U.S. Department
of Transportation
**Maritime
Administration**

Administrator

1200 New Jersey Avenue, S.E.
Washington, DC 20590

FEB - 8 2008

James H. Burnley IV
Venable LLP
575 7th Street, NW
Washington, D.C. 20004-1601

Re: Safe Harbor Energy LNG Deepwater Port—Request for Reconsideration of Designation of New Jersey as an "Adjacent Coastal State"

Dear Mr. Burnley:

This is in response to your letter of December 3, 2007, in which you made certain claims regarding the Maritime Administration's finding that New Jersey qualifies as an Adjacent Coastal State as defined by the Deepwater Port Act of 1974, as amended. We note that, in response to your earlier request of November 13, 2007 we emphasized that there is no right to appeal the Adjacent Coastal State (ACS) designation under the Deepwater Port Act of 1974, as amended (DWPA), and by that letter we accommodated your concerns by extending to you and your client the opportunity to provide arguments presumably to explain, in opposition to our finding, why New Jersey's coastal environment is not subject to risk equal to or greater than that posed to New York's (NY). You have now supplied us with your arguments to reconsider the designation of New Jersey (NJ) as an ACS.

The salient factor distinguishing NY and NJ under the statute is the proximity of the port to each State. The proximity requirement of 15 miles was not meant to bar consideration of the potential of environmental impact to NJ, a State located at the 19-mile mark from the proposed site. Likewise, the fact that NY is within 15 miles of the proposed site, which, as intended by Congress, represents a clear indication of the legitimate interest and risk posed to NY, does not establish a finding that the proposed DWP's pipeline poses no environmental risk to any other State. Rather, as evidenced by Section 1508(a)(2) of the DWPA, Congress recognized the importance of including other States not meeting the § 1508(a)(1) criteria of proximity or direct connection, and intended for a State with legitimate and regional interest to be afforded the opportunity to make a case to the Secretary of Transportation for special consideration. Accordingly, a review was made of the available information within the statutory period, and the ACS status was issued under the discretionary authority of the Secretary of Transportation as delegated to the Maritime Administrator. 49 C.F.R. § 1(i)(6); § 1.66(aa)(a)(1)-(2). The Secretary expressly delegated the authority to the Maritime Administration to process deepwater

port license applications in coordination with the Commandant of the Coast Guard. § 1.66(a)(2).

In our determination letter designating NJ an ACS, the Maritime Administration concluded that NJ met the definition under Section 1508(a)(2) of the DWPA. Section 1508(a)(2) establishes the standard to be applied, "that there is a risk of damage to the coastal environment of such State equal to or greater than the risk posed to the State directly connected by the pipeline to the proposed deepwater port." In crafting this specific section of the statute, Congress intended to provide regional interests not meeting the proximity or direct connection requirement a role in the decision-making process if it could be evidenced that the risk of damage to their coastal environment was equal to or greater than the risk posed to the 1508(a)(1) designee. Congress was careful to limit involvement and thus crafted a standard that would narrow the field of interests seeking to be designated as an Adjacent Coastal State. In crafting Section 1508(a)(2), Congress provided an alternative to the physical construct of (a)(1) and sought an equitable approach. There is no better example of legitimate regional interests under the Safe Harbor proposal than that of NY and NJ. NY and NJ have historically shared environmental and economic concerns due to their geographic proximity, predominant ocean currents from NY toward NJ, and common industry. They share the port and its facilities. The staging areas for the construction and operation of the Safe Harbor DWP implicate NY and NJ without distinction. Alternate sites required under the National Environmental Policy Act to be reasonably foreseeable bring the possible final site to within 9 miles of NJ, and both NY and NJ share equally in the inherent risk of losing the Cholera Bank fishery.

With regard to the claim that I acted outside my delegated authority in unilaterally making the designation, I disagree. You argue that the Homeland Security Act of 2002 transferred the authority of the USCG to make an ACS determination to the Department of Homeland Security; however, the USCG was never delegated the authority to make a § 1508(a)(2) ACS determination and therefore the Homeland Security Act of 2002 did not transfer that authority. In fact, that authority was reserved for the sole discretion of the Secretary of Transportation, and was exercised only twice before, in 1976 to deny Mississippi and Florida ACS status. The Secretary reserved that authority until delegation to the Maritime Administrator in 2003. (68 FR 36496); 49 CFR § 1.66(aa)(2). Consistent with the view of the USCG, as evidenced by the rulemaking published in 62 FR 11382 (1997), the Secretary first made a partial delegation of his DWPA authority to the Maritime Administration in coordinated efforts with the USCG. Through the 2003 delegation, the Secretary delegated his remaining authority to the Maritime Administrator, and both the USCG and the Department of Transportation have correctly interpreted that delegation to establish the Maritime Administration as the lead decision-making agency, which encompasses the issuance of § 1508(a)(2) ACS determinations. The purpose of the 2003 rulemaking was to clarify certain previous delegations and to delegate remaining authority to the Maritime Administration to implement the DWPA, which had been recently amended in 2002. In stark contrast to your interpretation, the

USCG and the Maritime Administration have agreed that review of the record and the 1997 and the 2003 rulemakings establishes that once-reserved Secretarial authority, historically exercised in making ACS determinations, has been delegated exclusively to the Maritime Administrator.

Contrary to your argument that USCG regulation 33 C.F.R. § 148.217(d) provides clear evidence of delegated authority in the Commandant, a delegation to the Maritime Administrator in determining an ACS is more consistent with the overall allocation of responsibilities under the DWPA. Accordingly, both the Maritime Administration and the USCG have agreed that authority to make substantive decisions not specifically delegated, and those arising above processing decisions, are subject to the Maritime Administration as the lead decision making agency. Furthermore, Part 148 cannot be genuinely argued to evidence a delegation to the Commandant in making ACS determinations because the regulations in their current form are ambiguous. For example, 33 C.F.R. § 148.5(3) provides that only the Maritime Administrator will designate an ACS under 33 U.S.C. § 1508(a)(2) while 33 C.F.R. § 148.217(d) provides that the USCG Commandant will make an ACS designation. Even with the inconsistencies of the current USCG DWPA regulations, both agencies are in agreement as to their respective roles and authority. As my office advised ASIG just after receiving the New Jersey request, both federal agencies agree that the Maritime Administration alone has the authority to designate § 1508(a)(2) ACS status for DWPA projects and that the agencies are working together to address the ambiguities in the regulations.

You also claim that we applied an improper standard and that a factual finding is required to be released. A full and comprehensive reading of our November 2nd determination makes clear that the basis for designating NJ an ACS was in accordance with Section 1508(a)(2) of the statute, which sets forth the "equal to or greater" risk standard:

> "1508(a)(2) The Secretary shall, upon request of a State, and after having received the recommendations of the Administrator of the National Oceanic and Atmospheric Administration, designate such State as an "adjacent coastal State" if he determines that there is risk of damage to the coastal environment of such State equal to or greater than the risk posed to a State directly connected by pipeline to the proposed deepwater port. This paragraph shall apply only with respect to requests made by a State not later than the 14th day after the date of publication of notice of an application for a proposed deepwater port in the Federal Register in accordance with section 1504(c) of this title. The Secretary shall make the designation required by this paragraph not later than the 45th day after the date he receives such a request from a State."

You argue that we applied an invalid standard of "significant impact." That simply is not the case. As we stated in our determination, "upon consideration of the NOAA recommendation, as well as the magnitude and scope of the proposed project and its potential for significant environmental impact to the State of New Jersey, I have

determined that New Jersey is an Adjacent Coastal State as defined under the Act and is so designated..."(emphasis added) Our determination clearly incorporates the standard of "equal to or greater than" as defined in the statute and therefore your characterization of the standard that was applied is incorrect.

As to a factual finding, the statute requires nothing further than a decision be made by the Administrator, by delegation from the Secretary, of whether the State meets the requirements of the statute to be designated an ACS. There is no basis in the statute for your claim that our finding be subject to public scrutiny. The 1976 Mississippi ACS determination signed by the Secretary of Transportation cited only the sources used to assist in the determination and did not include a detailed finding. Furthermore, although you have obtained the NOAA recommendation from 1976, it is unclear whether that recommendation was formally released to the general public. Upon comparing my November determination to that of the Secretary's Mississippi determination from 1976, the bases offered in the determinations are equivalent. Both offer a basic justification and neither adds details of the rationale itself.

ASIG assails NJ's presentation of its case on, among other bases, its lack of documentation and support, comparing it unfavorably to those of earlier ACS cases. This approach is unpersuasive. When the prior ACS issues were resolved, in 1976, the US, and the world generally, had substantial experience with oil spills. The basic interplay among oil viscosity, water salinity, temperature, currents, and other factors was understood, although not so well as now. By contrast, the world at this time knows very much less about LNG spills, on land or water. When, in 1979 and 1980, DOT established the regulatory framework for LNG plants, the primary concerns were explosion and fire, especially in proximity to population centers. An LNG-fueled explosion or fire at a place as far removed from population centers as is proposed here would likely have some, but less, impact directly on individuals but may have significant impact on the marine environment. Since all interests, including NOAA, agree that the currents there run toward NJ, the risk from such a fire or explosion is at least as great to NJ's coastal environment as to NY's. Note: I do not at this juncture need to decide relative harm between the two States; I need only decide the relative risk of harm, and I see NJ's as at least equal to NY's.

I use this example as just that, an example, because I agree with you that the comparative risk analysis must evaluate the totality of impacts.

You also rely heavily on a methodology report prepared by Arthur Little to argue that our determination could not be properly supported. However, it is unclear whether the conclusions and guidance offered in the Little report were ever followed since it was published only 13 days before the 1976 NOAA recommendation and the following issuance of the Section 1508(a)(2) ACS determination by the Secretary. What is clear, however, is the description in the preface to the Little report authored by the then Manager of the Deepwater Ports Project, Captain K.G. Wiman. He wrote, "The contents

of this report do not necessarily reflect the official view or policy of the Coast Guard, and they do not constitute a standard, specification, or regulation." The Little report's preface recognizes that the methodology is not the official view of USCG and reflects the USCG understanding that each case would offer unique challenges in the availability and analysis of data. The Captain's statement also reflects deference to the Secretary as the ultimate decision-maker and to the discretion in his authority to make the ACS determination. The authority to make the designation is clearly at the discretion of the Secretary of Transportation as provided by the statute, with no requirement to concur with NOAA or USCG, or to follow USCG methods or publish a factual finding.

You claim that the time had expired for us to respond to the Governor's request. The official date the Administrator is deemed to have received the Governor's request was September 18, 2007. Because there are so many forms in which to communicate, it is necessary and practical to the proper implementation of the statute that we establish one method as the official method of receipt for the Administrator. The September 18th date is based not on telephone, email, fax, or docket notices but on the date the letter request was posted to the Administrator's controlled correspondence database. The NJ ACS determination was made on the very last day provided under the statute in an effort to grant all due consideration to the issues given the strict timeframe for making the designation.

In conclusion, the determination designating NJ ACS status was made under the authority of the Secretary of Transportation as delegated to the Maritime Administrator pursuant to delegations published in 68 FR 36496 (June 18, 2003) and 62 FR 11382 (March 12, 1997). Both Federal agencies, the Maritime Administration and the United States Coast Guard, interpret the delegations to provide exclusive authority to the Maritime Administrator to make such a decision even when faced with contradictory USCG regulations.

The ACS designation was made following the statutory standard pursuant to Section 1508(a)(2) and the rationale was formed using the data available within the 45 day timeframe. As contemplated by Congress, the statutory authority vested in the Secretary and delegated to the Maritime Administrator is discretionary, and was properly exercised to make an interlocutory decision based on the unique set of facts, procedural requirements, and regional interests of the State of NJ within the strict statutory timeframe for the review and processing of DWP applications.

Thank you for supplying us with your arguments for consideration. As a result of a thorough and comprehensive review, my determination designating the State of New Jersey an Adjacent Coastal State for purposes of the Safe Harbor deepwater port application remains unaltered. It is my hope that we can move forward in the processing of the Safe Harbor application to include the State of New Jersey in its role as an Adjacent Coastal State.

If you have any further questions or concerns please contact Mr. Keith Lesnick, Director, Office of Deepwater Ports and Offshore Activities at 202-366-1624 or Keith.Lesnick@dot.gov.

Sincerely,

Sean T. Connaughton
Maritime Administrator

cc: The Honorable Frank R. Lautenberg
The Honorable Jon S. Corzine
The Honorable Frank Pallone