



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
OFFICE OF COASTAL ZONE MANAGEMENT
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July 30, 2009

Gregg R. Landes
Weaver's Cove Energy LLC
One New Street
Fall River, MA 02720

RE: Weaver's Cove Energy, LLC – Federal Consistency Review for LNG Facility
Offshore Berth and Mill River Natural Gas Pipelines Laterals Projects

Dear Mr. Landes:

On January 30, 2009, the Massachusetts Office of Coastal Zone Management (CZM) received your federal consistency certification submissions for the proposed Liquid Natural Gas (LNG) Facility Offshore Berth and Mill River Natural Gas Pipelines Laterals Projects. The submissions contained descriptions of the proposed projects; statement of compliance with the Massachusetts approved management program enforceable policies; descriptions of the projects' compliance with each of the enforceable policies; and a copy of the US Army Corps of Engineers ("Corps") §10/404/103 permit application.

In letters dated February 27, 2009 and July 2, 2009, CZM notified Weaver's Cove Energy, LLC ("Weaver's Cove") that your federal consistency review submissions were incomplete, missing necessary information required to commence review as well as information necessary to determine consistency. As prescribed by federal rules at 15 C.F.R. §§ 930.58(a)(2) and 930.60(a)(2) and identified as necessary information in the Massachusetts Coastal Program at 301 C.M.R. § 21.07 (3)(a)(3), CZM conveyed to Weaver's Cove in this written correspondence that it was missing required Massachusetts Environmental Policy Act (MEPA) documentation—the Final Environmental Impact Report (EIR) and the final Secretarial Certificate indicating that the Final EIR adequately and properly complies with MEPA. CZM also informed Weavers Cove in writing that required information to conduct and complete federal consistency review included the Massachusetts Department of Environmental Protection's ("MassDEP") §401 Water Quality Certification, Chapter 91 Waterways authorizations, and Wetlands Protection Act Order of Conditions or Superseding Order of Conditions.

In letters dated March 18, 2009 and July 20, 2009, Weaver's Cove confirmed its position that the federal consistency certification and other materials filed in the submission are complete and suitable for review as of the date they were submitted. In the July 20, 2009 correspondence, Weaver's Cove also declined CZM's offer to waive the requirement per 15 C.F.R. § 930.60(a)(2) for receipt of the final MEPA certificate and allow for commencement of review upon receipt of the Final EIR. To date, CZM has also not received the outstanding permits cited above.

Through this letter and as detailed below, CZM maintains its position and affirms once again that federal consistency review for the Weaver's Cove Offshore Berth LNG Facility and the Mill River Laterals projects has not commenced. We have provided Weaver's Cove in writing with the

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specific information required for the consistency certification submissions and have indicated that our review will commence upon receipt of the outstanding information. In order to preserve the Commonwealth's rights and avoid any interpretation of presumptive concurrence, CZM is also including in this letter an objection to the Weaver's Cove federal consistency certifications for the proposed Offshore Berth LNG Facility and the Mill River Laterals projects based on our determination, as authorized at 15 CFR § 930.63(c), that Weaver's Cove has failed to supply the information required for CZM to determine consistency, and the adverse effects on coastal resources and uses resulting from the project as currently proposed and described are inconsistent with enforceable policies of the Massachusetts Coastal Management Program.

Commencement of Federal Consistency Review

Prior to initiation of federal consistency review, 15 C.F.R. § 930.58(2) requires “[i]nformation specifically identified in the management program as required necessary data and information for an applicant’s consistency certification. The management program as originally approved or amended...may describe data and information necessary to assess the consistency of federal license or permit activities.” Id.

CZM has determined that the body of information generated through the Commonwealth’s MEPA process—including the detailed description and analysis of the proposed project, possible alternatives, and measures to avoid, minimize, and mitigate damage and adverse effects—are critical information for the review of a federal consistency certification. The MEPA review process

[I]s an informal administrative process that is intended to involve any interested Agency or Person as well as the Proponent and each Participating Agency. The Secretary [of Energy and Environmental Affairs] conducts MEPA review in response to one or more review documents prepared and filed by a Proponent. The Secretary's decision that a review document is adequate or that there has been other due compliance with MEPA and 301 CMR 11.00 means that the Proponent has adequately described and analyzed the Project and its alternatives, and assessed its potential environmental impacts and mitigation measures. A Participating Agency retains authority to fulfill its statutory and regulatory obligations in permitting or reviewing a Project that is subject to MEPA review, which does not itself result in any formal adjudicative decision approving or disapproving a Project.

301 CMR § 11.01(1)(b)

The Secretary’s determination that the administrative information gathering and analysis process is complete is not a permit, and MEPA does not result in the issuance of a permit. 301 C.M.R. § 11.12(4) precludes agencies from issuing authorizations or decisions until after the Secretary has concluded that the filings required by the administrative MEPA process are complete, as demonstrated by the issuance of the final Certificate. Id. As stated above, CZM requires evidence that the MEPA administrative record is complete by calling for a copy of the final Secretary’s Certificate indicating that the EIR adequately and properly complies with MEPA as part of the package of required necessary information for an applicant’s consistency certification submission and commencement of federal consistency review. Id. at 301 C.M.R. § 21.07(3)(a)(3)

The submissions by Weaver’s Cove on January 30, 2009 did not contain the required final MEPA Secretarial Certificate and, after several written requests, Weaver’s Cove has not provided the necessary information. As such, CZM has not initiated federal consistency review and requires the

completion of the submission package prior to initiating the review. In the spirit of cooperation and in an effort to expedite review of the Weaver's Cove projects as allowed under 15 C.F.R. § 930.60(a)(2), in its July 2, 2009 letter CZM offered to waive the requirement for the final MEPA Secretarial Certificate and allow commencement of federal consistency review with receipt of the Second Final EIR. As indicated above, Weaver's Cove rejected this offer on July 20, 2009.

The disagreement between CZM and Weaver's Cove as to the required necessary data and information for federal consistency review submissions and the timing of commencement of review is a threshold issue. Since the six month review period prescribed by the federal rules at 15 C.F.R. § 930.60 has not commenced, no appeal to the Secretary of Commerce should be afforded to Weaver's Cove for this dispute.

Objection Based on Determination of Insufficient Information

Notwithstanding the threshold issue as to the timing of commencement of federal consistency review, the proponent has still failed, following written notification, to provide necessary information pursuant to 15 C.F.R. § 930.58 and other information necessary for CZM to determine consistency. Accordingly, to preserve the Commonwealth's rights and avoid any interpretation of presumptive concurrence, CZM issues this objection to Weaver's Cove's consistency certifications pursuant to 15 C.F.R. § 930.63(c). This objection is based upon our determination that Weaver's Cove has failed to supply necessary state licenses and permits for CZM to determine consistency as required in 310 C.M.R. § 21.07(3)(g). CZM informed Weaver's Cove in its July 2, 2009 letter that information required to conduct and complete federal consistency review includes MassDEP's §401 Water Quality Certification for the project's dredging activities, the Chapter 91 Waterways license for the construction and use of portions of the LNG facility located within filled or flowed tidelands, and the Chapter 91 Waterways permit for the dredging activities within flowed tidelands associated with the project.

In the June 6, 2008 *Decision and Findings by the U.S. Secretary of Commerce in the Consolidated Consistency Appeals of Weaver's Cove Energy, L.L.C. and Mill River Pipeline, L.L.C. from Objections by the Commonwealth of Massachusetts*, the Commonwealth's previous objection to the Weaver's Cove's shore-side LNG facility and pipeline laterals was upheld. This objection was based, in part, on the failure of Weaver's Cove to acquire and submit specific, applicable licenses and permits. In the decision, the Secretary of Commerce held that

Under the Department's [of Commerce] regulations implementing the CZMA, a state is entitled to certain information from applicants in order to evaluate a project for consistency with its coastal management program. That information includes "necessary data and information" identified by the regulations, such as a copy of the application for the Federal license or permit and relevant materials provided to the Federal agency in support of the application. Once an applicant provides a state with the "necessary data and information", the state's six-month consistency review period commences. A state may, however, also require that an applicant provide it with "other information necessary for the State agency to determine consistency" in accordance with the enforceable policies of the state's coastal management program. If this other information is not provided within the six-month review period, the state may object to the applicant's consistency certification. The Department [of Commerce] has interpreted "other information" to include applicable licenses and permits, if required by a state.

Given these requirements, [Weaver's Cove's] argument is misplaced. A state may require that an applicant obtain and submit relevant state licenses and permits as a condition to possessing necessary information. Moreover, commencement of the state's six-month consistency review period does not indicate that the state requires no other information to complete its consistency review. Massachusetts's Program requires submission of applicable licenses and permits, authorizing the state to object to projects when an applicant has failed to obtain and submit all applicable state licenses and permits during the state's review period. As such, [Weaver's Cove's] failure to obtain applicable state licenses and permits provided Massachusetts a valid basis upon which to object to the [p]roject.

Department of Commerce, June 26, 2008, Administrative Decision.

[http://www.ogc.doc.gov/czma.nsf/C634D3C1AABDD7D08525747400775095/\\$File/Weavers+Cove+Decision.pdf?OpenElement](http://www.ogc.doc.gov/czma.nsf/C634D3C1AABDD7D08525747400775095/$File/Weavers+Cove+Decision.pdf?OpenElement)

Setting aside the threshold issue of commencement of federal consistency review, there can be no finding of presumed consistency as, to date, Weaver's Cove has not demonstrated that it has obtained the aforementioned permits and licenses nor submitted to CZM copies of required information under its Coastal Management Program.

Determination of Adverse Coastal Effects as Inconsistent with Policies

As described above, Weaver's Cove has failed to fully and adequately describe and analyze the project, its various alternatives, and measures to avoid, minimize, and mitigate damage and adverse effects. The proponent must submit a Second Final EIR that meets the Secretary's scope as contained in the Second Draft EIR Certificate. Therefore, in addition to our objection based on insufficient information, with this letter CZM also objects to the certifications on the basis that the adverse effects on coastal resources and uses resulting from the project as currently proposed and described are inconsistent with several of the enforceable policies of the Massachusetts Coastal Management Program.

The current Weaver's Cove project proposal consists of a pile-supported offshore LNG berthing station in Mt. Hope Bay connected by a 4.25 mile submerged cryogenic pipeline to a terminal in Fall River. Among other impacts, the currently proposed preferred configuration for the project will require the dredging of 3.3 million cubic yards of submerged lands, including habitat for fish and shellfish. Further habitat impacts include the entrainment and/or impingement of fish eggs during important seasonal periods and turbidity from wave, tidal, or vessel generated sediment transport from the installation and operation of the berth station. The project as proposed will also have significant impacts on water-dependent commerce and navigation uses of Mt. Hope Bay through the creation of mandatory security zones around the offshore berth terminal and arriving/departing LNG tankers that will displace commercial and recreational vessels and activities in the central area of the bay.

In order to be consistent with Habitat Policy #1 of the Massachusetts Coastal Management Program, CZM must find that projects "protect coastal resource areas...for critical wildlife habitat functions." The policy affirms that state Wetland Resource Areas, flowed tidelands, and water column sustain strong public interests in the protection of fisheries, shellfish, and wildlife habitat and water-dependent uses. To be consistent with Water Quality Policy #1, CZM must find that "point source discharges in or affecting the coastal zone are consistent with federally-approved state

effluent limitations and water quality standards.” The policy goes on to explain that “the intake and discharge of large quantities of cooling water...may entrain eggs, fish larvae, or other small marine organisms...[and] may also result in the impingement of marine organisms.” Finally, to be consistent with Coastal Hazard Policy #2, CZM must “ensure that construction in water bodies and contiguous land areas will minimize interference with water circulation and sediment transport” and determine consistency with this policy “only when it has been determined that there will be no significant adverse impacts on the project site or adjacent or downcoast areas.” All three applicable policies state that “Federal consistency review is carried out in accordance with the state statutes and regulations that are included at the end of this section”, and of the authorities listed, the ability of the proponent to demonstrate conformance with the following is of particular importance in this case for determining consistency with state enforceable policies:

- 301 C.M.R. § 11.00 et. seq. (MEPA Regulations);
- 310 C.M.R. § 9.00 (Waterways Act Regulations);
- 314 C.M.R. § 3.00 et. seq., 314 CMR § 4.00 et. seq., and 314 CMR § 9.00 et. seq. (Massachusetts Surface Water Discharge Regulations, Surface Water Quality Standards, and §401 Water Quality Certification Regulations); and
- 310 C.M.R. § 10.00 et. seq. (Wetlands Protection Act Regulations).

To date, the requirements for review under 301 C.M.R. § 11.00 have not been met. In this case, absent a final Secretarial Certificate for the project, there is no demonstration that the proponent has adequately described and analyzed the project and its alternatives, including options and measures to avoid and minimize environmental damage. In the Secretarial Certificate issued for the Second Draft EIR, the Secretary required that the proponent prepare a Second Final EIR, addressing the following informational needs: additional analysis of market need, clarification of inclusion of the previously objected to shore-side berthing project alternative, assessment of the Mount Hope Point alternative and an alternative location suggested by CZM. The Secretarial Certificate also required that additional information and clarification be supplied regarding the security and safety zones, impacts to marine fisheries and benthic communities, impacts of pipeline trenching and backfilling, water quality, storm water management, air quality, and greenhouse gas emissions. As stated in the Secretarial Certificate, the proponent’s efforts to avoid and minimize the proposed project’s adverse effects have not been finalized and mitigation measures are at preliminary stages of development and review.

Among other applicable requirements, the Water Quality Certification regulations (314 C.M.R. § 9.07) contain a performance standard that prohibits dredging if there is a practicable alternative that will have less impact to the aquatic ecosystem. The information provided to date discusses several alternatives to the proponent’s preferred location, however a detailed analysis of those alternatives is lacking. This is particularly relevant for the two alternative locations cited in the Secretary’s Certificate on the Second Draft EIR, the Mt. Hope Point Alternative and the alternative project site suggested for consideration by CZM in its comments on the Second Draft EIR. These alternatives have significantly less impact to estuarine habitat and, from the information provided, it appears that technical concerns—including pipeline length and diameter, and pressure drop and heat loss over the added distance—could be addressed based on the multiple examples of existing pipe-in-pipe applications of 15-20 miles in length. Given the availability of less damaging, practical alternatives, the project does not meet the above referenced performance standard as currently proposed and configured.

State rules governing dredging in Commonwealth tidelands are at 310 C.M.R. § 9.40 and include a standard that states, in part, that “the project shall not include any dredging of channels, mooring basin or turnaround basins to a mean low water depth greater than 20 feet, unless said project: (1) is located within a Designated Port Area (DPA); or (2) serves a commercial navigational purpose of state, regional, or federal significance, and cannot be reasonably located in a Designated Port Area.” The current location is outside a DPA, and the proposed dredging project does not serve a navigational purpose. Unlike federal navigation channel dredging projects that serve the public’s interest by maintaining lanes for all commercial shipping, the dredging associated with the Weaver’s Cove project is exclusively self-serving with the objective of delivering a new source of LNG supply to the Northeast market. MassDEP’s analysis and interpretation as conveyed to the Secretary in its May 22, 2009 comment letter on the Second Draft EIR, finds that “the project’s exceedance of the dredge depth limitations in 310 C.M.R. 9.40 is a bar to the issuance of a c.91 license for the project.”

Water-dependent uses in Mt. Hope Bay will also be adversely affected. As currently described by the proponent, more than one LNG tanker per week will arrive, dock at, and depart from the offshore berth. During these frequent periods the mandatory safety exclusion zone established by the Coast Guard will be in force, prohibiting any and all naval traffic from entering the approach channel and most of the turning basin. Commercial and recreational fisherman, recreational boaters, and commercial vessels will all be affected by the exclusionary LNG tanker travel and docking, and the restricted and lost uses will have adverse effects on navigation and commerce.

As proposed, the project will have significant adverse effects on the marine resources of Mount Hope Bay—including state-designated class SA waters under 314 C.M.R. § 4.00 and both Land Under the Ocean and Land Containing Shellfish under the state’s Wetland Protection Regulations 310 C.M.R §§ 10.25 and 10.34. Class SA waters are to be protected and enhanced for their designation as “excellent habitat for fish, other aquatic life and wildlife, including their reproduction, migration, growth, and other critical functions...”. Nearshore Areas of Land Under the Ocean are presumed significant to the protection of marine fisheries, and the project, as proposed, will have significant impacts to fisheries. Specifically, dredging and operational activities from the project as proposed will result in temporary impacts to 192 acres of winter flounder feeding habitat and permanent impacts to at least 73 acres of winter flounder spawning habitat. The southern New England stock of winter flounder—and the Mt. Hope Bay sub-population in particular—are in extremely poor condition. In efforts to improve conditions for restoration of winter flounder populations, the Massachusetts Division of Marine Fisheries has prohibited the commercial taking of any winter flounder in Mt. Hope Bay, and the National Marine Fisheries Service has instituted similar prohibitions in the southern New England region. As with benthic fish habitat, the projects will also have temporary and permanent impacts to Land Containing Shellfish. The ecological community shift associated with the deepening and chronic resuspension of sediments in the approach channel and turning basin, and the anticipated need to maintenance dredge the basin on a regular basis, will likely result in a permanent impact to the shellfish resources. The Second Draft EIR also provides estimates for entrainment of fish eggs and larvae, including winter flounder, and the proponent provides no plan or information for avoiding or minimizing these losses. For the marine resources identified here, the proponent has not adequately demonstrated that the project in its currently proposed preferred configuration has protected the existing designated SA class, avoided adverse effects on shellfish, nor minimized adverse effects of

marine fisheries and productivity resulting from the suspension or transport of pollutants, the smothering of bottom organisms, or the destruction of marine fisheries habitat or wildlife habitat.

Based on CZM's review of the adverse effects on coastal resources and uses resulting from the project as currently proposed and described, and the inability of the proponent to demonstrate conformance with the above policies and underlying state authorities, it is our determination that the Weaver's Cove certifications are inconsistent with the enforceable policies cited above.

Required Statement

As stated above, CZM affirms again its position that federal consistency review for the Weaver's Cove Offshore Berth LNG Facility and the Mill River Laterals projects has not commenced, as the submissions to date by Weaver's Cove have not contained the required MEPA documentation. After written requests, Weaver's Cove has not provided the necessary information, and CZM has not initiated review of the federal consistency certifications. CZM further holds that the threshold issue at hand is the matter of federal consistency commencement, and since the six month review period as prescribed by federal rules has not commenced, there is no opportunity for appeal to the Secretary of Commerce. With this letter, however, CZM has exercised its right to ensure that concurrence may not be interpreted by detailing an objection to the Weaver's Cove certifications. Therefore, should the matter be interpreted and treated as an objection, the following statement shall apply:

Pursuant to 15 C.F.R. pt. 930 (H) and within 30 days from receipt of this letter, you may request that the Secretary of Commerce override this objection. In order to grant an override request, the Secretary of Commerce must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security. A copy of your request and supporting information must be sent to CZM and the federal permitting or licensing agency. The Secretary of Commerce may collect fees from you for administering and processing your request.

15 § C.F.R. 930.63(e)

Sincerely,



Deerin Babb-Brott
Director

Cc:

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