

INTRODUCTION

In March 2004, Weaver's Cove Energy, LLC and Mill River Pipeline, LLC (collectively the "Project Proponents" or "Project") submitted applications to the United States Army Corps of Engineers ("USACE") under Section 10 of the Rivers and Harbors Act of 1899, Section 103 of the Marine Protection, Research and Sanctuaries Act, and Section 404 of the Clean Water Act (the "Applications") seeking permits to dredge, over a continuous, thirty-six (36) month period, approximately 3 million cubic yards¹ of contaminated sediments from the Taunton River and Mount Hope Bay and to fill or cross fourteen streams, 2.2 acres of inland vegetated wetlands, and .43 acres of coastal beach, coastal bank, salt marsh, and intertidal mud flats designated by the United States Environmental Protection Agency as Special Aquatic Sites.² The impacts of the proposed program will affect Essential Fish Habitat for fourteen (14) federally managed species,³ including winter flounder, *Pseudopleuronectes americanus* (Exhibit 8). The dredging will also result in the permanent loss of in excess of eleven acres of winter flounder habitat and eighty-five (acres) of quahog habitat.⁴

As the USACE considers the Applications under Section 10 of the Rivers and Harbors Act and section 404 of the Clean Water Act, the starting place is with the purpose of the proposed dredging. What is the dredging for, and will it accomplish that purpose? In this case, the USACE is faced with the anomalous situation where the proposed dredging would serve NO purpose, and therefore there would be no benefits to even partially offset the detriments caused by the dredging.

¹ The quantity of dredged material provided by the Project in the Application; 2.1 – 2.6 million cubic yards; is simply inaccurate, as was pointed out by the National Oceanic and Atmospheric Administration/National Marine Fisheries Service in its September 17, 2004 comments to the USACE. Applying the USACE protocols for calculating overdredge quantities, the proposed volume approximates 3 million cubic yards. This number was adopted in the FEIS, although these Applications have never been modified to reflect the difference in quantity.

² As discussed infra., the Taunton River and Mount Hope Bay are also considered Special Aquatic Sites by virtue of their outstanding value as irreplaceable natural resources.

³ Other species include haddock, red hake, windowpane flounder, Atlantic sea herring, American plaice, Atlantic mackerel, bluefish, summer flounder, scup, black sea bass, King mackerel, Spanish mackerel, and Winter skate.

⁴ The adverse impacts on diadromous species, water quality, and wetland resources will be discussed infra.

The claimed purpose of the dredging is to accommodate large LNG carriers, to serve the proposed marine terminal, but as the result of the enactment of the Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users (SAFETEA-LU), Pub.L. 109-59, on August 10, 2005, the large LNG carriers for which the dredging is designed will not be able to reach the site of the proposed terminal. SAFETEA-LU *requires* the preservation of the existing Brightman Street Bridge. Section 1948 provides:

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.

If the Project Proponents have some other means of delivering LNG to the site of the proposed terminal than by the use of the large LNG carriers for which the dredging program has been designed and which will not fit under or through the bridge's abutments, then they must come forward so that the substantiality and the environmental impact of any such alternative can be assessed.

A dredging program designed to accommodate one type of vessel should not go forward if the type of vessel is to be changed. If there is any alternative that would allow LNG to be delivered to the preferred Site in Fall River while the existing Brightman Street Bridge is maintained in place, then the Project Proponents must be required to put that alternative on the table and allow the public and the USACE itself adequate time to review the dredging program in light of the needs of that alternative delivery mechanism.

The City of Fall River believes that there is no practical alternative to those LNG carriers that will not fit under or through the existing bridge. The Project Proponents appear to be counting on a change of law to save the Project as proposed in the Applications. But unless and until there is a change in law, such plans are idle day dreams, and those reveries can not support any further consideration of the Applications.

The Applications should be dismissed. If the Project develops an alternative means for delivering LNG to the site of the proposed marine terminal, it should develop new permit applications, with a dredging plan tailored to the needs of any such alternative means of delivery. That new dredging plan, and any other changes in the overall proposed project (such as changes in the proposed frequency of LNG carrier deliveries, and changes in the configuration of the proposed terminal) should be the subject of a Supplemental Environmental Impact Statement, and they should be subjected to the full gamut of procedures to ensure adequate notice and opportunity for public comment.

Even if SAFETEA-LU were to be changed, and the existing Brightman Street Bridge were to be demolished, the USACE could not issue the permits required for dredging the Taunton River and Mount Hope Bay, for all the reasons discussed below.

BACKGROUND

When the Applications were initially filed, the preferred option for disposal of the contaminated dredged material was upland placement, at the proposed terminal site. Since that time, the Project has completed a Tier III Testing Program to evaluate the possible use of the Massachusetts Bay Disposal Site and the recently-designated Rhode Island Sound Disposal Site for offshore disposal, with a remaining 60,000 cubic yards of contaminated material to be disposed, as of this writing, at an unidentified upland location.⁵

In September 2004, the Federal Energy Regulatory Commission (the "Commission") and the USACE conducted a joint public hearing on the Commission's Draft Environmental Impact Statement/Draft Environmental Impact Report ("DEIS") and the Applications.⁶ In May 2005, the Commission issued its Final Environmental Impact Statement ("FEIS").

⁵ The physical and chemical characteristics of the proposed 60,000 cubic yards destined for upland disposal and distinct from the material proposed for offshore disposal, have not been characterized, nor has the manner in which this material will be managed, de-watered, treated, stockpiled, or transported for disposal. The USACE may draw on its unprecedented experience with upland management and disposal of contaminated dredged materials to conclude that this deficiency alone makes any determination of administrative completeness problematic.

⁶ The DEIS also served as the DEIR under the Massachusetts Environmental Policy Act ("MEPA") statute, G.L. c. 30, §§ 61 – 62H. The Secretary of the Massachusetts Executive Office of Environmental Affairs found the DEIS to be inadequate and required both a Supplemental Draft Environmental Impact Report ("SDEIR") and a Second Supplemental Draft Environmental Impact REPORT ("SSDEIR").

On November 1, 2005, the USACE issued a Revised Public Notice, based on changes proposed to the configuration of the Project and consideration of the offshore disposal option. The primary focus of the Revised Public Notice and comment period was the proposed dredging program and the impacts on the aquatic environment and waters of the United States.

On December 27, 2005, the USACE issued a second Revised Public Notice, extending the public comment period for the Applications from December 23, 2005 through February 8, 2006. The following comments are offered by and on behalf of the City of Fall River, Massachusetts.

DETERMINATION PROCESS

The decision whether to issue the permits requested by the Project Proponents is to be based "on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 CFR § 320.4(a)(1). To facilitate its mission, the USACE has developed policies and decision-making strategies for evaluating projects designed to identify those projects that are clearly infeasible for development as early as is practicable in the process over which the USACE has control. Application of these policies and strategies allows the USACE to devote public resources to those projects that will provide the greatest benefits and to reduce unnecessary process.

One such policy is the development of evaluation criteria, specific parameters that will screen out those projects that are infeasible for development and unlikely to achieve stated project purposes. Evaluation criteria are generally relative indicators of performance. However, some evaluation criteria, called Exclusion Criteria, are "absolute" or conditions constituting a "fatal flaw" that will simply make it technically or practically impossible for the Project to proceed. Exclusion Criteria must be met for any alternative to be carried forward for further consideration.

Working in tandem with evaluation criteria and, in particular, with the Exclusion Criteria, is the so-called, "Decision Rule." The Decision Rule documents what constitutes sufficient information to make a determination. The Rule is structured as an "IF, THEN" statement, with

the "IF" portion setting the conditions which, if encountered, will result in the action prescribed in the "THEN" portion.⁷

CONCLUSIONS NECESSARY TO SUPPORT FURTHER REVIEW OF THE APPLICATION

Applying these decision-making policies, the City of Fall River offers three "IF, THEN" statements for the USACE's consideration:

IF the Project Fails to Meet Applicable Site Exclusion Criteria, THEN the USACE should deny the Application;

IF the Project Cannot Demonstrate that It is the Least Environmentally Damaging, Practicable Alternative to Fulfilling the Stated Purpose of Providing a New Source of Liquified Natural Gas to New England, THEN the USACE should deny the application;

IF the Project Imposes Foreseeable Detriments that Outweigh Foreseeable Benefits, THEN the USACE should deny the application.

INCORPORATION OF PRIOR PUBLIC COMMENTS, TESTIMONY, AND DETERMINATIONS

The Project has undergone several rounds of public review and comment on the federal and the state level, including a public hearing jointly hosted by the Commission and the USACE on September 8 and September 9, 2004. In addition, the Commission docket (CP04-36-000, CP04-41-000, CP04-41-000, and CP04-42-000) includes highly relevant, technical testimony and analysis that has not, heretofore, been included in the record of the USACE. The response to these opportunities for public review and comment and considerations laid before the Commission includes significant, thoughtful comments written by United States Senators, United States Congressional Representatives, federal agencies (*e.g.*, the United States Environmental Protection Agency; the United States Department of the Interior; the National Oceanic and Atmospheric Administration/National Marine Fisheries Service ("NOAA/NMFS")); state agencies

⁷ **Principles of Environmental Restoration and Their Application to Streamlining Initiatives; U.S. Army Environmental Center (August 9, 2000)**. This approach is also memorialized in the December 17, 2004 regulatory Standard Operating Procedures for Processing Liquified Natural Gas Projects (SOP). Unfortunately, the NEPA process, with the Commission as Lead Agency, commenced prior to the adoption of the SOP and the establishment of the requisite checkpoints for concurrent review, which did not occur during the review of the WCE Project by the Commission. The USACE has the opportunity to expediently rectify the deficiencies in the NEPA process and achieve the goals of the SOP by either denying the Applications for insufficient information to address the RHA/CWA Section 404(b)(1) Guidelines (SOP at page 2) or by initiating the development of a Supplemental Environmental Impact Study.

(*e.g.* the Massachusetts Office of Coastal Zone Management; the Massachusetts Department of Environmental Protection; the Massachusetts Division of Marine Fisheries); the Attorneys General of Massachusetts and Rhode Island; non-governmental organizations (*e.g.* the Conservation Law Foundation); municipal governments and regional planning agencies in Massachusetts and Rhode Island; business groups, and private citizens.

Rather than re-stating the issues, concerns, expert opinions, and conclusions about the overwhelming detriments to human health safety, welfare, and the environment that will be imposed by the Project and the correspondingly meager public benefit it may offer, the City of Fall River is expressly incorporating specific comments, and testimony, as they are relevant, into the instant submission. This will ensure that the USACE has the full benefit of the information that has been compiled in many diverse and technically significant forums and that the record before the USACE is complete. These comments and submissions include the following:

Exhibit 1: September 20, 2004 City of Fall River Comments to the Federal Energy Regulatory Commission In Response to the WCE Draft Environmental Impact Statement;

Exhibit 2: September 24, 2004 City of Fall River Comments to the Commonwealth of Massachusetts Executive Office of Environmental Affairs In Response to the WCE Draft Environmental Impact Report;

Exhibit 3: December 7, 2004 City of Fall River Comments to the Commonwealth of Massachusetts Executive Office of Environmental Affairs In Response to the WCE First Supplemental Environmental Impact Report;

Exhibit 4: August 15, 2005 Request for Rehearing and For Oral Argument submitted to the Commission in Docket Numbers CP04-36-000, CP04-41-000, CP04-42-000, CP04-43-000 by the City of Fall River, Massachusetts, 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;

Exhibit 5: December 9, 2005 City of Fall River Comments to the Commonwealth of Massachusetts Executive Office of Environmental Affairs In Response to the WCE Second Supplemental Draft Environmental Impact Report;

Exhibit 6: September 20, 2004 comments submitted to the Commission by the United States Environmental Protection Agency;

Exhibit 7: December 9, 2005 Comments submitted to the Massachusetts Executive Office of Environmental Affairs by the Conservation Law Foundation;

Exhibit 8: December 2005 Comments Submitted to the Massachusetts Executive Office of Environmental Affairs by the Massachusetts Division of Marine Fisheries.

Exhibit 9: January 6, 2006 interview broadcast by Weaver's Cove Energy, LLC on Radio Station WSAR – Fall River, MA.

Exhibit 10: Commissioner Suedeen G. Kelly, Dissenting from the Commission Order dated July 15, 2005.

Exhibit 11: Commissioner Suedeen G. Kelly, Dissenting from the Commission Order dated January 23, 2006.

THE PROJECT CANNOT MEET APPLICABLE SITE EXCLUSION CRITERIA

In April 2005, WCE provided to the Massachusetts Office of Coastal Zone Management its Exclusion Criteria, the minimum acceptance characteristics any proposed site must meet to warrant further consideration (Exhibit 5, Attachment 14).

The Exclusion Criteria required any site considered to be a practicable alternative to exhibit, at a minimum, the following physical and geographical attributes:

Channel Depth – a minimum of 35 feet (or more if suitable tidal ranges were not present), attainable with approximately up to a dredge requirement of two (2) million cubic yards. [emphasis added]

Airport proximity – Requires air draft (vertical clearance) of at least 135 feet and horizontal clearance of not less than 165 feet.

Distance to Pipeline – Site within reasonable distance of a minimum 20-inch high pressure pipeline connected to the New England pipeline grid.

Developed port area – Site fell within an existing developed port area.

Bridge Access – Requires air draft (vertical clearance) of at least 135 feet and horizontal clearance of not less than 165 feet. [emphasis added]

The preferred Site in Fall River cannot meet the **Channel Depth** criterion. Even applying the under-estimated volume of 2.4 to 2.6 million cubic yards adopted in the FEIS rather than the 3 million cubic yards the Project could actually generate, this quantity of contaminated dredged material exceeds the criterion.

As set forth extensively in the public hearing testimony provided to the USACE on December 14, 2005 by the City of Fall River and others, and as further discussed in detail in Exhibit 5, pages 13 – 15, the **Bridge Access** criterion cannot be met. The Brightman Street

Bridge, with a vertical clearance of 28 +/- feet above mean high water and a horizontal clearance of only 98 feet, is literally the immovable object defeating any traversing of the Taunton River by LNG tankers to the preferred Site in Fall River.

THE PROJECT CANNOT DEMONSTRATE ITSELF TO BE THE LEAST ENVIRONMENTALLY DAMAGING PRACTICABLE ALTERNATIVE

The Performance Standards Established by the 404(b)(1) Guidelines Require Denial of the Applications

As set forth in **40 CFR Part 230: Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material** (the "Guidelines"), the USACE is charged with the obligation to maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material. The Guidelines are driven by the precept that:

dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known or probable impacts of other activities affecting the ecosystems of concern.⁸ From a national perspective, the degradation or destruction of special aquatic site, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.⁹

⁸ 40 CFR § 230.1(c)

⁹ 40 CFR § 230.1(d)

The National Value of the Taunton River and Mount Hope Bay, As Recognized by the Department of the Interior and the Environmental Protection Agency, Must Be Accorded Due Weight in Any Evaluation of Project Impacts to the Aquatic Environment

The unique value of the Taunton River, designated for study under the National Wild and Scenic Rivers Act, Section 7(b),¹⁰ was underscored in this proceeding by the United States Department of the Interior's ("DOI") comments to the Commission on July 5, 2005. DOI stated as follows:

[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. Exhibit 5, Attachment 13, at 1.

Further commenting, the DOI stated:

In the absence of satisfactory fishery resources 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... The relevant State and Federal fishery agencies, in their comments on the DEIS, have indicated that there may be unavoidable adverse site impacts related particularly to the enlargement of the turning basin and development of the Weaver's Cove site. These include the permanent loss of 11 acres of winter flounder habitat and 1.15 acres salt marsh and intertidal/subtidal habitat. The FEIS appears to agree that these impacts to this portion of the Taunton River are unavoidable. Exhibit 5, Attachment 13, at 3.

On February 1, 2006, the Environmental Appeals Board ("EAB") of the United States Environmental Protection Agency ("EPA"), issued its Remand Order *In re: Dominion Energy Brayton Point, L.L.C. (Formerly USGen New England, Inc.) Brayton Point Station*; NPDES Permit No. MA0003654 (Slip Opinion); NPDES 03-12 ("decision"); concerning Brayton Point's request for review of its final National Pollutant Discharge Elimination Permit (NPDES Permit). This EAB decision is highly relevant to the analysis the USACE must perform concerning the scope and extent of impacts to the aquatic environment weighed against possible benefits from the Project, the existence and practicability of alternatives, the fragile nature of the Mount Hope Bay ecosystem, the deplorably degraded and devastated condition of the stressed winter flounder

¹⁰ Contrary to the assertions of the Project Proponents, a river designated for study under § 1278(a) of the Wild and Scenic Rivers Act is afforded the same protection and is ascribed the same value as a river that has been designated for inclusion in the Wild and Scenic Rivers program implemented by DOI. Hughes Watershed Association v. Glickman, 81 F.3d 437, 449 (1996).

population, and the extent of adverse impacts, including the quantitative effect of the impacts imposed upon Mount Hope Bay.

In affirming almost every aspect of the EPA's NPDES permit, including the requirement for Best Technology Available, which incorporates the same performance standards as the Guidelines,¹¹ the EAB questioned the validity of the USGenNE 1999 Study¹² relied upon in the FEIS at 4-304, incorporated the EPA July 22, 2002 Determinations concerning the significantly degraded condition of Mount Hope Bay, and adopted the EPA's conclusions concerning the continuing and massive decline of fish populations in Mount Hope Bay resulting from anthropomorphic impacts:¹³

As a requirement of previous permits, Brayton Point Station has been required to collect finfish abundance data from several fish trawl stations in Mount Hope Bay... In 1996, Mark Gibson of RI DFW issued a final report which brought information from these sampling efforts together and looked at the historical trends in fish abundance in Mount Hope Bay. **Gibson's report painted a bleak picture of the condition of most of the fish stocks in Mount Hope Bay. In 16 of the 21 species examined, the rate of decline in Mount Hope Bay was greater than in adjacent Narragansett Bay. Winter flounder abundance in Mount Hope Bay declined from an average of approximately 34 fish/tow in 1972 to 1984 to 2 fish/tow from 1985 to 1998.** [emphasis added]

The EAB also determined, in its evaluation of the integrity of the cost/benefit analysis conducted by EPA; which is analogous in intent and application to the public interest analysis the USACE must perform; that while the additional requirements for facility retrofitting and the use of Best Technology Available would cost up to \$ 120.2 million dollars which would inexorably fall on Brayton Point ratepayers, the impacts on the Mount Hope Bay estuarine ecosystem; huge decreases in fisheries viability and productivity; outweighed the economic impacts.¹⁴

¹¹ 40 CFR § 230.1(a).

¹² The EAB determined that the population modeling performed for this study significantly underestimated the impacts of the Brayton Point discharges alone and cumulatively and overestimated the abundance of winter flounder populations at all life stages.

¹³ Decision at 2, 3, 158 – 160, 206 – 206, 210 – 211.

¹⁴ Decision at 7 – 8.

The Commission's Delegation of Major Components of the FEIS to the USACE Leaves the Record Bereft of the Data Necessary to Process the Applications in Accordance with the Guidelines

The Commission concluded that the Project would not result in significant adverse impacts to outstanding national aquatic resources.¹⁵ It did so acknowledging that significant information concerning the development of the dredging program, the staging, management, treatment, and disposal of contaminated dredged materials, and the determinations concerning the mitigation of the overall impacts of the Project on the Taunton River and Mount Hope Bay had not been included in the FEIS, but would be left to the USACE in this proceeding. The Commission delegated this NEPA requirement over the emphatic objections of the EPA and other federal and state natural resource agencies. Exhibit 5, Attachments 13, 19, 20, 21, 22; Exhibit 6.

In addition, the Commission, in the parlance commonly adopted within the energy industry, "hedged" its own determination. The Commission acknowledged in its July 15, 2005 Order¹⁶ that a significant amount of information would need to be developed prior to actual construction of the Project and again delegated this obligation to the USACE. In turn, EPA found this deferral inappropriate and cautioned that, as a result, the USACE would likely be required to undertake a supplementary Environmental Impact Statement ("SEIS") before it would be able to reach a permit decision (Exhibit 5, Attachment 19).

The USACE is obligated under the Guidelines to deny any permit for the discharge of dredged or fill material if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

The Commission's deferral of this fundamental question has left the USACE with two possible courses of action: It can deny the Applications or it can require the development of an SEIS that provides the information necessary for the USACE to make a defensible determination

¹⁵ The deficiencies apparent in the Commission's analysis were commented on by the EPA (Exhibit 7, ADC-13).

¹⁶ The Commission re-stated this position in its January 26, 2006 Order.

under the Guidelines.¹⁷ Whether the Commission can defer making its own determination is dubious; see Calvert Cliffs Coordinating Committee v. Atomic Energy Commission; 449 F.2d 1109, 1123 (DC Cir. 1971), but it is perfectly clear that the USACE cannot.

The USACE has a nondelegable obligation to determine for itself whether the Project has demonstrated that it meets the performance standards prescribed by the Guidelines.

The Project Will Violate Virtually Every Requirement of the Guidelines

Practicable Alternatives Requirement:

The Guidelines § 230.10(a)(2); provide that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem. An alternative is considered practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Additionally, the Guidelines prescribe that present ownership, management, or control is not determinative. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be considered.

The Project, as set further in further detail in the December 9, 2005 comments of the Conservation Law Foundation (Exhibit 7, at pages 6 – 9) as well as the comments of the City of Fall River (Exhibit 5, pages 9 -11, 25 – 27, Attachments 9, 10, 11, 12) ensured that other, practicable alternatives would be eliminated at the outset through the selection of criteria that would guarantee the only site to be considered was the preferred Site in Fall River. The Project,

¹⁷ It is worthwhile to note, as an illustration of the extent to which the Commission failed to respond to the comments of the agencies charged with the stewardship of natural resources, that among the many, significant data gaps and deficiencies, the FEIS failed to respond to a September 17, 2004 comment made to the Commission by the USACE:

5. The need for an alternative that provides both a storage component as well as LNG truck delivery to other LNG storage facilities should be expanded in the project purpose section of the EIS. This would aid our determination of the least environmentally damaging practicable alternative that satisfies the basic project purpose. (page 2)

This comment expressly articulated the USACE's duty to make this determination and requested the information necessary for that determination. A review of the Statement of Project Purpose and Need; FEIS at 1.3, pages 1-5 through 1-9, is bereft of any information responsive to the USACE's comment.

at the outset, dismissed any otherwise practicable site over which it did not have ownership or control, with no consideration given to how such control could be obtained.

The Project also summarily rejected any consideration of disconnecting components such as storage capacity and truck access, as is demonstrated in its rejection of the Northeast Gateway (Accelerate Energy) Project and its complete disregard for the September 17, 2004 USACE comment described at footnote 17, supra.

Finally, the Project disregarded its own Exclusion Criteria after the preferred Site in Fall River would have, and should have, been excluded from further consideration, in light of the excessive quantity of dredged material to be generated and the enactment of SAFETEA-LU which preserved and required the improvement and enhancement of the Brightman Street Bridge as a pedestrian and bicycle pathway and as an emergency service route spanning the Taunton River.

The Project simply fails to comply with a fundamental requirement for full and fair consideration of alternatives to imposing severe and irreversible impacts on Special Aquatic Sites of national value.

Accordingly, the USACE may act in one of two ways. It may deny the Applications outright or it may require the development of a SEIS that satisfies the Guidelines. As set forth in relevant part at § 230.10(a)(4):

For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph **or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information** [emphasis added].

Water Quality Requirements and Toxic Effluent Standards:

The Guidelines § 230.10(b)(1) and (2); provide that no discharge of dredged or fill material shall be permitted if it causes or contributes to violations of any applicable State water quality standard or violates and applicable toxic effluent standard or prohibition under Section 307 of the Clean Water Act.

The Project will violate state water quality standards in Massachusetts and Rhode Island and it will violate applicable toxic effluent standards for, at a minimum, copper and zinc. These conclusions were not made unilaterally by the City of Fall River. They were drawn by the Commission in the FEIS at 4-72; Exhibit 5, Attachment 17 at 4-41; and by EPA in Exhibit 5, Attachment 19, and Exhibit 6.

The FEIS also states that, while both water quality standards in two states as well as toxic effluent standards would be violated as the result of dredging activities, the impacts would be localized and likely diluted downstream of the dredging (*i.e.*, somewhere in Mount Hope Bay).

There is no argument about these impacts. Accordingly, the USACE must deny the Applications.

Prohibition on Activities Resulting in Degradation of Waters of the United States:

The Guidelines § 230.10(c); provide that no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. When considering a finding of significant degradation, the Guidelines require consideration of effects upon physical substrate; water circulation, fluctuation, and salinity determinations; suspended particulate/turbidity determinations; contaminant determinations; aquatic ecosystem and organism determinations, proposed disposal site determinations; determination of cumulative effects on the aquatic ecosystem; and determination of secondary effects on the aquatic ecosystem.

The Project will contribute to the significant degradation of waters of the United States unique both in their value and in the irreversible character of their loss. Virtually every participating natural resource agency that has reviewed the FEIS has concluded that the impacts upon the physical and chemical characteristics of these waters, upon the struggling finfish and shellfish populations, upon 200 acres of subtidal habitat, upon on fourteen estimated finfish habitats, upon overall water quality, upon the integrity of the affected ecosystems, and upon the future survival of these ecosystems, are significant and potentially permanent (Exhibit 5, Attachments 13, 19, 20, 21, 22, and 23, and Exhibit 6).

To articulate these conclusions within the language of the Guidelines, the Project will impose significant, adverse effects on:

- human health and welfare, including effects on plankton, fish, shellfish, and aquatic species;

- life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;

- aquatic ecosystem diversity, productivity, and stability including loss of essential fish habitat; and

- recreational aesthetic, and economic values.

Accordingly, the USACE must deny the Applications.

Requirement for Minimization of Potential Impacts:

The Guidelines § 230.10(d); provide that no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic system. Such steps include actions that will minimize smothering of organisms; benthos and finfish at all life stages; adopting dredging windows appropriate to all life stages of affected populations; limiting the introduction of invasive species; limiting the entrainment/impingement of ichthyoplankton; and adopting mechanical and seasonal practices to avoid and minimize impacts on water quality. § 230.70.

As set forth by Weaver's Cove itself in its comments on the FEIS, the Project refuses to:

Consider sediment modeling inputs that would minimize the impacts on habitat, benthos, shellfish, and diadromous species, as recommended by the National Oceanic and Atmospheric Administration/National Marine Fisheries Service (“NOAA/NMFS”) and the Massachusetts Division of Marine Fisheries (“DMF”) (Exhibit 5, Attachments 20 and 21 and Exhibit 8); or

Consider the dredging windows recommended by EPA, NOAA/NMFS, and DMF.

The Project has rejected out-of-hand the concerns and proposed minimization actions recommended by EPA to limit the introduction of invasive species into the severely stressed aquatic environment of the Taunton River and Mount Hope Bay.

The Project has rejected the recommendations of EPA, NOAA/NMFS, and DMF concerning the appropriate mechanical and seasonal practices necessary to ensure that adverse impacts will be limited.

The Project offers no justification or argument; it simply will not consider the steps necessary to minimize the egregious impacts it will impose upon aquatic resources.

Accordingly, the USACE must deny the Applications.

ANY FORESEEABLE BENEFIT OF THE PROJECT WILL BE OUTWEIGHED BY THE SCOPE AND EXTENT OF PERMANENT ADVERSE IMPACTS ON THE PUBLIC INTEREST

Under the USACE regulations codified at 33 CFR § 320.4(a) **Public Interest Review**, the USACE must conduct an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. The regulations provide a suggested list of factors to be evaluated, but all factors must be considered not as a snapshot in time, but on a continuum that incorporates past, present, and reasonably foreseeable impacts.

Cumulative Impacts Analysis

Prior to analyzing the appropriate public interest factors, some discussion of the Cumulative Impacts Analysis embodied in the FEIS is warranted. The Cumulative Impacts Analysis, as with earlier omissions and deferrals presumed by the FEIS, is fundamentally deficient because it adopts, erroneously, the following working assumptions:

- (1) existing conditions, such as significant degradation of aquatic resources, serve to excuse further degradation that will be imposed by the WCE Project;¹⁸ and
- (2) known anthropogenic stressors set the baseline for additional anthropogenic impacts; i.e. existing projects such as Brayton Point are already degrading the aquatic environment and the WCE Project may not be as destructive as Brayton Point.¹⁹

FEIS at 4-297 through 4-305.

The FEIS thus turns the cumulative impacts²⁰ analysis on its head. Instead of serving as a basis, as it should, for limiting additional impacts because of the impacts of earlier projects or activities, it becomes a rationale for “anything goes.”

The USACE Must Consider All Factors Relevant to a Particular Project When Engaging in Public Interest Review, Including the Likelihood that the Project Can or Will Be Constructed

Earlier in these comments, the City of Fall River discussed the decision-making policies of the USACE, in order to provide some context for further evaluation of the Project and to question whether, at the outset, additional public resources should be invested in a Project that has no likelihood of fulfilling the stated project purpose.

¹⁸ Using the current, degraded condition of a resource does not adequately represent how actions have impacted resources in the past and present or how resources might respond to future impacts. Designating existing environmental conditions as a benchmark may focus the environmental impact assessment too narrowly, overlooking cumulative impacts of past and present actions or limiting assessment to the proposed action and future actions. **Consideration of Cumulative Impacts in EPA Review of NEPA Documents (EPA 315-R-99-002/May 1999, at 13 – 15).**

¹⁹ The use , as a baseline, of an environmental condition already substantially degraded by years of development in a heavily urbanized setting to assess the impacts of sediment dredging and disposal would prevent the analysis to recognize the full extent of the degradation and would possibly underestimate the actual impacts of the proposed action. **Id. at 16 – 17.**

²⁰ As defined in the CEQ regulations, 40 CFR § 1508.7, “cumulative impact” is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

The Project cannot proceed unless the SAFETEA-LU legislation is somehow nullified. Despite the emphatic protests and assurances made by the Project Proponents that the physical existence of the Brightman Street Bridge provides no impediment to 185 feet wide LNG tankers attempting pass through 98 feet balustrades, NOTHING has been offered to support this absurd proclamation. The USACE should quantify and incorporate the time, effort, and costs to taxpayers, as well as the chilling effect upon other, more plausible energy projects, resulting from devoting resources to a technically impossible project. If and when the existing Brightman Street Bridge somehow disappears, then and only then should the USACE review the Applications in full. Until then, however, the regulations direct that this consideration be factored into the public interest analysis, with the result that the Applications should be denied without further delay.

Setting aside for a moment the current, physical presence of the Brightman Street Bridge spanning the Taunton River, the USACE must consider another factor, just as significant to the public's realizing a new source of clean energy in New England. Reasonable, practicable alternatives to this Project exist and are underway, in several instances well ahead of this Project. The Northeast Gateway Project, the Neptune LNG Project, and the expansion of the Maritimes and Northeast Pipeline to accommodate the 1.5 bcf, contracted-for output of the LNG projects already under construction in the Canadian Maritimes, will probably seize and dominate the New England market well ahead of this Project (Exhibit 5, Attachments 9, 10, 11, 12) but in any event practical alternatives clearly do exist – alternatives that will not inflict the harms that this Project does.²¹

²¹ On January 6, 2006, Mr. James Grasso, a representative of Weaver's Cove Energy, gave an early morning interview on a South Coast radio station, 1480 (AM) WSAR. During that interview, he described the necessity for expeditiously constructing the Project in terms that invoked looming disasters, including a vulnerable population left without heat or electricity. Mr. Grasso asked "How will the elderly people survive... with this kind of a situation? We need the natural gas energy now."

The "situation" to which the representative was referring was his assertion that the Independent System Operator, ISO-NE, would be initiating rolling black-outs that would affect hundreds of thousands of people, because New England did not have enough natural gas to endure the winter heating season.

The fear evoked by these statements was felt in the Office of the Mayor that very morning, through the receipt of dozens of panicked telephone inquiries, primarily from elderly residents. In order to assuage these concerns, the radio station broadcast a response that very afternoon. The City of Fall River is providing, for inclusion in the record with these comments, a CD of portions of this interview (Exhibit 9) provided by the radio station. Deliberately trying to provoke fear

The Significant Adverse Impacts to the Aquatic Environment and Natural Resources Imposed by the Project Significantly Overshadow the Possible Benefit Suggested in the Project Purpose

The USACE regulations at 33 CFR § 320.4 provide that the USACE consider the benefits that may reasonably accrue from a project and then balance those against reasonably foreseeable detriments.

The impacts to the aquatic environment - wetlands, fish and wildlife, and water quality - have been discussed as part of the analysis of the 404(b)(1) Guidelines and are further analyzed in Exhibit 4 at Attachment 1, Exhibit 5 at Attachments 13, 17, 18, 19, 20, and 21, Exhibit 6, Exhibit 7, and Exhibit 8. The following comments address the egregious impacts and the potential for devastating harm to the City of Fall River and the South Coast that must be considered by the USACE.

The Project Presents a Potential for Irreversible and Devastating Impacts to Human Health and Public Safety

The USACE is obligated to use the information developed by the U.S. Coast Guard as well as the FEIS developed by the Commission to set the baseline for its analysis of safe vessel transit and facility operations. However, the USACE is authorized and, indeed, is obligated to consider all information that is relevant to the proposal, including the cumulative effects thereof, in its public interest analysis, as prescribed by 33 CFR § 320.4.

The following information, the full text of which is incorporated in Exhibit 4, Attachments 2 and 3, and Exhibit 5, Attachments 24.1, 24.1A, 24.2, 24.3, 24.4, 24.5, and 24.6, was not considered by either by the U.S. Coast Guard or by the Commission during the development of the FEIS and is not included in the record of the FEIS.

As eloquently described in Exhibit 4, at pages 37 – 40, the Project “presents the paradigm of a high-consequence event.” The proposed siting of this Project in a densely populated urban area; within ½ mile of residents physically or economically unable to remove

and panic through the dissemination of such misleading information by the Project is completely antithetical to the public interest.

themselves from this threat (*i.e.* the elderly population at which the Project's representative directed his dire radio warning of rolling black-outs) and the dismissal of the plain truth that there is no way in which to avoid or minimize the devastating human consequences in the event of a release, or terrorist incident²² is hardly in the public interest.

The USACE has the means and the obligation to nullify the potential for the most extreme and egregious impacts to public health and public safety, and to address the needs and welfare of the people, as required by 33 CFR § 320.4. As further described in the expert testimony included in Exhibit 5, Attachments 8, 24.1, 24.1A, 24.2, 24.3, 24.4, 24.5, and 24.6, the USACE may avoid, minimize, mitigate, and altogether remove the potential for these extreme, adverse impacts by denying the Applications outright or by directing the Project to consider the siting alternatives summarily rejected in the Alternatives Analysis engaged in by the Project.

The Project is Antithetical to the Long-Term Socio-Economic Health and Development of the City of Fall River and of the Region

The impacts upon the cultural value, recreational resources, land use and redevelopment, and the economic viability of the City of Fall River and the greater South Coast region were the subject of public comments submitted during the December 14, 2005 and December 15, 2005 public hearings conducted by the USACE in Fall River, Massachusetts and Bristol, Rhode Island. As with the expert information and conclusions concerning public safety, the devastating impacts of an LNG "incident," the impossibility of developing an evacuation plan or providing the police, fire, and medical resources required to respond to a spill, accident, or attack, the U.S. Coast Guard and the Commission did not consider or include in the FEIS the expert information available concerning the cultural and socio-economic impacts the Project will impose on the City of Fall River and the region as a whole.

²² Exhibit 4, page 49, quoting the Commission's July 15, 2005 Order (para. 84):

Unlike accidental causes, historical experience provides little guidance in estimating the probability of 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 the 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.

As set forth in greater detail in Exhibit 4, Attachment 2, pages 2 – 6, if this Project is allowed to proceed, the City of Fall River will be irrevocably locked into permanent economic decline. The Project will promote an exodus of the population, leaving those behind with ever-increasing economic burdens, a deteriorating quality of life, loss of jobs, a dwindling manufacturing base, and sub-standard public services and infrastructure.

The City of Fall River already faces the burden of a resident population where only 54.6% has attained a high school degree, contrasted to the state average of 84.8% and a median income that ranks as one of the lowest in the Commonwealth. Fall River's median household income in 2000 was \$ 29,014, as compared to the State average of \$ 50,502. Fall River must be allowed to retain its existing population and attract new residents, which form the basis for adding jobs, expanding the education and skills base, and fueling redevelopment. The Project will ensure the reverse and will permanently deprive this area of any hope for a better future.

The basis for economic and social revitalization in the old industrial, primarily first generation immigrant communities of the Commonwealth rests in their ability to re-vitalize their waterfronts. Without that critical component -- the lynchpin of the City of Fall River's redevelopment strategy -- this region will become the permanent "dumping ground" that the public interest analysis is intended to prevent. This effect will not be limited to the City of Fall River, but will inevitably affect the surrounding communities and businesses in Somerset, Swansea, Freetown, Tiverton, and Bristol. This Project, quantitatively and qualitatively, represents the social and economic ruin of this region.

CONCLUSIONS

At the outset, the City of Fall River posed three, IF, THEN statements for the USACE's consideration:

IF the Project Fails to Meet Applicable Site Exclusion Criteria, THEN the USACE should deny the Application;

IF the Project Cannot Demonstrate that It is the Least Environmentally Damaging, Practicable Alternative to Fulfilling the Stated Purpose of Providing a New Source of Liquefied Natural Gas to New England, THEN the USACE should deny the application;

IF the Project Imposes Foreseeable Detriments that Outweigh Foreseeable Benefits, THEN the USACE should deny the application.

The Project unquestionably fails to meet applicable Exclusion Criteria and never should have been considered at the preferred Site in Fall River.

The Project presents a scope and extent of environmental damage that cannot, based on any reasoned analysis, meet any of the standards required by the USACE. This promise of environmental damage has not been tempered by any credible consideration of practicable alternatives and has been amplified by a refusal to consider reasonable avoidance, minimization, or mitigation proposals.

The Project virtually guarantees significant, foreseeable, and entirely avoidable detriments and fails to offer more than an incredible promise of a benefit that cannot be supplied, by a Project that cannot be constructed.

Commissioner Suedeen G. Kelly, one of the three sitting Commissioners at the Federal Energy Regulatory who voted on the Project on both July 15, 2005 and January 23, 2006, dissented from the July 15, 2005 Commission Order and reiterated that dissent on January 23, 2006.

Cognizant that the Commission's mission and standards were quite different from those embraced by the USACE, Commissioner Kelly still believed this project to be ill-advised, even

within the purview of the Commission's primary statutory objective to certificate energy projects as expeditiously as possible. According to Commissioner Kelly's July 15, 2005 dissent:

There are numerous gas infrastructure projects proposed to serve the New England region that present reasonable alternatives to the Weaver's Cove facility; [emphasis added] Exhibit 10, at page 2.

With regard to public health and safety:

This Project raises significant, unresolved safety issues, especially in the event of an intentional breach of an LNG vessel as it passes by densely populated shoreline communities en route to the LNG import terminal in Fall River; Exhibit 10, at page 3;

Further, I believe that the lack of adequate emergency resources and the need for evacuation within a short time interval, in the event of an LNG cargo release, present serious obstacles to creating a viable Emergency Plan and evacuation plan; Exhibit 10, at page 3;

The FEIS concludes that "[s]ome areas of development along the shoreline in the path of the LNG vessel transit in Rhode Island and Massachusetts could be within a potential transient hazard area, while parts of North Fall River would be exposed to a potential hazard while the LNG vessel is at the dock and unloading cargo." I agree with this assessment, and it is a significant concern to me; Exhibit 10, at page 4;

Specifically, the FEIS states that, assuming an LNG vessel transits the Taunton River at 3 knots while under tug assist, the adjacent communities located within a 4,340 to 4,810-foot distance to the 1,600 Btu/ft²-hr thermal radiation level for a 2.5 and a 3-meter diameter hole would be exposed to a potential transient hazard "for less than 30 minutes." While transiting the East Passage to Sandy Point at 10 knots, the transient hazard to shoreside communities would be "less than 10 minutes." A temporary hazard would also exist around the ship during part of the 10- to 12- hour period while the LNG vessel is at the dock and unloading cargo. For a spill in the vicinity of the dock, approximately 1,600 to 2,100 buildings, including single-family residences and multi-family units, would be within the temporary hazardous area. Also located in this area are an elementary school a rehabilitation and nursing center, a public housing project, an apartment building and a MassHighway facility. I find the length of these exposures to people along the transit route and the vicinity of the dock to be unacceptable; Exhibit 10, at page 4;

This order requires Weaver's Cove to develop emergency evacuation routes for the areas along the route of the LNG vessel transit prior to construction and to develop an initial Emergency Response Plan, including evacuation, prior to initial site preparation, in cooperation with local groups. However, in light of the proposed transit of the LNG vessel past densely populated shoreline communities and well-traveled bridges, local officials' concerns about the lack of adequate emergency resources, and the need for evacuation within short time intervals in case of a release of LNG cargo, I believe there are serious impediments to the development of a viable, Effective, Emergency Response Plan and evacuation plan in the area; Exhibit 10, at page 5.

With regard to adverse environmental impacts:

This project will have significant environmental impacts due to dredging and LNG ship ballasting. ... The project would require the dredging of up to 2.6 million cubic yards of sediment from the Mount Hope Bay and Taunton River and a turning basin to enable LNG ships to transit, dock, and turn in the Taunton River. The dredging would disturb about 191 acres of river and bay bed. ... The proposed project area serves as an important winter flounder spawning and juvenile development habitat. The project would have adverse effects on this species, including the temporary loss of 6.2 acres of winter flounder spawning habitat and a permanent loss of 11 acres of winter flounder habitat due to deepening and widening of the turning basin. Further, there would be entrainment or impingement of larvae and eggs during the operation of the LNG terminal when ballast water would be withdrawn from the river by ships during offloading of LNG. A total of 980 million gallons of water could be withdrawn each year from the river for ship ballast, which would entrain and or impinge larvae and eggs. The cumulative impact of these losses, when combined with the numbers lost as the result of power plant operations in the area, will further tress the fish populations of Mount Hope Bay and Narragansett Bay. Exhibit 10, at page 6.

With regard to socioeconomic impacts:

This project will also cause socioeconomic impacts on the affected communities. ... Vehicle traffic delays resulting from the temporary closure of the Brightman Street Bridge could span 16 minutes per transit. The temporary closures of the Pell Bridge, Mount Hope Bridge, and Braga Bridge during the LNG vessel transit would result in delays ranging from 6 to 98 minutes per transit. The safety and security zone enforced around each LNG ship and around the ship unloading facility while it is docked could result in recreational boating delays of up to 60 minutes. Exhibit 10, at page 6.

Commissioner Kelly re-stated her objections in the January 23, 2006 Commission Order, succinctly summarizing her position as follows:

For the reasons detailed in my dissent from the July 15 Order, I continue to believe that, under the facts and circumstances of this case, it would not be in the public interest to authorize the Weaver's Cove LNG facility under NGA section 3. In my view, there are reasonable alternatives to this facility for meeting New England's growing demand for natural gas. Given these alternatives, I think that, on balance, the unresolved safety, environmental and socioeconomic concerns raise by this project outweigh the benefit of the additional gas supply that it would provide. [emphasis added]

Exhibit 11, at page 1.

The City of Fall River joins with Commissioner Suedeem G. Kelly. In light of all of the facts presented and the performance standards which the USACE must apply, the City of Fall River, Massachusetts respectfully requests that the USACE deny the Applications for a permit under Section 10 of the Rivers and Harbors Act of 1899, Section 103 of the Marine Protection, Research and Sanctuaries Act, and Section 404 of the Clean Water Act.