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DRAFT BOARD ORDER

IN THE MATTER OF

CALAIS LNG PROJECT CO., LLC and	)
CALAIS LNG PIPELINE CO., LLC	) APPLICATIONS FOR
Calais, Baring Plantation,	) AIR EMISSION,
Baileyville, and Princeton	) SITE LOCATION OF DEVELOPMENT,
Washington County, Maine	) NATURAL RESOURCES PROTECTION,
#A-1029-71-A-N	) WASTE DISCHARGE, and
#L-24843-26-A-N	) WATER QUALITY CERTIFICATION
#L-24843-TG-B-N	)
#L-24843-IW-C-N	) SIXTH PROCEDURAL ORDER
#L-24843-L6-D-N	)
#L-24843-4P-E-N	)
#W-9056-5O-A-N	)

Calais LNG Project Company, LLC and Calais LNG Pipeline Company, LLC (collectively Calais LNG) have proposed to construct a liquefied natural gas terminal and import facility in Calais and pipeline project in Calais, Baring Plantation, Baileyville and Princeton. By letter dated December 2, 2010, Calais LNG filed a request with the Board asking the Board to continue the delay in the processing of its applications until January 15, 2011 to allow additional time for the applicant to re-secure title, right or interest in property proposed for development and to address other issues associated with the proposed project. The project was scheduled for public hearing in July 2010, but has been on hold at the request of the applicant since mid July 2010. Since that time, Calais LNG has lost title, right or interest in a significant portion of the property proposed for development and has failed to resolve financing issues such that its applications are now devoid of any demonstration of financial capacity. Additionally, the applicant has not addressed the technical issues which were the basis for the first time extension request in July. In light of the foregoing deficiencies in the applications, this Order sets forth the Board's decision to return Calais LNG's applications without prejudice.

1. Procedural History regarding Schedule for the Proceeding

The following is the procedural history regarding the Board's schedule for processing Calais LNG's State applications to date:

- Calais LNG's applications were submitted to the Department on January 27, 2010 and accepted as complete for processing by the Department on February 19, 2010.

- The Board assumed jurisdiction over the applications on March 18, 2010 and set a deadline for petitions to intervene of April 1, 2010.

- Petitions for intervention were considered and decided by the Board at its April 23, 2010 meeting.

- A pre-hearing conference with the parties was held on April 27, 2010 at which, among other things, a schedule for review and consideration of the applications was discussed. The schedule was established in a procedural order dated April 30, 2010. That schedule required the parties to complete their review of Calais LNG's applications and submit pre-filed direct testimony by June 11, 2010 and pre-filed rebuttal testimony by July 1, 2010, with a five-day public hearing in Calais the week of July 19, 2010. Throughout this period, Calais LNG stated its support for an aggressive schedule in the face of requests from some of the other parties for more time.

- In response to the schedule set by the Board, the parties secured witnesses and prepared and filed both direct and rebuttal testimony by the specified deadlines.

- On July 13, 2010, the Board received a request from Calais LNG to postpone the hearing until after September 1, 2010 so that Calais LNG could provide information to the Board, Department and the parties prior to the hearing including information in response to issues previously raised by Department and state agency review staff.

- After considering comments from the other parties, some of whom objected to the postponement, the Board Chair agreed by letter dated July 14, 2010 to postpone the public hearing. Given that Calais LNG indicated it would likely be ready to proceed to hearing in September, the Board conducted its site visit on July 18, 2010 as previously scheduled.

- On July 21, 2010, the Board received a letter requesting that the conference of counsel scheduled for July 23, 2010 (to discuss re-scheduling the hearing) be postponed. In that letter, Calais LNG stated that GS Power Holdings, LLC, the managing member of Calais LNG, was "in the process of selling its interest in the project to a new financial partner." Calais LNG anticipated that the transaction would occur by August 11, 2010 or Calais LNG "would expect to withdraw all Calais LNG applications" filed with the Board. By electronic mail dated July 22, 2010, the Presiding Officer canceled the conference of counsel but a conference call was held to discuss the status of the applications and the repercussions of further postponement of the hearing.

- By letter dated August 9, 2010, Calais LNG requested additional time beyond its previously stated deadline of August 11, 2010. Calais LNG stated that it was "actively engaged in negotiations with potential financial partners" and requested until September 11, 2010 to secure new financing for the proposed project.

- By letter dated August 12, 2010, the Board Chair granted the request to keep the application on hold for a limited time period. The Chair noted that the financial capacity standard in the Site Location of Development Law is not a threshold requirement for processing of an application.

- By letter dated September 13, 2010, Calais LNG stated that "its lead financial partner and managing member, GS Power Holdings LLC, needed an additional thirty days to negotiate with new potential financial partners for the project." Calais LNG requested that the Board provide "an additional 30 days to complete those efforts" and asked that the Board postpone the conference of counsel scheduled for September 15, 2010 until the week of October 11, 2010.

- A conference of counsel was held on September 15, 2010 to discuss Calais LNG's request for additional time to complete negotiations with potential financial partners. At the conference on September 15, 2010, Calais LNG represented that mid-October was a relatively reasonable estimate of the time needed to secure new financial backers. Calais LNG stated that it would likely require an additional 6 weeks beyond that date, or until the end of November, to supply the technical information previously requested by Department and state agency review staff. Based upon these representations, and to avoid further requests for extensions of time, the Board Chair issued a decision on September 16, 2010 placing processing of the applications on hold until December 1, 2010 at which time the Board would "re-evaluate the status of the applications."

- The Board received a letter dated November 17, 2010 from the owners of a 279 acre parcel of land upon which much of the Calais LNG facility and the pier are proposed to be built. In their letter Steven M. Carothers and Gail J. Roberts stated that, "Calais LNG and their assigns, collectively failed to exercise or renew their Option to Purchase Agreement…and consequently as of September 1st 2010, Calais LNG Project lost any rights to use or purchase" their property. They stated that because the previous option to purchase expired on August 31, 2010, they no longer had any "legal obligation to sell" their property to Calais LNG.

- By letter dated November 19, 2010, the Board Chair notified Calais LNG of its receipt of the letter from Mr. Carothers and Ms. Roberts and offered Calais LNG an opportunity to address the matter. The Board Chair stated that if Calais LNG did not intend to withdraw its applications it should show cause why the applications should remain pending.

2. Pending Request for Further Time Extension

A. By letter dated November 23, 2010, Calais LNG submitted a response to the Board Chair's letter of November 19, 2010. In its response Calais LNG acknowledged that the option on the Carothers/Roberts property had terminated. Calais LNG stated that it did not intend to withdraw its applications at this time and argued that the applications should remain pending. Calais LNG stated that once project funding is in place, title, right or interest to the subject property will be secured and various modifications to the project applications will be completed and submitted. Calais LNG stated its view that "the project, appropriately, would be summarily dismissed if the proceedings were re-started and there was not an adequate demonstration of title, right or interest." Calais LNG asked the Board to continue the matter until January 15, 2011. This request was followed by a letter dated December 2, 2010 from Harold Ian Emery stating that North East Energy Development, LLC has purchased GS Power Holdings' interest in the project and stating its intent to resolve title, right or interest

issues by January 15, 2011 and respond to the additional information requests by February 15, 2011.

B. In accordance with Board procedures, the other parties to the proceeding were provided an opportunity to comment on Calais LNG's November 23, 2010 request for a time extension. The Board received comments from the following parties: City of Calais, Maine State Chamber of Commerce, Roosevelt Campobello International Park Commission, Save Passamaquoddy Bay-U.S. and Nulankeyutomonen Nkihtahkomikumon, and Conservation Law Foundation and Sierra Club.

C. Intervenors City of Calais and Maine State Chamber of Commerce (Chamber) support Calais LNG's request for a further time extension. The Chamber argues, in part, that the requirement that an applicant demonstrate "sufficient title, right or interest in all the property proposed for development or use" and that "an applicant maintain sufficient title, right or interest throughout the entire application processing period" (06-096 CMR 2(11)(D)) should not apply since the Board had previously placed processing of the applications on hold. The Chamber comments that the project is important to the state and argues that withdrawal of the applications at this point would require the process to begin anew at a future date causing further delays in consideration of the applications. The Chamber argues that Calais LNG's request for additional time, if granted, would not cause hardship to any party.

D. Intervenors Conservation Law Foundation and the Sierra Club (CLF/Sierra), Save Passamaquoddy Bay-US and Nulankeyutomonen Nkihtahkomikumon (SPB-US/NN), and Roosevelt Campobello International Park Commission (RCIPC) oppose the request for a further time extension. They argue, in part, that Calais LNG has conceded that it lacks sufficient title, right or interest in all the property proposed for development or use, which is a threshold criterion for processing of an application. Citing the Department's rules and case law regarding title, right or interest, SPB-US/NN argues that Calais LNG lacks administrative standing and its applications must be withdrawn or returned. SPB-US/NN further argues that under the Chair's September 16, 2010 decision, financial backing and responses to the technical information requests were to have been provided by December 1, 2010. CLF/Sierra argues that Calais LNG's failure to maintain title, right or interest legally compels withdrawal of the applications. CLF/Sierra further argues that Calais LNG has provided no information on the ability of North East Energy Development, LLC to finance the project absent the resources of GS Power Holdings, and that the significant changes to the project since initial filing of the applications including changes in ownership, financing and information yet to be provided on outstanding information requests will necessarily require additional time to re-evaluate portions of the applications when the applications are complete. RCIPC shares the concerns regarding Calais LNG's lack of sufficient title, right or interest and the absence of information on financial capacity. RCIPC further argues that the repeated delays in processing of the applications do, in fact, impose time and personnel burdens on all participants.

3. Discussion

A. Title, Right or Interest

(1) In accordance with Chapter 2, section 11(D) of the Department's Rules Concerning the Processing of Applications and Other Administrative Matters, "prior to acceptance of an application for processing, an applicant shall demonstrate to the Department's satisfaction sufficient title, right or interest in all of the property that is proposed for development or use. An applicant must maintain sufficient title, right or interest throughout the entire application processing period." In accordance with Chapter 372, section 9 of the Department's Policies and Procedures under the Site Location Law, "the Department shall consider an application only when an applicant has demonstrated sufficient title, right or interest in all of the property which is proposed for development or use." The Board finds that demonstration of sufficient title, right or interest is a threshold criterion which must be met prior to acceptance of an application for processing and that title, right or interest must be maintained throughout the processing of an application.

(2) In a letter dated November 17, 2010, Steven M. Carothers and Gail J. Roberts, the owners of Calais Tax Map/Lot 022-007, stated that Calais LNG and their assigns failed to exercise or renew their Option to Purchase Agreement, and thus that agreement expired on August 31, 2010. Consequently, Calais LNG lost the right to use or purchase their property which comprises a significant portion of the proposed project site.

(3) By letter dated November 23, 2010, Calais LNG acknowledged that it no longer has title, right or interest to a significant portion of the proposed development site. In its letter dated December 2, 2010, Calais LNG states only that it is "renewing prior discussions in an effort to re-secure title, right or interest to the property upon which Calais LNG is proposing to build the bulk of its marine terminal and LNG receiving facility," and that it anticipates doing so by January 15, 2011.

(4) The Board finds that Calais LNG has not provided a legal basis to support its request that the applications should remain pending in the absence of title, right or interest although given an opportunity to do so.[1] The Board finds that arguments that the requirement for title, right or interest cannot be disregarded on the basis that processing of Calais LNG's applications was placed on hold at the applicant's request to provide additional time for Calais LNG to secure financing and respond to information requests. At the time the September 13 request for a further delay in the hearing date was made, and at the September 15 conference of counsel, Calais LNG knew and chose not to disclose that it no longer had title, right or interest in all of the property proposed for development or use. Neither the Board nor the Department staff was notified in a timely manner that title, right or interest had lapsed on a major portion of the land required for the proposed project.

[1] See November 19, 2010 letter from Susan Lessard to David Van Slyke.

(5) A review of the Calais LNG application materials filed with the Department confirms that the most recent information regarding title, right or interest for Mr. Carothers and Ms. Roberts' property consists of an option agreement dated in 2007. This agreement provides for annual renewal of the agreement. While the letter from Mr. Carothers and Ms. Roberts, the owners of Lot 022-007, represents that the option on that property was renewed effective through August 31, 2010, the documents on file with the Department demonstrate only that the option was renewed and in effect until September 11, 2007. Additionally, the option on a 70 acre parcel owned by David A. Brown, which is also proposed for development, is dated September 2007. Assuming semi-annual payments were made to preserve the option as specified in the agreement, the agreement with Mr. Brown expired by its terms on September 30, 2010. The Department file does not contain evidence of renewal.

B. Financial Capacity

(1) State statute (38 M.R.S.A. § 484(1)) and Department rule (06-096 CMR 373(1)) require that applications for approval of a proposed development must include evidence that affirmatively demonstrates that the developer has the financial capacity to undertake the proposed development.

(2) By letter dated December 2, 2010, Calais LNG stated that North East Energy Development, LLC has "purchased all of the interests of GS Power Holdings, LLC in both Calais LNG Project Company, LLC and Calais Pipeline Company, LLC.

(3) A review of the Calais LNG applications indicates that Calais LNG Project Company, LLC and Calais Pipeline Company, LLC are limited liability companies whose members were, at the time the applications were filed, North East Energy Development, LLC and GS Power Holdings, LLC. The applications state that GS Power Holdings, LLC is a wholly owned direct subsidiary of Goldman Sachs Group, Inc. Information on the assets of Goldman Sachs Group, Inc. was submitted in the applications as evidence of financial capacity for the proposed project. On that basis the applications were declared complete for processing. The Board finds that, given that GS Power Holdings, LLC no longer holds any interest in the proposed project, the applications now lack the financial capacity information on which the finding that the applications were complete for processing was based. No new information has been submitted to substitute for the filing on this issue, as no information has been submitted on the financial capacity of North East Energy Development, LLC to undertake the proposed development. North East Energy Development, LLC is not a new partner in this project; rather it is apparently the sole remaining entity involved in the proposed development. A statement identifying it as the entity that has purchased GS Power Holdings' interest in the project does not provide even a minimal demonstration of financial capacity to support processing of the applications.

C. Technical Information

In its letter of December 2, 2010, Calais LNG acknowledges that its applications continue to lack sufficient information to proceed to hearing and that it anticipates submitting the necessary information by February 15, 2011. The Board's record shows that in July 2010 Calais LNG requested and was granted time to provide additional technical information in support of its applications. At the time of the most recent time extension, which was granted on September 16, 2010, Calais LNG represented that it would likely be able to resolve financing issues and provide the outstanding technical information by December 1, 2010. Apart from the newly identified issue of title, right or interest, Calais LNG was aware that December 1, 2010 was a date by which significant progress in submitting the necessary information had to be made. The Board finds that no additional information has been presented to respond to agency requests; rather, Calais LNG has asked for an additional two months to produce the same information for which a time extension was granted five months ago.

D. Returning the Applications

Citing the significance of the project, Calais LNG's financial investment, and the time and effort expended by Calais LNG, the Board and the other parties to date, Calais LNG argues that its applications should remain pending until Calais LNG has resolved the outstanding issues and is ready to proceed. The Board is sensitive to the significance of the proposed project and the investments made to date; however, given the time that has elapsed since submission of the applications and the nature of the outstanding information, further time extensions are no longer appropriate. The return of the applications is without prejudice and the applicant is free to re-file applications at any time when it is ready to address the issues of incompleteness listed above. While the current applications would require revisions to address changed circumstances, the applicant would likely be able to incorporate a significant amount of its current application materials into revised and updated applications. Additionally, it may not be necessary to revisit many of the procedural issues addressed to date thus saving time in the processing of a re-filed application. The Board has demonstrated that it can process Calais LNG's applications in an expeditious manner when the applicant is ready to proceed.

BASED on the above findings of fact, the Board makes the following CONCLUSIONS:

1. The record shows, and there is no dispute, that after nearly a year Calais LNG's applications are not ready for processing for reasons that are unrelated to the Board or its application review process. In fact, the applications are less ready for processing now than when the first time extension was granted in July 2010, Calais LNG having lost title, right or interest and financial capacity in the interim.

2. Under the Department's rules and Maine caselaw, sufficient title, right or interest in all the property proposed for development or use is a threshold criterion which must be met for processing of an application. The standards and manner in which permit applications are processed and reviewed must be consistent for all applicants including Calais LNG. For strong policy and legal reasons, a demonstration of sufficient title, right or interest is required of all applicants for permits whether before the Board or the Department. The failure to apply this requirement here would be contrary to Department rules and would set a precedent in which applicants could ask the Department and others to spend time and resources on applications where there is no legal right, and may never be a right, to the property proposed for development or use.

3. After consideration of the information submitted by the applicant and intervenors and a review of the record of this proceeding to date, it is evident that Calais LNG does not have sufficient title, right or interest in a major portion of the property proposed for development. The applications also lack information on financial capacity to construct the proposed facility. Calais LNG has failed to provide this information as well as additional technical information to address other licensing criteria despite six months of time extensions in which to do so. Accordingly, the Board concludes that the applications are incomplete and will be returned.

THEREFORE: The applications by Calais LNG Project Company, LLC and Calais LNG Pipeline Company, LLC will be returned without prejudice on December 17, 2010 if they are not first withdrawn by the applicant.

DONE AND DATED AT AUGUSTA, MAINE THIS 16th DAY OF DECEMBER, 2010.

BOARD OF ENVIRONMENTAL PROTECTION

BY:

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Susan M. Lessard, Chair

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