

| | |
|---------------------------------------|-------------------------------------|
| DOWNEAST LNG, INC and |) APPLICATIONS FOR AIR EMISSION, |
| DOWNEAST PIPELINE, LLC |) SITE LOCATION OF DEVELOPMENT, |
| Robbinston, Calais, Baring Plantation |) NATURAL RESOURCES PROTECTION ACT, |
| Baileyville, Princeton |) WATER QUALITY CERTIFICATION |
| Washington County, Maine |) |
| #A-000960-71-A-N |) FOURTH PROCEDURAL ORDER |
| #L-23432-26-A-N |) |
| #L-23432-TG-B-N |) |

This Order addresses two matters which have come before the Board for a ruling. First, on June 15, 2007, Save Passamaquoddy Bay et al. (SPB) filed a request for subpoenas of State agency staff. On June 19, 2007, Downeast LNG, Inc. and Downeast Pipeline LLC (Downeast LNG) filed a response to the request. On June 22, 2007, SPB filed a reply to Downeast LNG's response. Second, on June 18, 2007, SPB filed a Motion to Strike certain pre-filed testimony of Downeast LNG and Professional Mariners and Waterway Users of Passamaquoddy Bay (Professional Mariners). On June 20, 2007, Downeast LNG filed a response to the Motion to Strike the testimony of one of its witnesses. On June 22, 2007, SPB filed a reply to Downeast LNG's response. On June 25, 2007, Professional Mariners filed a response to the Motion to Strike portions of the testimony of its witness. This Order sets forth the Presiding Officer's rulings on the request for subpoenas and SPB's Motion to Strike.

1. SPB's Request for Subpoenas of State Agency Staff

SPB's Request:

SPB requests that the Board issue subpoenas for staff from the following State agencies to appear at the hearing in this matter for the following reasons:

- Maine Department of Transportation (MDOT): SPB notes that the application indicates that the exclusion zone for the facility extends onto U.S. Route 1, raising questions of sufficient title, right or interest to construct and operate the facility. SPB argues that MDOT staff is needed to address control of activities on U.S. Route 1.
- Department of Marine Resources (DMR): DMR has filed comments on the application. SPB requests their presence to respond to questions regarding impacts on existing commercial fishing uses.
- Department of Inland Fisheries and Wildlife (IF&W): IF&W has filed comments on the application including comments regarding designated shorebird areas, waterfowl and wading bird habitat, and the applicant's mitigation plan for wetland impacts. SPB requests the presence of IF&W staff to respond to questions on their comments.

- Maine Atlantic Salmon Commission (ASC): SPB requests the presence of ASC staff to respond to questions on any comments the agency files in this proceeding.
- Department of Conservation (DOC), Bureau of Parks and Lands, Submerged Lands Program: SPB requests the presence of DOC staff to respond to questions on any comments the agency files in this proceeding.

Downeast LNG's Response:

By letter dated June 19, 2007, Downeast LNG objected to the request for subpoenas. Downeast argues that the request for subpoenas is late and should have been submitted by the deadline for identification of witnesses. Downeast also argues that the request is unreasonable and that the normal procedure is for the Board to request the voluntary appearance of State agency staff if the Board believes their attendance would be of assistance to the Board.

With respect to the request for MDOT to appear, Downeast LNG argues that the issue raised by SPB is not a matter of title, right or interest; but rather a matter of law which the parties are free to argue in their post-hearing briefs.

With respect to the request for staff from the Submerged Lands Program to appear, Downeast LNG argues that SPB acknowledges that the process for obtaining a submerged lands lease from DOC is separate from the licensing proceeding before the Board. Downeast LNG argues that it would be inappropriate to issue a subpoena to DOC staff.

SPB's Reply to Downeast LNG's Response:

By letter dated June 22, 2007, SPB argues that its request for subpoenas is not untimely since the agencies had not completed filing their comments on the proposed project at the time witness lists were due. With respect to MDOT, SPB argues that the control over activities on U.S. Route 1 is not a purely legal issue.

Ruling:

The request for subpoenas for DMR, IF&W, and ASC staff to appear is denied. As stated in the Third Procedural Order, the Board will request that staff of these agencies be available to respond to questions from the Board and the parties on the substance of their review comments and on any comments which they have filed in response to the pre-filed testimony of the parties. Questioning will be restricted to questions on the comments filed by the agency; parties may not question staff on issues or testimony upon which the agency has not commented.

The request for the subpoena of MDOT staff is denied. It is reasonable to assume that the State has, as part of its police powers, authority to close U.S. Route 1 in the event of an emergency. The Board will defer to the Federal Energy Regulatory Commission (FERC) to determine whether Downeast LNG has met U.S. DOT regulations and FERC's requirements regarding exclusion zones for LNG facilities which fall on government property. Further legal argument concerning the applicant's title, right or interest may be made in post hearing briefs.

The request for the subpoena of DOC staff is denied. DOC's procedure for issuing a submerged lands lease is separate from the Board's licensing proceeding.

2. SPB's Motion to Strike Testimony

SPB has filed a motion to strike the pre-filed direct testimony of Downeast LNG's witness Dean Girdis and three exhibits attached to the testimony of Professional Mariner's witness Captain Gerald Morrison.

With respect to the testimony of Dean Girdis, SPB argues that the "alleged need for LNG in the region" is not relevant to the proceeding. In its response to the motion, Downeast LNG argues that, under provisions of Chapter 310.9(A)(4), project need is relevant to a determination of whether there is a practicable alternative to the proposed wetland alteration.

With respect to the testimony of Captain Morrison, SPB argues that the exhibits at tabs 3, 6, and 9 are essentially newspaper or magazine articles which the Board does not normally admit as evidence in an adjudicatory proceeding before the Board. In its response to the motion, Professional Mariners acknowledges that exhibits 3 and 9 are copies of articles from periodicals and various newspapers and does not object to the motion to strike these two exhibits. Professional Mariners does object to the motion to strike exhibit 6, which it argues contains scholarly and technical articles on the transport of liquefied natural gas by ship. In its response to the motion, Downeast LNG argues that it is appropriate to allow a witness to submit an article as evidence provided the witness is available for cross-examination.

Ruling:

With respect to the testimony of Dean Girdis, the motion to strike is denied. Evidence of project need is relevant when assessing alternatives to a proposed wetland alteration.

With respect to the testimony of Captain Morrison, exhibits 3 and 9 are stricken.

Exhibit 6 is a U. S. Coast Guard publication on the Proceedings of the Marine Safety and Security Council Fall 2005. Exhibit 6 does not contain information specific to the proposed project and much of the information is irrelevant to the Board's consideration of the application in this proceeding; however, the document does provide some helpful background information on the LNG industry and the broader regulatory framework for the licensing of LNG facilities.

With respect to the specific chapters in the document, the ruling is as follows:

- The chapter beginning on page 6 (LNG: Liquefied Natural Gas) addresses the properties of LNG. Allowed.
- The chapter beginning on page 8 (The Developing Market for LNG in the United States) addresses national demand for LNG (need). Allowed.
- The chapters beginning on page 12 (Regional LNG Update – Gulf of Mexico) and page 15 (The LNG Market and its Effects on Shipbuilding) are not relevant to the Board's licensing criteria in this proceeding. Stricken.

- The chapter beginning on page 18 (Liquefied Natural Gas Shipment) describes the Port of Boston Partnership for LNG Safety and is not relevant to the Board’s licensing criteria for the proposed project. Stricken.
- The chapter beginning on page 22 (Accidents, Incidents, Mistakes, and the Lessons Learned from Them) provides background information on the properties of LNG, the history of the industry, and the role of the Coast Guard. Allowed.
- The chapter beginning on page 25 (Liquefied Natural Gas Risk Management) addresses potential worst-case consequences of LNG spills onto water. Allowed. The impact of a spill if it were to occur may be considered by the Board in this proceeding.
- The chapter beginning on page 29 (LNG and Public Safety Issues) discusses potential worst-case consequences of LNG spills onto water. Allowed. The impact of a spill if it were to occur may be considered by the Board in this proceeding.
- The chapter beginning on page 33 (Liquefied Natural Gas Transportation) discusses LNG properties, risks and incidents. Allowed. The impact of a spill if it were to occur may be considered by the Board in this proceeding.
- The chapter beginning on page 37 (LNG Tank Designs) describes a variety of LNG tank designs and is not directly applicable to the proposed project. Additionally, as set forth in the Third Procedural Order, “the safety of LNG facilities and tankers from a design and construction perspective is not a criterion on which the Board will base its decision”. Stricken.
- The chapters beginning on pages 39 (Compressed Natural Gas), 43 (LNG Carrier Construction in Asia), 45 (Coast Guard Marine Safety Center), 47 (Manning the Ship), 54 (The Safe Transfer of LNG), 56 (LNG and the Deepwater Port Act), 59 (Examining the Excelsior), and 63 (Third-Party Technical Review – deepwater ports) address compressed natural gas, ship construction in Asia, streamlining procedures, personnel demand and training, and the Deepwater Port Act. These topics are not relevant to the Board’s licensing criteria in this proceeding. Stricken.
- The chapters beginning on page 66 (Approval of Shoreside LNG Terminals), 70 (Environmental Impacts of Coast Guard LNG Actions), 73 (FERC’s Environmental Review Process), 76 (Engineering Safety Review of Shoreside LNG Facilities), 79 (Implementing the WSA) provide information on the regulatory framework for licensing of LNG facilities at the federal level. Allowed. The chapter beginning on page 93 (Harbor Safety Committees) provides additional information on the waterway suitability assessment process. Allowed.

- The chapters beginning on pages 83 (LNG Safety and Security) and 87 (Cove Point Risk Assessment) are not relevant to the Board’s licensing criteria in this proceeding. Stricken.

Parties are reminded that, as set forth in the Second Procedural Order, “the safety of LNG facilities and tankers is regulated by the Federal Energy Regulatory Commission; the Board does not have jurisdiction on this issue.” Accordingly, the Board will not determine whether the proposed terminal or the tankers likely to use it have been designed and constructed to meet federal safety requirements.

With respect to the required exclusion zones for terminals and the safety and security zones for transiting LNG vessels, the exclusion zones are established by FERC for safety and security reasons and cannot be modified by the Board. However, information on the nature, extent and location of the exclusion and safety and security zones associated with the proposed project is relevant to an assessment of the potential impact of the proposed project on existing uses, such as navigation, under the Natural Resources Protection Act and the Site Location of Development Law and is admissible.

With respect to hazards to navigation, the U.S. Coast Guard will conduct a waterway suitability analysis in this instance. Therefore, in accordance with the Third Procedural Order, the Board will not independently assess waterway suitability or the underlying simulation studies, or ultimately decide whether LNG tankers can safely transit the waterway to the proposed facility. However, evidence on hazards to navigation particular to Passamaquoddy Bay is admissible for its tangential relevance to environmental impacts associated with a potential release of LNG. Such information is also relevant to the Board’s consideration of potential impacts to existing uses, and to the Board’s understanding of the public’s concerns related to the passage of LNG tankers through Head Harbour Passage to the site of the proposed terminal facility.

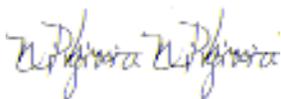
While this ruling allows the limited introduction of information on safety and security, the parties are urged not to devote significant time at the hearing to an examination of issues which are beyond the Board’s jurisdiction to decide.

3. Appeal

Any appeal of this Order to the full Board must be filed by Tuesday, July 3, 2007 at noon and will be considered by the full Board at its regular meeting on Thursday, July 5, 2007.

DONE AND DATED AT AUGUSTA, MAINE THIS 2nd DAY OF JULY, 2007

BOARD OF ENVIRONMENTAL PROTECTION



BY: _____
Virginia N. Plummer, Chair

Michelle Cronin

From: Rebecca Boucher [rboucher@sdkslaw.com]
Sent: Monday, July 02, 2007 12:32 PM
To: 'Michelle Cronin'
Subject: FW: Downeast LNG: BEP 4th Procedural Order

For binder thanks

From: Hanson, Terry [mailto:Terry.Hanson@maine.gov]
Sent: Monday, July 02, 2007 11:59 AM
To: Bensinger, Peggy; Bertocci, Cynthia S; Carl Myers; Cayer, Jennifer; Clifford Goodall; Edgar Catlin; Gordon Grimes; Kimberly Cook; Lynne Williams; Matt Manahan; Roger Huber; Ron Shems; Skip Cole; Voisine, Jon
Cc: Adam Wilson; Bob Cochran; Brian Smith; Chip Ahrens; David Jenkins; Dusch, Jim E; Gerald Morrison; Greg Cunningham; Harold Bailey; Harold Ian Emery; Jeff Thaler; Linda Godfrey; Rebecca Boucher; Robert Godfrey; Ron Kreisman; Verna Francis
Subject: Downeast LNG: BEP 4th Procedural Order

Attached to this email is your copy of the Board of Environmental Protection's Fourth Procedural Order. Because of the timing for this matter you will not receive a copy via US Postal service, therefore I am requesting that you confirm receipt of this email transmittal.

The deadline for any appeal of this order is Tuesday, July 3rd at noon. The Board will consider any appeal on Thursday, July 5, 2007 at the Holiday Inn / Ground Round in Augusta at approximately 1:30 p.m.

Thank you
Terry

<<4th Procedural Order 07-02-07.pdf>>

=====
Terry Hanson, Administrative Assistant
Office of the Commissioner
#17 State House Station
Augusta, Maine 04333-0017
Tel. (207) 287-2811 fax (207) 287-2814

No virus found in this incoming message.
Checked by AVG Free Edition.
Version: 7.5.476 / Virus Database: 269.9.14/883 - Release Date: 7/1/2007 12:19 PM

No virus found in this outgoing message.
Checked by AVG Free Edition.
Version: 7.5.476 / Virus Database: 269.9.14/883 - Release Date: 7/1/2007 12:19 PM

7/6/2007