



CONSERVATION LAW FOUNDATION

March 4, 2009

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

Re: Weaver's Cove Energy LNG Project – Mt. Hope Bay Location
FERC Docket No. CP04-36-005

Dear Ms. Bose:

The Conservation Law Foundation (CLF) appreciates this opportunity to submit comments regarding the application filed by Weaver's Cove Energy, LLC ("Weaver's Cove") pursuant to Section 3 of the Natural Gas Act (NGA) to amend the certificate granted to it on July 15, 2005 in FERC Docket No. CP04-36-000. Weaver's Cove now proposes to construct and operate a so-called "offshore" berth¹ for receiving and unloading LNG tankers in Mount Hope Bay, and a related system to pipe LNG (in liquid form, not re-gasified) from this LNG tanker berth to an LNG terminal in Fall River, with a proposed in-service date of December 2014.

From its inception, the Weaver's Cove LNG project has been characterized by fundamental flaws in terms of its environmental and public safety impacts.² The new "offshore birth" proposal is no different in this regard. Among other things, the Project would (1) entail the regular transit of fully-laden LNG tankers along dozens of miles of inland waterways that are heavily used and have densely settled shorelines; (2) undermine long-fought and hard-won progress in restoring the natural resources of Mount Hope Bay³ – including but not limited to

¹ Typically, "offshore" LNG terminals are those located in federal waters and subject to the jurisdiction of the United States Maritime Administration rather than FERC. From CLF's perspective, the proponent's characterization of the Weaver's Cove Project as an "offshore" LNG terminal is inapt and misleading, given the Project's location in an inland waterway only about one mile from shore.

² CLF's concerns regarding the version of the LNG project previously proposed by Weaver's Cove are extensively reflected in FERC Docket No. CP04-36-000 and the related federal court appeal (*CLF v. Federal Energy Regulatory Commission*, before the United States Court of Appeals for the First Circuit, Docket Nos. 06-1204 and 06-2147).

³ See, e.g., Order Denying Review, September 27, 2007, *In re Dominion Energy Brayton Point LLC*, United State Environmental Protection Agency Environmental Appeals Board, NPDES Appeal No. 07-01.

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critical winter flounder habitat – as a result of substantial dredging activities, anticipated entrainment and impingement of fish eggs and larvae through LNG vessel water intake structures, and the introduction of invasive species; (3) cause significant long-term damage to the natural resources of Mt. Hope Bay and the Taunton River⁴ through the installation and operation of a 4-mile long cryogenic pipeline to bring LNG in its liquid form from the vessel berthing site to a land-based storage facility in Fall River; and (4) exacerbate local air pollution, potentially exceeding one or more federal air quality standards (e.g., for PM₁₀). From our perspective, the Project continues to be one of the most fundamentally flawed LNG terminal projects ever proposed in the Northeast and perhaps the nation. FERC’s issuance in 2005 of a certificate for the original project serves as one of the most poignant examples of the extraordinary flaws in the nation’s LNG terminal siting regime. These flaws include the “first-come, first-served” system by which LNG projects have been allowed to advance without regard to their relative impacts as compared to other projects; the lack of any clear coordination between the federal government agencies (FERC and the Coast Guard) responsible for overseeing land-based and offshore LNG projects, respectively; and the absence of the obvious, sensible first step of taking stock of the need for any LNG projects before rushing to approve them – leaving the question of need up to the market to decide.⁵

Thus, while the environmental and public safety impacts of the Weaver’s Cove LNG project are considerable and continue to raise significant concerns that should be fully vetted through rigorous and comprehensive review under NEPA and the Natural Gas Act,⁶ CLF’s comments here are focused on the need for FERC to take a new, thoughtful approach to considering the Weaver’s Cove LNG project and other LNG projects in the region. Now, more than ever before, it is critically important to take a hard look at whether there is a need for additional LNG infrastructure in the region *before* expending substantial resources on reviewing the particular attributes of this or any other specific project.

New England is currently host to two of the nine existing LNG import terminals in the United States, with a third under construction and a fourth nearing completion in an adjacent Canadian Maritime Province. Given that one new offshore LNG project (Excelerate/Northeast Gateway)

⁴ The Taunton River notably has been proposed for permanent protection under the federal Wild & Scenic Rivers Act pursuant to legislation that is pending but has not yet been enacted. Efforts to secure this protection were commenced long before the Weaver’s Cove LNG Project ever was proposed, and if successful will require heightened standards for the protection of the Taunton River’s natural resources that may well preclude the dredging and other activities required by the Project. 16 U.S.C. § 1278.

⁵ Concerns regarding such an approach have been raised by CLF and many others in various LNG siting proceedings, and recently were echoed by Acting FERC Chairman Wellinghoff in his dissent on the AES Sparrows Point Certificate issued in January 2009. As the Commissioner pointed out in his January 15, 2009 “Statement of Commissioner Jon Wellinghoff on AES Sparrows Point LNG Terminal & Mid-Atlantic Express Pipeline” (“January 15, 2009 Wellinghoff Statement”) explaining his dissenting vote on the Certificate, the Sparrows Point LNG Project was approved even though (i) it “is not needed to serve the energy needs of the Mid-Atlantic and South Atlantic region;” (ii) “the future energy needs of these regions can be better met with alternative resources, such as domestic natural gas infrastructure and renewable and distributed energy resources;” and (iii) “environmental and community concerns [were not] fully and fairly evaluated.”

⁶ As noted in the discussion at p. 8 *infra*, particularly rigorous scrutiny should be applied to the unprecedented four-mile cryogenic LNG pipeline that Weaver’s Cove now proposes.

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has become operational off the coast of Massachusetts during the time the Weaver's Cove LNG project has been pending, another (Suez/Neptune) is under construction nearby, and the Canaport LNG project in New Brunswick is near completion (with expected throughput capacity of up to 1 billion cubic feet (bcf) per day of natural gas to be supplied to the Northeast via an expanded Maritimes & Northeast pipeline), there is good reason to question whether additional massive LNG terminal infrastructure is needed here. And even if this question is somehow satisfied in the affirmative, FERC should at least then undertake a comparative analysis of proposed LNG projects and reasonable alternatives – including energy efficiency, conservation and renewable energy – to fashion a result that is in the public interest consistent with the Natural Gas Act.

Background Regarding Conservation Law Foundation:

CLF is a public interest advocacy organization that works to solve the environmental problems that threaten the people, natural resources and communities of New England. Founded in 1966, CLF is a nonprofit, member-supported organization. CLF promotes clean, renewable and efficient energy production in New England and has an unparalleled record of advocacy on behalf of the region's environmental resources. As part of its more than 40-year legacy in the New England region, CLF has prevented drilling for oil and gas on Georges Bank, led the legal effort to clean-up Boston Harbor and other major coastal estuaries, fought to reduce damaging off-road vehicle use on the beaches and dunes of the Cape Cod National Seashore and successfully advanced legal strategies to restore groundfish to the Gulf of Maine and southern New England waters.⁷

Although CLF has viewed natural gas as an important transitional fuel that is cleaner burning than coal or fuel oil, CLF repeatedly has urged the federal government to take a proactive approach to the siting of LNG facilities, and has testified on numerous occasions (including before Congress) regarding the need for coordinated regional analysis of the demand for natural gas and comparative analysis of LNG terminal proposals.

In the absence of a comprehensive and sensible federal approach to siting, state agencies and local communities have been forced to expend scarce resources on reviews of projects that have forced such expenditures solely by their position in the queue. CLF has been involved in reviewing all of the individual LNG terminal proposals in New England. We have opposed particularly flawed LNG project proposals such as the Weaver's Cove LNG project and the now-abandoned Outer Brewster Island LNG project that had been proposed on state and federal parkland in the Boston Harbor Islands. We also carefully scrutinized the two deepwater LNG terminals (Excelerate/Northeast Gateway and Suez/Neptune) off the coast of Massachusetts, and concluded that these projects entailed far fewer environmental and public safety impacts than the Weaver's Cove LNG project or LNG projects proposed for Passamaquoddy Bay in Maine.

⁷ *Conservation Law Foundation v. Clark*, 594 F. Supp. 1373 (D.Mass. 1984); *Conservation Law Foundation v. Secretary of the Interior*, 790 F.2d 965 (1st Cir. 1986); *Conservation Law Foundation v. Clark*, 590 F. Supp. 1467 (D.Mass. 1984); *Conservation Law Foundation v. Metropolitan District Commission*, 757 F. Supp. 121 (D.Mass. 1991); *Conservation Law Foundation v. Evans*, 209 F. Supp.2d 1 (D.D.C. 2001); *Conservation Law Foundation v. Evans*, 203 F.Supp.2d 27 (D.D.C. 2002); *Conservation Law Foundation v. Evans*, 211 F. Supp.2d 55 (D.D.C. 2002).

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In addition, CLF has continued to advocate successfully to promote policies, programs and projects that provide reasonable alternatives to fossil fuels, including renewable energy, energy efficiency and energy conservation.⁸

THE NATURAL GAS ACT AND NEPA REQUIRE A REGIONAL LNG ANALYSIS BEFORE SITE-SPECIFIC PROPOSALS ARE CONSIDERED.

It goes without saying that any new LNG terminal in New England should be sited fairly, strategically, securely, and in an environmentally protective manner. More fundamentally important, however, is the fact that any new facilities must be based on documented need. New or expanded LNG import facilities represent substantial long-term commitments of capital and present significant potential environmental impacts. Therefore, new facilities should not be approved unless there is a clearly demonstrated need for the facility and a very high degree of confidence that the facility is sited in the “right” location.

CLF for many years has called on FERC to conduct a regional analysis of energy needs and potential sources of supply for New England in order to guide FERC’s analysis under the Natural Gas Act and the National Environmental Policy Act (NEPA). *See, e.g.*, CLF letters of September 20, 2004 and January 21, 2005. As we have explained, such regional analysis should include the potential for meeting demand through efficiency and conservation, and options for increasing supply through increased pipeline capacity. If new LNG importation is required, the analysis should determine where a terminal meeting rigorous environmental standards could be safely constructed and operated. Such analysis is critically important because the decision to license an individual facility is in essence a siting decision for the region, and would likely foreclose other potentially less environmentally harmful options for meeting the region’s energy needs.

The Natural Gas Act:

Under Section 3(a) of the Natural Gas Act, FERC is required to examine all relevant factors bearing on the Project’s consistency with the public interest. According to the Act, importation of natural gas requires a license from FERC, which “[t]he Commission shall issue...upon application, *unless*, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest.” 15 U.S.C. § 717b (emphasis added). FERC’s regulations require a Section 3 applicant to demonstrate that a construction project for

⁸ One important such development was the enactment in 2008 of the Massachusetts Green Communities Act, which among other things amends existing laws to require Massachusetts utilities to (1) purchase 1% more electricity from new renewable energy generation sources each year (so that by 2025, 20% of the electricity supplied to Massachusetts consumers must come from such sources); and (2) procure cost-effective clean demand-side resources (energy efficiency and conservation measures) as resources of first recourse before procuring more expensive electric or natural gas supplies. Chapter 169 of the Acts of 2008. These measures are consistent with Massachusetts Governor Deval Patrick’s commitment to meet all new load growth with demand-side resources. *See, e.g.*, Executive Order 484 (“Leading by Example – Clean Energy and Efficient Buildings”).

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the purposes of importation “is not inconsistent with the public interest.” 18 C.F.R. § 153.7(c)(1).

The Supreme Court has held that FERC’s determination whether a facility is in the public interest “can be made only after an exploration of *all* issues relevant to the ‘public interest.’” *Udall v. Fed. Power Comm’n*, 387 U.S. 428, 450 (1967) (emphasis added):

The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the “public interest,” *including future power demand and supply*, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.

See also, Confederated Tribes and Bands of Yakima Indian Nation v. FERC, 746 F.2d 466, 470 (9th Cir. 1984) (FERC grant of license reversed for failure to meet obligation to study the effect of the project on the fishery resource).

Thus, in order to make a reasonable determination with respect to whether any LNG terminal project – including this one – is in the public interest, FERC first must assess whether there is a need for the new LNG import capacity, among other considerations. Even if the answer is yes, FERC still must ensure that the benefits of the project will outweigh the impacts and that the project as a whole is in the public interest.

The National Environmental Policy Act (NEPA):

NEPA likewise requires FERC to determine the need for the Project up front, which can only reasonably be assessed in the context of regional energy supply and demand. Moreover, producing a programmatic environmental impact statement (PEIS) is required by NEPA, by applicable regulations promulgated pursuant to NEPA, and by the relevant case law in a situation where, as here, one large project or several related projects will have cumulative or synergistic environmental consequences.⁹

⁹ In situations similar to the one here presented Courts have repeatedly reversed agency decisions not to produce a PEIS. *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142 (9th Cir. 1997) (holding that agency’s EIS was satisfactory in every respect except the lack of review of cumulative impacts); *City of Tenakee Springs v. Clough*, 915 F.2d 1308 (9th Cir. 1990) (holding that where several foreseeable similar projects in a geographical region may have a cumulative impact a PEIS must be produced); *LaFlamme v. Fed. Energy Regulatory Comm’n*, 842 F.2d 1063 (9th Cir. 1988) (reversing FERC’s decisions not to produce a *programmatic* EIS and not to grant a rehearing), *opinion amended*, 852 F.2d 389 (9th Cir. 1988) (suspending license previously granted by FERC and instructing FERC not to reissue license until and unless programmatic EIS is produced); *Sierra Club v. U.S.*, 23 F. Supp.2d 1132 (N.D. Ca. 1998) (“Where there are large scale plans for regional development, NEPA requires both a programmatic and site-specific EIS.” [internal quotation marks and citation omitted]); *Nat’l Wildlife Fed’n v. Benn*, 491 F. Supp. 1234 (S.D.N.Y. 1980) (granting summary judgment to environmental plaintiffs only on claim that defendant agencies had failed to produce a *programmatic* EIS); *Am. Pub.*

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Preparing a PEIS in an appropriate case is an important way for an agency to carry out NEPA's broad mandate. When enacted, NEPA was considered "the most important and far-reaching environmental and conservation measure ever enacted by the Congress." 115 Cong. Rec. 40,416 (Dec. 20, 1969). It was a "comprehensive national [environmental] policy[,]" S. Rep. No. 91-296, at 5 (1969) which would henceforth require a detailed Environmental Impact Statement (EIS) be done on all future major Federal projects. 42 U.S.C. § 4332(2)(C). The concept of a PEIS had its origins in a Supreme Court case which held that where several projects or potential projects "will have a cumulative or synergistic environmental impact upon a region . . . their environmental consequences *must* be considered together." *Kleppe v Sierra Club*, 427 U.S. 390, 410 (1976) (emphasis added).

The Weaver's Cove LNG Project should trigger a PEIS, in significant part because the Project is intended to meet New England region-wide energy needs. FERC has acknowledged that potential alternatives to the Project include other pending land-based and offshore LNG terminal proposals. All these potential options vary widely in characteristics that can dramatically affect environmental impacts.

The reason why a *programmatic* EIS is so crucial in this case is that FERC's decision to approve *this* Project will have inevitable, far-reaching effects on *other* potential projects in the Northeast. In the narrowest and most immediate sense, FERC's approval of one project may have the effect of precluding other projects from coming to fruition. In that event, the importance of choosing an alternative with the fewest adverse environmental impacts is obvious. In the alternative, it is possible that multiple projects increasing New England's supply of natural gas may be approved and built but that the market will only economically support some, but not all, of the newly built facilities. New England would then be faced with a truly terrible situation – suffering the potentially severe environmental impacts from the construction of a plant or plants the viability of which cannot be sustained by the market.

There are today multiple projects proposed to help address New England's future needs for natural gas and other forms of energy supply. NEPA requires producing a PEIS that first analyzes the need for increased supply and then generic attributes that may be desirable (or undesirable) for projects to increase supply (such as, for LNG import terminals, population density, berth depth, and so forth) and only then compares, contrasts, and considers the environmental pros and cons of potential alternatives. This is because "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting *Marsh v. Oregon Natural Res. Def. Council*, 490 U.S. 360, 371 (1989)).

It is important to note that even though several LNG projects have been approved and even constructed and put into operation in the past few years, it is not too late to undertake a PEIS

Transit Assoc. v. Goldschmidt, 485 F. Supp. 811 (D.C.D.C. 1980) (granting summary judgment in favor of plaintiff environmentalists on issue of programmatic EIS).

now. Indeed, the need for a PEIS is even more urgent given that the new LNG capacity in the region has significantly diminished if not eliminated the need for any further LNG infrastructure in the foreseeable future, yet several massive LNG projects nonetheless are still pending in the pipeline (including the Weaver's Cove Project as well as the Calais and Downeast projects in Maine).

The Natural Gas Act and NEPA Call for a Rational, Structured Approach:

Ultimately, meeting the requirements of the Natural Gas Act and NEPA calls for a two-pronged approach at the outset of project review:

First, an energy and gas supply needs assessment must be undertaken. This assessment, which can build upon the wealth of existing analyses to determine a realistic level of need in order to avoid overbuilding (or under-building) of facilities, can then serve as a key determinant in decision-making. It is essential that this assessment be based on a balanced approach that looks to increased energy efficiency¹⁰ and demand-side management of gas and electricity in addition to clean renewable energy alternatives and supply-side answers like augmenting LNG import facilities.

Here, the needs assessment should consider the significant new LNG import capacity that was dismissed by FERC as "too speculative" during its review of the original Weaver's Cove LNG project yet has recently become available or is soon to become available in the region. Projects bringing substantial new capacity (and that were not previously considered as realistic in FERC's prior review of the Weaver's Cove LNG project) include (1) the Excelerate/Northeast Gateway LNG facility off the north shore of Massachusetts that has already received LNG deliveries;¹¹ (2) the Suez/Neptune offshore LNG project that is under construction and expected to go into service later this year; (3) the nearly 90% complete Canaport LNG facility in New Brunswick, and associated upgrades to the Maritimes and Northeast pipeline, that are expected to provide up to 1 billion cubic feet (bcf) of additional natural gas supplies into the New England region. The assessment also should take into account that the Bear Head LNG facility approved for construction in nearby Nova Scotia, also intended to service the New England market in substantial part, has been mothballed by its developers due to unfavorable market conditions.

In addition, as Acting Commissioner Wellinghoff aptly noted in his dissent to FERC's January 2009 AES Sparrows Point LNG Terminal decision, previous estimates by the United States Energy Information Administration (EIA) regarding likely demand for imported LNG recently have been revised significantly downward to reflect far more modest figures than the numbers that were taken into account when the previous Weaver's Cove LNG Project was considered, and there is credible evidence that "the United States remains the market of last resort for LNG Supplies [in the global marketplace]." January 15, 2009 Wellinghoff Statement at pp. 1-2. Existing LNG import facilities have substantial untapped existing capacity, and it makes no

¹⁰ Appropriate investment in efficiency can help meet our gas needs more quickly and with greater results than capital investment in extraordinarily costly LNG terminal and shipping infrastructure.

¹¹ As recently as 2005, these two offshore LNG projects were viewed by FERC as too "speculative" to be considered as viable alternatives in connection with the environmental impact review of the original Weaver's Cove LNG project.

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sense to invest in additional massive energy infrastructure (with all of the associated impacts) if the need readily can be met by these existing facilities.

Second, a regional siting approach should be developed to evaluate the comparative merits of the actual site(s) for LNG import facilities, based upon rigorously developed criteria that address both public safety and environmental protection concerns. Community stakeholders should be included in an informed, participatory process that can translate any assessed regional need for expanded LNG import capacity into a coordinated effort to build only responsible LNG infrastructure to serve the region.

In the event a determination is made that additional LNG infrastructure makes sense in the region, this “comparative analysis” step is necessary for ensuring that permitting of any new facility is based not on a race to the wire but on relative merit in terms of avoiding or mitigating environmental and public safety impacts. As part of this analysis, it will be critically important to take a “hard look” at the environmental impacts of the newly proposed Weaver’s Cove Project located in Mount Hope Bay and weigh those impacts against the impacts presented by project alternatives, including but not limited to other LNG terminal proposals.

As highlighted in the comments submitted by the Massachusetts Department of Environmental Protection and City of Fall River, Weaver’s Cove’s proposed large-scale transfer of LNG using cryogenic pipeline technology over more than a four-mile distance in a submerged aquatic environment is believed to have no prior commercial application or to otherwise have been evaluated in a comparable demonstration project anywhere in the world. As such, it is particularly important to rigorously assess the feasibility of the proposal and to understand the potentially unique consequences that could result during normal operations and maintenance as well as potential system disruptions or failures. These impacts, once understood, must then be taken into account as part of a comparative regional assessment of LNG projects and clean energy alternatives.

Any LNG import facility siting process should ensure that any development occurs only in the right locations, subject to terms that fully protect the public interest, and through processes that ensure ample public input.

Conclusion:

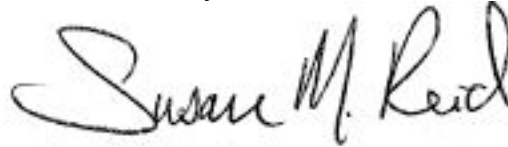
Undertaking a regional approach to LNG terminal siting represents an important opportunity to address this controversial issue in a strategic manner and propel consideration beyond the current, site-specific, polarized siting debates. The essential starting point for such an approach is an up-to-date regional natural gas and energy needs assessment to determine the extent to which any new LNG infrastructure is needed. Such an assessment must take into account existing, new and soon-to-be available natural gas capacity in the region, as well as consideration of whether there are better alternatives such as energy efficiency, conservation or renewable energy.

C O N S E R V A T I O N L A W F O U N D A T I O N

Any further consideration of LNG infrastructure at that point should be undertaken on a regional and comparative basis, ensuring that only projects with preferable environmental and public safety characteristics are allowed to move forward. Ultimately, a more rational approach to LNG siting should help ensure that any terminal site selection process provides an economically sensible and environmentally acceptable result.

Thank you for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink that reads "Susan M. Reid". The signature is written in a cursive, flowing style.

Susan M. Reid, Esq.
Director, MA Clean Energy & Climate Change Initiative

cc: Jon Wellinghoff, Acting Chairman
Suedeem G. Kelly, Commissioner