief Operating Officer of Weaver's Cove Energy, who was also a presenter at the conference) but it was excluded from the SSDEIR.

New MEPA Submission

The Project maintains that, given the anticipated increase in demand for natural gas and the forecasted shortfall in available supply, a project that can respond by providing additional natural gas supply by Q4 2007 is vital to the public health, safety, and welfare of New England. To use the Project's own words:

The New England area has an undisputed need for additional natural gas supply **by no later than 2007-2008** [emphasis added]. Not even project opponents deny this. Weaver's Cove believes it is the *best* project to meet that new demand in a timely fashion, because it can provide a 15% increase to the current peak day deliveries of natural gas in New England, and more particularly in southeastern Massachusetts...

There is not *one single project* either presently proposed before regulatory agencies (and there is only one of those in New England) ... that can provide *the same level of service...* at anywhere near *the same price* and within *the same timeframe*. (SDEIR at Appendix A, pages 4 – 5).

The Project cannot respond to the very need it identifies, although there are clearly other alternatives that could. The material changes that have occurred, which will inexorably delay construction or make construction impossible at the Fall River Site, have been excluded from MEPA and public consideration. The material facts that have also been excluded from consideration by the Secretary and by the public, who must live with the consequences, and that have been selectively reserved to federal review, must now be reviewed and incorporated into any State decision-making.

The radical shifts in the Project, which have occurred outside of the public view and without MEPA consideration, call for the preparation of a new Environmental Impact Report. At the very least, the Secretary should determine that a Notice of Project Change is required that

incorporates responses to the material changes to the Project, fully addresses the material facts that have been excluded from MEPA consideration, provides a credible Alternatives Analysis, and offers a specific Project schedule that includes realistic dates for construction, completion, and commencement of operations.

Fatal Flaw Analysis

A “fatal flaw” in a project is a condition that removes a project from further consideration. A fatal flaw so limits any practical ability to fulfill the Project Purpose that further review is no longer in the public benefit. Most federal agencies who routinely engage in NEPA review; e.g. United States Army Corps of Engineers; the Department of Transportation; structure the scoping process to identify and eliminate fatal flaws at the early stages of project development.

Occasionally, a fatal flaw will arise later in the review process as the result of a shift in physical conditions, technology, or changes in the law. In this instance, two fatal flaws have been imposed on the Project.

The first fatal flaw came about on July 5, 2005, when the United States Department of the Interior (DOI) advised the FERC that it would not concur with the FERC’s conclusion that the Project would not have a substantial, adverse impact on the Taunton River. The second fatal flaw arose on August 10, 2005, when President Bush signed SAFETEA-LU, the applicable text of which is set forth at page 3, supra. Once federal law prescribed that the existing Brightman Street Bridge had to be maintained and improved for pedestrian access, bicycle access, and as an emergency service route, locating the LNG terminal at the Fall River Site became functionally impossible. No LNG tanker could ever access it.⁹

Unlike the NEPA process, where the lead agency may request that a project address a fatal flaw whenever it is identified, MEPA prescribes a process that is fundamentally driven by the project proponent. MEPA must rely upon the project proponent to affirmatively raise and respond to the existence of a fatal flaw. Understandably, the Project did not either raise or respond to the two fatal flaws that arose prior to the filing of the SSDEIR on October 31, 2005.

DOI Determination of Adverse Impact

The DOI initially communicated its concerns about the adverse impacts of the Project on the fishery resources of the Taunton River with its comments on DEIR. DOI stated at that time that the Commission had not adequately addressed the protection of fishery resources, a

⁹ A fundamental assumption about the feasibility of the Project, from the initial Coast Guard Navigational Assessment in 2003 to the present time, has been that the Project cannot go forward into operation unless and until the existing Brightman Street Bridge is demolished.

conclusion concurred with by the United States Environmental Protection Agency (“EPA”), the National Oceanic and Atmospheric Administration/National Marine Fisheries Service (“NOAA/NMFS”), and the Massachusetts Division of Marine Fisheries (“DMF”).

On July 5, 2005, following the issuance of the FEIS, DOI advised the Commission that it would not, in discharging its obligations under the Nation Wild and Scenic Rivers Act, provide an affirmative statement of no adverse impacts upon the Taunton River, a necessary requirement for the Project to proceed. The full text of DOI’s comments are included here as **Attachment 13**. The effect on the Project was the imposition of the first of two fatal flaws.

The National Wild and Scenic Rivers Act, Section 7(b) provides, in relevant part, that:
... no 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.

This provision does not act as a limitation on exclusively federal actions. The provision includes state departments and agencies receiving financial assistance for agency activities material to the Wild and Scenic Rivers Act. Without DOI concurrence, federal and state agencies are estopped from proceeding with licensing and permitting activities. The Project excluded any reference to this issue from the SSDEIR.

Preservation of the Brightman Street Bridge

The enactment of § 1948 of SAFETEA-LU on August 10, 2005 imposed the second fatal flaw on the Project; preservation of a structure that makes it impossible for LNG tankers to traverse the Taunton River to the Fall River Site. This second fatal flaw also presents an irony that the Project cannot deny. Had WCE applied the fatal flaw analysis it developed for its own internal use, it would have been compelled to conclude that the Project was functionally impossible to construct at the Fall River Site.

On April 6, 2005, WCE provided to the Massachusetts Office of Coastal Zone Management (“CZM”) its own Fatal Flaw Analysis and weighting system, included here at **Attachment 14**.

The WCE Analysis identified five threshold factors. If a project site failed to meet any one of those factors, the site was eliminated from further consideration by WCE. Those five factors were Channel Depth; Airport Proximity; Distance to Pipeline; Developed Port Area; and Bridge Access. The Bridge Access Factor eliminated any site from further consideration if bridge access provided less than 135 feet of vertical clearance and 165 feet of horizontal clearance.

The existing Brightman Street Bridge has 28 +/- feet of vertical clearance above mean high water and 98 feet of horizontal clearance (WCE Resource Report 5 at 57 – 58). Had WCE

applied its own criteria to the Fall River Site following the enactment of SAFETEA-LU and prior to the submission of the SSDEIR, it would have been compelled to eliminate it from further consideration.

The SSDEIR is notably deficient in its treatment of the fatal flaw introduced by SAFETEA-LU. The SSDEIR provides no alternate schedule for project commencement, construction, completion, no in-service date, and no alternative scenario under which the Project could be constructed at the Fall River Site.

Rather than address the fatal flaw, the SSDEIR attempts to re-define the Project Purpose, moving from its original statement of imminent shortfalls and the need for action by Q4 2007 to a more general observation concerning the “growing demand for natural gas in New England, almost half of which is consumed in Massachusetts.” (SSDEIR at page 3-3).¹⁰

What leaps forth as the most glaring deficiency is, of course, the complete absence of any basis for affording additional consideration of the Project at this juncture. The SSDEIR’s limited response to SAFETEA-LU may be fairly characterized as a “rant,” bereft of any meaningful information or substantive plan for going forward:

Although opponents of Weaver’s Cove contend that this legislative maneuver will effectively block the project, they are not correct. The provision was hastily enacted, is legally and constitutionally flawed, and will have numerous unintended consequences for Massachusetts taxpayers that were not taken into consideration by its sponsors... Weaver’s Cove is currently undertaking measures that will address section 1948, and is confident that this ill-advised provision will not prevent the project from going forward on a timely basis. (SSDEIR 12-6, 12-7).

This section of the SSDEIR did not pass unnoticed by Congressman Barney Frank, representing the 4th District of Massachusetts. As one of the most knowledgeable legislators concerning the history of the Brightman Street Bridge, Congressman Frank challenged WCE directly to provide some factual support for the assertions included in the SSDEIR. Congressman Frank’s response, constructed as a letter to Secretary Stephen Pritchard and included in full here at **Attachment 15**, responds to WCE in relevant part as follows:

You [Secretary Stephen Pritchard] have received a submission from the corporation seeking to construct an LNG tank in the northern part of Fall River which comments, *inter alia*, on Section 1948 of the Transportation Bill of 2005... Sadly, this

¹⁰ The new Project Purpose calls to mind the original “Star Trek” television series. When first aired, the show’s purpose was articulated to be its “five year mission.” This communicated urgency and immediacy about the need for knowledge. However, that purpose was not sustained over five years. When the series became the basis for a feature film and what would prove to be a series of sequels, its purpose shifted. It became its “continuing mission.”

WCE has taken a similar tack. Its cannot fulfill its original, the urgent Project Purpose and the only way in which it can assure itself of continued consideration (viewers and funding sources) is by shifting its mission from being the sole answer to an immediate problem to being an ongoing aide to a chronic condition.

submission is an example of shoddy logic, intellectual dishonesty, and disregard for inconvenient facts that has marked so much of Hess' presentation. I refer specifically to the assertion that Mr. McGovern's provision [Section 1948], "is legally and constitutionally flawed..." As to its being legally flawed, this of course makes no sense at all. This was an amendment passed by the US Congress and signed into law by the President. No one has alleged that there was any fraud in the process, and it simply makes no sense to argue that a law passed and signed by the President is "legally flawed." Something is legally flawed if it is not in compliance with the law...

Since they [Hess] are obviously aware that the "legally flawed" argument is a weak one, Hess then goes on to say that it is "constitutionally flawed." What is particularly striking here is the absence of any reference to any particular part of the Constitution.... The Constitution is not what Justice Oliver Wendell Holmes once described "as a brooding omnipresence in the sky," to be used in a vague and general way to swat down specific legislative enactments that one finds inconvenient. Things are only "constitutionally flawed" if they conflict with some provision of the Constitution. Hess' failure to cite any such provision is of course an implicit admission by them that they know that this is simply nonsense... At the very least, Hess ought to be asked what is the "constitutional flaw" which they find in this.

The question now presented to the Secretary and the public is why additional public resources should be expended at this time to further review the Project. While it may be an engaging exercise to speculate as to how any one of us would, if we were able, change laws and regulations with which we take issue, that is not a basis for expending limited public resources in considering a project that has been rendered functionally impossible.

MEPA as a Proponent-Driven Process

There is a further thought to consider here. As observed by the Secretary, MEPA is driven by project proponents. The Project was not compelled by any law or regulation to submit the SSDEIR on October 31, 2005:

The proponent was not required to submit the SDEIR by a certain date and could have taken the time necessary to prepare a responsive SDEIR (December 17, 2004 SDEIR Certificate at page 2)

The Project was free, prior to submitting anything further to MEPA, to resolve the fatal flaw raised as the result of DOI's non-concurrence under the Wild and Scenic Rivers Act by agreeing to adopt the Time of Year restrictions on dredging operations urged by NOAA/NMFS and DMF. Similarly, the Project was free to "undertake" [SSDEIR at 12-7] any of the measures implied by the SSDEIR to address § 1948 of SAFETEA-LU and to submit the SSDEIR to MEPA when those measures resolved the fatal flaw raised by SAFETEA-LU. Submitting the SSDEIR at this time simply joins the issue of justification and raises the question of why this Project requires further consideration and the further expenditure of scarce public resources when it cannot offer any public benefit.

The Secretary should terminate further review of this project under MEPA until such time as the Project is configured to achieve its stated purpose in light of the realities of the Wild and Scenic Rivers Act and SAFETEA-LU.

If the Secretary determines the Project still warrants consideration at this time, he should require that any future submission by the Project include specific responses, implementation plans, and schedules for eliminating what are inarguably fatal flaws as of the review of the SSDEIR, as well as specific plans, site configurations, and a schedule for commencement, construction, completion, including a credible in-service date for the Project.

COMMENTS CONCERNING THE SSDEIR'S FAILURE TO ADDRESS SUBSTANTIVE REQUIREMENTS OF THE DECEMBER 17, 2004 CERTIFICATE

The following comments, which address substantive requirements of the December 17, 2004 Certificate, are presented as follows. The actual language used by the Secretary and the page of the Certificate at which it appears is set forth in single-spaced, **bold** type, followed by Fall River's comments on each requirement.

Provision of Complete Information for Public Review

[Page 2] At best, the SDEIR partially addressed the scope contained in the Certificate on the DEIR issued on October 1, 2004. Generally, the SDEIR is largely comprised of portions of other documents that are part of the public record for review of the project by the Federal Energy Regulatory Commission (FERC), but contain only basic information and do not thoroughly respond to MEPA and state permitting requirements.

The SSDEIR suffers from the same deficiencies as the SDEIR, drawing most of its information from the FEIS and failing to thoroughly respond to MEPA and state permitting requirements. The SSDEIR directly acknowledges this approach at page at 1-1:

In preparing the FEIS, FERC addressed the majority of issues raised in the SDEIR Certificate, and responded to numerous agency and public comments on both the DEIS/DEIR and SDEIR. As such, this SSDEIR utilizes direct excerpts from the FEIS where appropriate.

It is a sad comment on the SSDEIR and the project's consideration of MEPA and state permitting requirements that it could fail to understand the Secretary's criticism. The SDEIR and SSDEIR are state submissions that are required to respond to state concerns, not to limit the issues through paraphrase of the FEIS.

The SSDEIR also ignores the Secretary's admonition and repeats the error of the SDEIR by referencing documents that are not provided and are resident in other dockets or before other agencies. The SSDEIR adds one further obstacle to the public's ability to engage in meaningful

review; it fails to include several documents upon which it relies that are only accessible by requesting them from the Project, once a reviewer has discovered they are not included at any point in the SSDEIR. The following examples are intended to be illustrative, not exhaustive, of these deficiencies.

The review of the SSDEIR concerning dredging issues turns upon the reviewer's ability to obtain copies of the December 2003 "Dredging Program," the Method 3 Risk Assessment, and the results of the Tier III Evaluation provided to the United States Army Corps of Engineers ("USACE"), as none of these documents are included; See SSDEIR at App. 5-3; Draft Conceptual Model for Taunton River Sediment at page 15.

The SSDEIR references the analytical results for VOCs, EPH/VPH, SVOCs, PCBs, and Metals at Appendix C of App. 5-4; Chemistry and Leachability of Taunton River Sediment. If the reviewer turns to Appendix C, the results are not there; only the statement that the Laboratory Reports are too voluminous to be included and may be separately requested.

[Page 2] The FERC is moving forward with the preparation of a Final EIS for federal review purposes. However, I again strongly encourage that such a filing be delayed until the state and public review of the SSDEIR is complete. This will allow for continued alignment of the federal and state review as envisioned in the Special Review Procedure and assist the public in understanding the numerous complex issues associated with the project.

Despite the agreement to engage in coordinated review under the Special Review Procedures, the Project did not heed the advice of the Secretary. With the urging of the Project, the FERC proceeded forward to issue the FEIS in May 2005, resulting in an asynchronous and incomplete review of the issues. The SSDEIR responds to the most critical points of the Secretary's Certificate by incorporating excerpts of the FEIS which, to use the words of the Secretary from the December 17, 2004 Certificate, "... point[s] to the lack of consideration given by the proponent to state regulatory and permitting requirements."

Substantive Requirements

The following comments address the requirements from the December 17, 2004 Certificate as they affect the Project's "preferred alternative" which provides that NO dredged material will be managed, processed, or placed on the Fall River Site. The proposal set forth in the SDEIR, which contemplated placement and disposal of approximately 2.5 – 3 million cubic yards of dredged material at the Fall River Site, was commented on by Fall River in December 2004 and, to the extent that any further consideration is being given to that alternative, Fall River expressly incorporates its SDEIR comments into this submission. The full text of those comments is included here at **Attachment 16**.

[Page 5] The SSDEIR should fully incorporate the scope for the SDEIR outlined in the DEIR Certificate issued on October 1, 2004, as amended by the following scope.

Permitting Requirements

[Page 5] The SDEIR responded minimally to the scope for this topic, as required in my previous Certificate. The MEPA process is predicated on a full accounting of the state agency actions required for any given project and how that project will comply with applicable performance standards. The SSDEIR should discuss all state agency permits or actions required for the project. The SSDEIR should also demonstrate that the project can meet all applicable regulatory or statutory performance standards related to each state agency action or permit.

The SDEIR was determined to be materially deficient concerning its demonstration of compliance with applicable state regulatory requirements and performance standards. The SSDEIR is similarly deficient, but the full scope of those deficiencies is not susceptible to refined analysis because, as commented on above, many of the documents upon which the SSDEIR relies to demonstrate compliance are not provided as part of the SSDEIR.

To the extent that comments can be made, Fall River believes that the SSDEIR not only fails to affirmatively demonstrate compliance with relevant state requirements; e.g. water quality impacts, wetland impacts, waterways and dredging requirements; the SSDEIR sets forth ample basis to conclude that the Project will violate state requirements and standards.

The temporary, permanent, and cumulative adverse impacts imposed by the Project upon water quality, wetlands, fisheries and aquatic habitats have been called out repeatedly by the Massachusetts Department of Environmental Protection (DEP), DMF, CZM, the Rhode Island Coastal Resources Management Council, EPA, NOAA/NMFS, and DOI, in comments submitted to the Commission in September 2004, June and July 2005, and to MEPA in September 2004 and December 2004. Fall River will not re-iterate all of those submissions here, but will identify and attach the relevant comments as this analysis proceeds.

Impacts to Water Quality

The Project has never been able to meet state water quality standards for zinc or copper and does not pretend to do so. Even with the substantial revisions to the Project that would limit upland placement of dredged material to 60,000 cubic yards,¹¹ the Project cannot meet water quality standards.

¹¹ The SSDEIR states that the 60,000 cubic yards will not be disposed at the Project site, but will be appropriately managed at an offsite receiving facility. However, the SSDEIR offers little detail

The SSDEIR fails to provide any new information demonstrating compliance with state water quality standards. The SSDEIR references the FEIS on this issue, which states expressly that elutriate test results for copper and zinc exceed water quality criteria for both acute and chronic exposures; **see Attachment 17: FEIS at 4-40 and 4-41**.

While the SSDEIR discusses the Tier III Sampling Program submitted to the USACE and offers the Laboratory Analytical Results at Appendix C of Appendix 5-4; **see Attachment 18**; the actual information is not provided in the SSDEIR. Appendix C consists of one page stating that the "Laboratory Reports are not reproduced here [in the SSDEIR] and are available upon request."

Finally, the SSDEIR; at Appendix 2-1, Page A2-39; dismisses the potential for adverse impacts identified in the State Water Quality Certification Regulations; 314 CMR 9.06 (7) as insignificant because of the impaired condition of the receiving waters.¹²

What is left to consider is the FEIS conclusion that the Project will exceed state water quality standards and the fact that additional information about other contaminants or sediment analyses is not included for review as part of the SSDEIR. In addition to these deficiencies, it is not possible, without this information, to analyze or comment on the cumulative effects on the Taunton River and Mount Hope Bay, which is a core requirement of MEPA.

Because the SSDEIR calls out the fact that the Project will violate state requirements and at the same time limits the data it provides in order to evaluate the full scope and extent of impacts, the comments submitted to the FERC by EPA on June 28, 2005 on this topic are instructive and must be included in any consideration of the SSDEIR.

Massachusetts shares with EPA various authorities under the federal Clean Water Act and must act in a coordinated fashion with EPA concerning such issues as water quality and anti-degradation. While the full text of EPA's comments are included here at **Attachment 19**, EPA's comments that go to § 401 and National Pollution Discharge Elimination System ("NPDES") permitting issues¹³ are set forth in relevant part as follows:

about the manner in which the dredged material will be stockpiled and processed in order to physically transport it off the Project Site.

¹² Even for impaired water bodies, a basis upon which WCE relies to justify the impacts the Project will impose, the Antidegradation Provisions of the Massachusetts Surface Water Quality Standards; 314 CMR 4.04 (1); require that "In all cases existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." Impairment is not a basis to further degrade water quality.

¹³ Massachusetts is not a delegated state for the purposes of NPDES permitting authority and must coordinate with EPA on the issuance of NPDES permits.

EPA's comments on the DEIS noted that Mount Hope Bay and the Taunton River do not meet state water quality standards and are on the Commonwealth of Massachusetts' Clean Water Act § 303(d) list (a list of water bodies not meeting state water quality standards) due to a number of specific causes including pathogens, nutrients, thermal modification, unknown toxicity and organic enrichment/low dissolved oxygen. Our comments also described our expectation that dredging and discharge of fluid from dewatered dredged material will exacerbate existing water quality problems; that Clean Water Act Section 401 certifications would be necessary from Massachusetts and Rhode Island to demonstrate that the dredging is protective of state water quality standards; and that the project will need a Clean Water Act Section 402 NPDES permit for discharges of storm water from the construction site and for discharge of the liquid waste from the dewatering activity. EPA is concerned that the discharges are not likely to meet state water quality standards in Mount Hope Bay and the Taunton River since those water bodies are currently impaired.

The FEIS indicates that copper concentrations in the Taunton River exceed EPA water quality criteria by a factor of 12 (chronic) and 7 (acute) [emphasis added]. The FEIS argues that water quality modeling shows that inputs of copper from the dredging will result in a relatively small area with levels elevated over those background conditions. Additionally, the analysis claims that the elevated copper concentrations in the river represent the "natural" condition of the river and that organisms have adapted to those conditions.

We do not agree that elevated copper concentrations in the Taunton River are "natural," elevated levels are the result of anthropogenic influences. Furthermore, we question the validity and basis (scientific evidence or rationale) for the unsupported assertion that organisms adapt to this degraded environment. Currently, ambient copper concentrations are well above the applicable copper criteria that have been established to protect aquatic organisms against acute and chronic toxicity. Therefore, sensitive marine organisms are already at risk of lethal and sub-lethal effects. Even a small addition of copper to this system would likely increase this risk. If the slope of the dose-response curve for copper is steep, small incremental changes in copper concentrations can produce substantial differences in toxicity.

The Massachusetts DEP has indicated that in order for a § 401 water quality certification to be issued for the dredging, it is likely that site-specific criteria for copper and zinc will need to be developed (Yvonne Unger, Massachusetts Department of Environmental Protection, personal communication, 6/13/05). While we would support exploration of site-specific criteria, it is premature to say whether such criteria would result in the current ambient levels being in attainment.¹⁴ It is also important to note that the adoption of site specific criteria would be a water quality standards change that would be subject to public notice and comment and could not take effect for federal law purposes (e.g. § 401 certifications, § 404 and § 10 permits issued by the Corps and NPDES permits issued by EPA) until after EPA review and approval [emphasis added]. Dredging in the Rhode Island portion of Mount Hope Bay would have to be done consistent with the state's water quality standards.

EPA Comments; June 28, 2005 at ADC-6 and ADC-7.

¹⁴ The SSDEIR does not include any proposal for site-specific criteria.

Even if DEP were to propose site-specific criteria that would, in the short term, allow the Project to exceed water quality standards, until EPA reviewed and approved such criteria, the Project would remain out of compliance with state law.

DEP Draft Water Quality Regulations

DEP recently issued, for the first time in many years, significant revisions to the Section 401 Water Quality Certification Regulations addressing dredging and discharges of dredged materials. While draft regulations do not have the force of law, they are appropriately considered to be agency guidance as to interpretation of program requirements.¹⁵ The Draft Regulations provide, in § 9.07; Criteria for Application for Discharge of Dredged or Fill Material; numeric standards for sediment analysis.¹⁶ Applying those standards to the limited information available in the SSDEIR further supports the determination that the Project cannot meet state water quality standards, under either the existing standards or the standards being considered by DEP for promulgation.

Time of Year Restrictions, Wetlands and Waterways Regulatory Requirements

Fall River is including its comments concerning Time of Year restrictions with its comments on wetlands and waterways requirements because of the integral relationship between these performance standards.

TOY Considerations

Time of Year (TOY) restrictions applicable to the Project's dredging program have been commented on at length over the course of the NEPA and MEPA review of this project. EPA, DOI, NOAA/NMFS, DEP, and DMF have urged the adoption of TOY restrictions in order to avoid and minimize impacts to fisheries resources throughout the course of their life-cycles, including migration windows for anadromous/catadromous species. TOY restrictions are incorporated into

¹⁵ The Draft Regulations will be discussed infra, as they make express certain requirements concerning time-of-year restrictions on dredging activities.

¹⁶ The proposed regulations also seek the guidance of the NEPA and MEPA processes in determining criteria relevant to evaluating water quality impacts:

9.07(f) The Department may consider any additional information including but not limited to that submitted under MEPA or NEPA on impacts from the dredging activity, management of the dredged material, the alternatives available for reuse or disposal techniques, alternative sites for various management activities, or information related to other Department programs.

state regulatory requirements by the Massachusetts Wetlands Protection Act, the Massachusetts Waterways Act, and the Massachusetts Water Quality Certification Program. The specific TOY restrictions are arrived at in these programs through consultation and recommendations made by DMF.

The SSDEIR establishes TOY restrictions that ignore both NOAA/NMFS and DMF recommendations, violating the requirements of the Wetlands Protection Act, the Waterways Act, and the Water Quality Certification Program. In addition, the SSDEIR attacks the validity of the recommendations made by DOI, EPA and NOAA/NMFS concerning impacts upon stressed fisheries resources in the Taunton River and Mount Hope Bay. The comments submitted by DOI are included at **Attachment 13**. EPA's comments are included at **Attachment 19**. The comments submitted by NOAA/NMFS are included at **Attachment 20**. Until the issuance of the Commission's July 15, 2005 Order, which imposed a January 15th through May 15th TOY restriction, the Project refused to consider any TOY restriction on its proposed three-year dredging program.¹⁷

The SSDEIR, at Appendix 2-1, page A2-19, sets forth the TOY restriction that it will tolerate. For offshore disposal activities, the Project will agree to accept a TOY restriction running from January 15th through June 15th. For all other dredging activities, the Project refuses to accept any TOY restriction whatsoever.

DMF, NOAA/NMFS, DEP, EPA, and DOI Comments and Recommendations

In July, September, and December 2004, DMF provided to the Fall River Conservation Commission, MEPA, and the FERC a series of written comments concerning the profound impacts upon fisheries resources the Project presented at all phases; pre-construction, construction and operations; as well as species-specific recommendations for TOY restrictions. Based upon personal communication on December 2, 2005 with Vin Malkowski at DMF, Fall River confirmed that those comments; included in full at **Attachment 21**; with relevant portions excerpted here, have not changed.

The DMF rejected the Project's proposed alternatives to traditional TOY restrictions, determining them to be completely unacceptable. The DMF set forth its own TOY restrictions as follows:

¹⁷ Even though the Project has revised its preferred disposal option for all except 60,000 cubic yards of dredged material from upland disposal at the Fall River Site to ocean disposal, it still contemplates a three year dredging program and the volume of material proposed to be dredged; 2.8 – 3 million cubic yards; has not changed. **See** also the discussion concerning drainage and storm water management infra.

Anadromous Species:

Alewife, Inward migration; Mid-March through Mid-June 15
Atlantic sturgeon, Inward migration; April through June
Blueback herring, Inward migration; April 15 through July 30
Rainbow smelt, Inward migration; March 1 through May 15
White perch, Inward migration; March through May

Catadromous Species:

American eel – Elver (juveniles) inward migration; March 15 through June 15

Shellfish:

American oyster, Spawning (may occur twice per year) Mid-June through September 15
Quahog, Spawning (may occur twice per year) Mid-June through September 15
Soft-shell clam, Spawning (may occur twice per year) May through October

Winter Flounder:

Spawning and larval development; Mid-January through May
Juvenile settlement and development; May through September

DMF comments, July 23, 2004 at page 3

The DMF TOY restrictions establish the performance standards for technical best practices and best practical measures in order to avoid and minimize significant impacts to fisheries resources for the wetlands program, the waterways license and permitting programs, and the water quality certification program. Failure to comply with those standards results in failure to comply with state regulatory requirements.

Wetlands Protection Act Performance Standards

The Wetlands Protection Act Regulations concerning Land Under the Ocean located in a Designated Port Area; a resource area directly affected by the Project; require as follows:

310 CMR 10.26 (3): Projects shall be designed and constructed, using best practical measures, so as to minimize adverse effects on marine fisheries caused by changes in:
(a) water circulation;
(b) water quality, including but not limited to, other than natural fluctuations in the level of dissolved oxygen, temperature or turbidity, or the addition of pollutants.

The Wetlands Protection Act Regulations concerning resource areas determined to be significant to the protection of land containing shellfish and therefore to the protection of marine fisheries; which has been determined here by the DMF; require as follows:

310 CMR 10.34 (4): Except as provided by 310 CMR 10.34 (5) [not applicable] any project on land containing shellfish shall not adversely effect such land or marine fisheries by a change in the productivity of such land caused by:

- (a) alterations of water circulation,
- (b) alterations in relief elevation,
- (c) the compacting of sediment by vehicular traffic,
- (d) alterations in the distribution of sediment grain size,
- (e) alterations in natural drainage from adjacent land, or
- (f) changes in water quality, including but not limited to, other than natural fluctuations in the levels of salinity, dissolved oxygen, nutrients, temperature or turbidity, or the addition of pollutants.

The Wetlands Protection Act Regulations concerning impacts on Anadromous/Catadromous Fish Runs; a resource area directly affected by the Project; require as follows:

310 CMR 10.35 (3): Any project on such land or bank shall not have an adverse effect on the anadromous or catadromous fish run by:

- (a) impeding or obstructing the migration of the fish, unless DMF has determined that such impeding or obstructing is acceptable, pursuant to its authority under M.G.L. c. 130, § 19;
- (b) changing the volume or rate of flow of water within the fish run; or
- (c) impairing the capacity of spawning or nursery habitats necessary to sustain the various life stages of the fish.

310 CMR 10.35 (4): Unless otherwise allowed by DMF pursuant to M.G.L. c 130, § 19, dredging, disposal of dredged material or filling in a fish run shall be prohibited between March 15th and June 15th in any year.

Waterways Performance Standards

The criteria for evaluation of a dredging project permit application set forth in the Chapter 91 Waterways Regulations provide as follows:

310 CMR 9.10: Standards for Dredging and Dredged Material

Any project that includes dredging or dredged material disposal shall comply with the following requirements:

- (2) Resource Protection Requirements
 - (a) The design and timing of dredging and dredged material disposal activity shall be such as to avoid interference with anadromous/catadromous fish runs. At a minimum, no such activity shall occur in such areas between March 15th and June 15th of any year, except upon a determination by the Division of Marine Fisheries, pursuant to M.G.L. c. 130, § 19, that such activity will not obstruct or hinder the passage of fish.
 - (b) The design and timing of dredging and dredged material disposal activity shall be such as to minimize adverse impacts on shellfish beds, fishery resource areas, and submerged aquatic vegetation.

The Department may consult with the Department of Fisheries, Wildlife, and Environmental Law Enforcement or the natural resource officer of the municipality regarding the assessment of such impacts.

Water Quality Certification Performance Standards

These comments have already addressed the current requirements concerning water quality impacts and the criteria considered for dredging activities. The Draft Regulations, also previously mentioned, expressly provide at 314 CMR 9.02(2) as follows:

No discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will avoid and minimize potential adverse impacts to the bordering or isolated vegetated wetlands, land under water or ocean, or the intertidal zone.

Read as Department guidance, which is appropriate for draft regulations, and within the context of the wetlands and waterways requirements, the Project fails to comply with these performance standards as well.

Alternatives Analysis

[Page 5] Project Alternatives

Moreover, the SSDEIR must evaluate any alternative sites deemed necessary by CZM to establish coastal dependency and to otherwise comply with Coastal Energy Policy #1. This information is necessary to fully evaluate the environmental and safety impacts of locating an LNG facility at alternative sites. In preparing this section, I strongly encourage the proponent to consider the numerous comments submitted on this aspect of the scope, especially those of the EPA and the City of Fall River.

The SSDEIR; at Appendix 3-1; discusses format and incorporation of CZM's requirements, but it does not address them. The SSDEIR evades any real alternatives analysis, as contemplated by CZM, by engaging in a screening exercise that quickly eliminates many of the alternatives at a threshold level, without ever addressing the specific information identified by CZM.

In order for the alternatives analysis to be responsive to Energy Policy #1, it is necessary to, "weigh the environmental and safety impacts of locating proposed energy facilities at alternative sites" [which] requires an evaluation of the characteristics of alternative sites and a comparative assessment of the sites' performance under specified criteria."¹⁸

¹⁸ Correspondence dated March 18, 2005 to Mr. Ted Gehrig, Weaver's Cove Energy, from Susan Snow-Cotter, Director of CZM.

CZM's comments make it clear that an alternatives analysis responsive to Energy Policy #1 is really a three-step endeavor. The first step requires identifying the universe of sites to be included in the alternatives analysis. Building on the first step, the second step identifies the environmental and safety criteria applicable to each of the alternative sites. Finally, feasibility issues for each of the sites should be addressed.

The SSDEIR offers a superficial analysis that employs exclusion criteria that it either selectively applied or did not apply at all to the Fall River Site. This flaw in the first step nullifies the validity of the findings that follow, which depend upon the selection of an appropriate universe of alternative sites. If the Project had applied the same criteria to the Fall River Site it used to limit its universe of alternative sites, there would be no SSDEIR; the Fall River Site would have dropped immediately from serious consideration. The following examples taken from the SSDEIR; Appendix 3-1; are illustrative, not exhaustive. However, they serve to demonstrate why the exercise included in the SSDEIR does not respond to the Energy Policy #1 requirement for a credible Alternatives Analysis.

The SSDEIR rejects the Prudence Island Site; Narragansett Bay, RI; on both safety and environmental exclusionary criteria. The Project eliminated this site at the first step; effectively reducing the appropriate universe of alternative sites that would be critically evaluated.

The presence of an active Navy test ground raised concerns about security and safety sufficient for the Project to exclude Prudence Island on the basis of safety. Had the Project applied this criterion to the Fall River Site, it also would have been excluded. The Navy's emphatic conclusion, as set forth in its Motion to the FERC; **Attachment 4**; that the Fall River Site presents a threat to national security certainly raises the same issues as those that excluded Prudence Island.

The SSDEIR also rejects the Prudence Island Site due to designations of portions of the island as off limits for industrial development because of fragile estuarine systems. While this designation was sufficient for the Project to exclude the Prudence Island Site, the non-concurrence of the DOI concerning the adverse impacts on the fisheries resources of the Taunton River did not result in the same determination and exclusion at the Fall River Site.

The next site the Project excluded was Melville, in Portsmouth, RI. The basis for the Project's exclusion was three-fold. The Site would have to be offered by the Navy, which was not certain. The community was opposed to the siting of an LNG facility. Prior uses at the Site had resulted in the presence of contamination. The Project concluded that without certitude that the Navy would offer the Site, combined with the local opposition and the existence of contamination, the Site warranted no further consideration.

Once again, an examination of the process and criteria employed by the Project demonstrate how the so-called "Alternatives Analysis" deliberately and selectively created a

metrics that limited the Project to its preferred alternative; the Fall River Site. The Shell Oil Company vigorously opposes the siting of an LNG terminal at the Fall River Site, at which Shell has been engaged in over twelve years of remediation activity to address the contamination resident in the ground water and soil as the result of prior uses of the Site. The community opposition to the Project at the Fall River Site is legendary. The environmental contamination includes contamination of the ground water at levels that exceed 2 – 3 feet of floating NAPL, plus the presence of heavy metals, PAHs, and a host of other hazardous materials.

The New London and New Haven Harbor sites were dropped from consideration based on density of population, concerns about the extent of exclusion zones, competing uses, and extent of dredging required. Each one of these criteria, if consistently applied, would have dictated that the Fall River Site be excluded at the outset.

The Project's selective application of exclusionary criteria would have continued to support the Fall River Site as the preferred alternative before MEPA, but for CZM compelling that the SSDEIR explain the process it employed to evaluate alternatives. That result, in and of itself, demonstrates why full disclosure of all relevant information for public review and comment must be demanded during the MEPA process.

The SSDEIR fails in other respects regarding Energy Policy #1 and the requisite Alternatives Analysis. It materially excludes from any discussion two further CZM components, which were fully set forth in CZM's comments on the DEIR and are included here at **Attachment 22**.

CZM recommended an enhanced *postponed action alternative* analysis. This analysis would include a full discussion of the impacts of the changes in the Brightman Street Bridge demolition schedule and how those delays would affect the proposed project, the regional gas supply, and how any delay in the completion could provide an opportunity for additional study and analysis. The SSDEIR ignores this recommendation.

CZM also recommended that supplemental information be submitted regarding an *enhanced system alternative* analysis, including investigative information concerning potential options for eliminating or reducing the need for significant LNG truck loading capacity at any new LNG terminal. CZM observed, with this recommendation, that "The potential decoupling of the need for an LNG trucking facility at any new LNG facility may expand the potential universe of sites for consideration of an LNG import terminal." The SSDEIR ignores this recommendation as well.

Dredging and Water Quality

[Page 6] In the SDEIR, the proponent committed to a program of monitoring water column conditions in the vicinity of dredging operations. The monitoring program will be designed to determine if excessive amounts of sediment are

suspended in the water column and to ensure compliance with water temperature, salinity, dissolved oxygen and other water quality parameters. The SSDEIR should report on the status of the development of the monitoring program.

The SSDEIR states, at 4-1, that a draft water quality monitoring plan was submitted to DEP for review and comment on August 22, 2005.¹⁹ This statement is a news bulletin, not a report concerning the status of a plan in development. In addition, the “draft plan” is not included as part of the SSDEIR.

The SSDEIR also states that the draft plan was based on data used for water quality plans implemented in Boston Harbor and the Providence River. The references to the Boston Harbor and Providence River plans are undated, contain no substantive information, and address water bodies that are significantly dissimilar to the Taunton River, its stressed populations [EPA’s description], and the unique values at risk in the Taunton River [DOI’s description].

As the Project did not include the draft or any details other than what is set forth above, the only conclusion that may be drawn is that the water quality monitoring being proposed is completely inadequate to address the significant environmental impacts this Project will impose. The decision to exclude the “draft plan” and any substantive information about plan development is further exacerbated by the express statement in the SSDEIR that state water quality standards will be violated by the Project, which makes a transparent, credible plan an imperative for MEPA review.

Drainage

[Page 9] This SSDEIR should include a plan that thoroughly describes the dewatering process and addresses how the dredged sediments, including contaminated sediments, will be stabilized. The plan should also include rigorous provisions for monitoring to ensure that water quality standards are met during these processes.

¹⁹ Based on personal communication with Deputy Associate Commissioner John Felix on December 7, 2005, the City of Fall River discovered that the Project submitted a draft plan to DEP in August, which DEP found to be substantially deficient. Further, based on a DEP response to a Public Document Request, the City of Fall River was able to obtain a copy of the draft plan. Despite the SSDEIR representation at 4-1, the draft plan does NOT include a list of applicable monitoring/sampling parameters or a description of the proposed mixing zone. It includes only a generic description concerning monitoring and sampling locations and an equally vague proposal concerning monitoring frequency.

While it can be expected that DEP will include comments on the draft plan in its own SSDEIR comments, it must be pointed out that the SSDEIR simply misrepresents what was provided to DEP. The failure to include the draft plan made it extremely difficult for the public to confirm the representations made in the SSDEIR.

As set forth earlier, these comments are directed at the preferred alternative described in the SSDEIR, which eliminates the management and processing of dredged materials at the Fall River Site and contemplates ocean disposal. To the extent that the Secretary addresses the issue of disposal of the dredged material at the Fall River Site, these comments incorporate the comments of the Fall River Conservation Commission; included here at **Attachment 23**; concerning the overall deficiencies of the storm water and materials management plan proposed by the Project. The SSDEIR has taken the same plans submitted to the Fall River Conservation Commission in June 2004 and incorporated them into the SSDEIR at Appendix 7-1.

With regard to the Secretary's requirement that the plan include "rigorous provisions for monitoring to ensure that water quality standards are met during these processes," the SSDEIR once again fails to provide the documents upon which it relies. The SSDEIR states that the Project will be overseen by full-time, on-site environmental inspectors implementing the Commission's *Upland Erosion Control, Revegetation and Maintenance Plan* and *Wetland and Waterbody Construction and Mitigation Procedures*.

The provisions contemplated by these documents cannot, of course, be evaluated, as the documents are not included in the SSDEIR. While they may commonly be included in the technical library of an agency or an environmental scientist, it is farcical to expect that members of the public, who are vitally interested in these proceeding and who will be materially affected by the Project, have them readily available for reference and analysis. The SSDEIR approach to providing this vital information does not lend itself to any meaningful public review, which undercuts one of the basic requirements of MEPA.

Waterways/Chapter 91

[Page 11] In its comments on the DEIR, DEP questioned whether alternatives to cut-and-cover (open trenching) and horizontal directional drilling (HDD) were feasible for the proposed construction of the gas pipeline under the Taunton River. In response, the SDEIR stated that the presence of bedrock throughout the proposed alignment made pipe-laying alternatives such as plowing, jetting, and water-to-water or water-to-land HDD impracticable. Although DEP indicated that it will re-examine this issue during the permitting phase of the project, I am requiring that the SSDEIR provide a justifications for the preferred pipe-laying alternative(s).

The SSDEIR provides no new information and certainly no justification, as required by the Secretary, for the open trenching across the Taunton River. The SSDEIR expressly states that it is supplying a "synthesis of the earlier information on the subject." That is what is included at Appendix 9-3; a recycling of the information provided in Resource Report 6 and the DEIR. The Secretary found this earlier information to be inadequate, precipitating the above comment. Submitting the same information with a different date does not cure the deficiencies.

As set forth in Fall River's comments on the SDEIR, the Project embraces this alternative with minimal technical data and almost no fieldwork. It extrapolates geological conditions from literature that fails to even address the specific project areas to be subjected to open cut, including the Taunton River crossing.

Marine Fisheries

[Page 11] In the SSDEIR, the proponent should either commit to observing the time-of-year (TOY) restrictions suggested by NOAA Fisheries in its comment letter, or present models that are based on comprehensive and current data in order to justify the limited TOY restrictions proposed by the proponent. The [sic] SDEIR should also analyze alternatives to protect the downstream migration of anadromous fish between June 15 and October 31 of each year. DEP emphatically stated that appropriate TOY restrictions on dredging activities have been, and will continue to be, conditions of 401 Water Quality Certifications when such restrictions are required to protect and maintain existing fisheries in Mount Hope Bay and the Taunton River.

As discussed in some detail at pages 22 - 24 supra., the Project emphatically rejects the recommendations of NOAA/NMFS, as well as the DMF recommendations concerning diadromous fish migration. The Project does so without any additional justification. What the SSDEIR provides is excerpts of the same information offered in support of the ENF, the DEIR, and the SDEIR, information found woefully inadequate by NOAA/NMFS, EPA, DOI, DEP, and DMF. As with the storm water plan and the "justification" for open cut construction across the Taunton River, the Project has failed to respond and appears to believe that changing the date on an earlier, previously submitted report responds to the need for "comprehensive and current data."

Public Safety and Security

The SSDEIR is careful to exclude all of the information provided to the FERC concerning the enormity of the public safety and security issues raised by siting the Project in Fall River. It makes no reference to the fact that there is no practicable manner to protect a completely exposed population from the ravages of fire or explosion, attack or accident, that the transportation infrastructure, police, fire, and emergency services simply do not exist to address the risks presented by the Project, and that the Project has no means by which to ensure or mitigate against those enormous and deadly risks.

The Secretary is empowered under the MEPA statute to examine these issues, even if the Project refuses to identify their existence. Accordingly, included here at **Attachment 24**, are the expert opinions provided to the FERC, but excluded from any state consideration whatsoever. **Attachment 24** incorporates into the MEPA review the expert opinions of Dr. Jerry Havens concerning the quantification of the consequences of the release of hazardous materials into the environment; Dr. Harry H. West concerning the threat to public health and safety presented as

the result of grave deficiencies in the safety and systems analysis of the Project; Dr. Bruce S. Auerbach, MD, FACEP concerning the devastating health and safety consequences that would result from an accident or release of LNG on South Coast communities; Fall River Fire Chief David L. Thiboutot concerning the inability to respond or evacuate in the event of an LNG "pool" fire; Fall River Police Chief John M. Sousa concerning the inability to prevent or respond to an intentional attack on or a release from the Project; and Mayor Edward M. Lambert, Jr. concerning the consequences to the City of Fall River resulting from an accident or an attack on an LNG tanker or on the LNG terminal itself.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

An informed and careful review of the SSDEIR supports the following conclusions:

The Project described in the SSDEIR bears little resemblance to the Project for which the MEPA process was initiated in June 2003;

The Project Purpose articulated in June 2003 cannot be achieved and the Project described in the SSDEIR offers no benefit sufficient to offset the grave impacts it will impose on public health, safety, welfare, and the environment;

Material changes, which have been ongoing since, at a minimum, October 2004, have been concealed from public review and excluded from the MEPA process;

Material facts that would have significantly affected the scope of the MEPA process have been concealed;

The imposition of two independent fatal flaws, while excluded from public review by the SSDEIR, nonetheless render the Project functionally impossible;

The violation of state law requirements and performance standards either cannot or will not be remedied or addressed; and

Fundamental elements of the MEPA process; transparency; disclosure of all relevant information; affirmative identification of issues and constraints; have either been ignored or compromised;

The failure of the SSDEIR to respond to the issues and requirements articulated by the Secretary and the undercutting of fundamental MEPA requirements and goals make it impossible for the Secretary to find that the SSDEIR adequately and properly complies with the Massachusetts Environmental Policy Act (G.L. c. 30, ss 61 – 62H) and with its implementing regulations (301 CMR 11.00).

Recommendations

Based on the above conclusions, the City of Fall River offers the following recommendations:

The Secretary should terminate any further MEPA review of the Project until such time as the Project can demonstrate that:

1. It can fulfill a need and a purpose that justifies the imposition of significant, adverse impacts on human health, safety, welfare, and the environment;
2. It has overcome the fatal flaws imposed by the Wild and Scenic Rivers Act and SAFETEA-LU; and
3. It can demonstrate that has the ability and the will to fully comply with all relevant requirements of state law.

In the alternative, the Secretary should refuse to certify the SSDEIR and should find it deficient as to all of the elements commented on by the City of Fall River.

Following that determination, the Secretary should require the following:

1. Submission of a Notice of Project Change that fully and completely addresses the deficiencies identified in the City of Fall River comments;
2. Preparation and submission of either a new Environmental Impact Report or a Third Supplemental Draft Environmental Impact Report that incorporates fully the requirements of the Notice of Project Change and that includes, at a minimum, the following:
 - Full and complete information and data sufficient to respond to the Certificates issued by the Secretary on October 1, 2004, December 17, 2004, and December 16, 2005;
 - A demonstration that the fatal flaws imposed by the implementation of the Wild and Scenic Rivers Act and SAFETEA-LU have been resolved; and
 - A demonstration of the ability and will to fully comply with all relevant requirements and performance standards prescribed by state law.