

Nos. 06-1203, *et al.*
ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**CITY OF FALL RIVER, MASSACHUSETTS, ET AL.,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

**JOHN S. MOOT
GENERAL COUNSEL**

**ROBERT H. SOLOMON
SOLICITOR**

**BETH G. PABELLA
SENIOR ATTORNEY**

**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426**

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STATEMENT OF THE ISSUES

The issues presented for review are:

1. Whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) reasonably approved, in the public interest, after comprehensive review and with numerous environmental and safety conditions, Weavers’ Cove Energy, LLC’s (“Weaver’s Cove”) proposed liquefied natural gas (“LNG”) project, which will provide new supplies to help meet New England’s substantially increasing winter peak natural gas demands.

2. Whether the Commission reasonably determined that Petitioners had not demonstrated good cause to reopen the record in the circumstances here.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum to this Brief.

COUNTER-STATEMENT OF JURISDICTION

Petitioner Conservation Law Foundation's standing to seek review of the challenged orders is neither self evident nor established in its initial brief. *See* Br. at 1 ("Jurisdictional Statement"). Article III Constitutional standing is a threshold jurisdictional issue. *Town of Norwood v. FERC*, 202 F.3d 392, 405 (1st Cir. 2000). "The burden to show standing is upon the litigant whose standing is challenged, and is not established merely because the agency permitted intervention." *Id.* (internal citation omitted).

"[T]o pursue judicial review, an association or similar representative organization may have standing if at least one of its members has standing in his or her own right, the interests served by the suit are pertinent to the mission of the organization, and relief does not require the presence of the members in the suit." *Id.* at 405-06; see also *id.* at 407 ("Germaneness of the interests served by a lawsuit to the purpose of the organization is a settled requirement for standing based on membership" which "prevent[s] litigious organizations from forcing the federal

courts to resolve numerous issues as to which the organizations themselves enjoy little expertise and about which few of their members demonstrably care” (quoting *Humane Society of the U.S. v. Hodel*, 840 F.2d 45, 57 (D.C. Cir. 1988)). “An individual has standing if he can show that he is suffering or is threatened with injury in fact to a cognizable interest; that the injury is causally connected to the conduct complained of; and that the court is competent to afford relief that will or is likely to redress injury.” *Id.* at 406.

STATEMENT OF THE CASE

This proceeding involved the Commission’s conditional approval of Weaver’s Cove’s proposed LNG project in Fall River, Massachusetts, which will provide new supplies to help meet New England’s substantially increasing winter peak natural gas demands. After conducting public meetings and workshops, and preparing extensive Draft and Final Environmental Impact Statements (“EIS”) in cooperation with other agencies, the Commission found Weaver’s Cove’s proposal to site, construct, and operate the proposed LNG terminal to be in the public interest and, therefore, approved it, subject to numerous environmental and other conditions and prerequisites to construction. *Weavers’ Cove Energy, LLC*, 112 FERC ¶ 61,070 (2005) (“Conditional Approval Order”) (C001-42), *order on reh’g*, 114 FERC ¶ 61,058 (2006) (“Conditional Approval Rehearing Order”) (C043-78) (collectively, “Conditional Approval Orders”).

In February and March 2006, the City of Fall River, the Attorneys General of the Commonwealth of Massachusetts and the State of Rhode Island, and the Massachusetts Energy Facilities Siting Board (collectively, “Fall River”), Conservation Law Foundation, and Mr. Michael Miozza (collectively, “Petitioners”), filed motions asking the Commission to reopen the record in this proceeding because Weaver’s Cove had notified the Coast Guard that it intended to use smaller LNG vessels than it had proposed originally. The Commission determined that Petitioners had not established good cause to reopen the record and, therefore, denied the motions. *Weavers’ Cove Energy, LLC*, 115 FERC ¶ 61,058 (C079-83), *order on reh’g*, 116 FERC ¶ 61,041 (2006) (C084-87).

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Three federal agencies share primary responsibility and authority in the approval, oversight, safety and security of the LNG import process: FERC, the Coast Guard, and the Department of Transportation. JA 3820 (Final EIS 4-230). The Coast Guard, which is part of the Department of Homeland Security, has authority over LNG facilities that affect the safety and security of port facilities and navigable waterways, *i.e.*, matters relating to navigation safety, vessel engineering and safety standards, and all matters pertaining to the safety and security of facilities or equipment located in or adjacent to navigable waters. JA

3820; C065 P 111; C081 P 11. The Department of Transportation is responsible for promulgating and enforcing safety regulations and standards (including siting requirements) for onshore LNG facilities. JA 3820. FERC has authority over the actual siting, construction, and operation of onshore LNG import terminals. JA 3820; C081 P 11.

In February 2004, to ensure that all safety and security issues are adequately and seamlessly addressed, these three agencies entered into an Interagency Agreement to coordinate review of proposed LNG facilities. JA 3820. In accordance with the agreement, the Commission is the lead agency in preparing the EIS, which analyzes environmental, safety, security and design issues regarding the proposed facilities as required by the National Environmental Policy Act of 1969 (“NEPA”). C081 P 12. Thus, the Commission’s EIS regarding a proposed LNG project includes all aspects of the overall project, even matters such as maritime safety and security operations that normally would be addressed separately by the Coast Guard. *Id.*

Under Section 3 of the Natural Gas Act (“NGA”), 15 U.S.C. § 717b, “no person shall . . . import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed . . . importation will not be consistent with the public interest.”

Furthermore, the Commission “may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.” NGA § 3.

II. Events Leading To The Challenged Orders

A. Pre-Filing Procedures

NEPA review of the proposed Weaver’s Cove project began even before the application was filed. On May 2, 2003, Commission staff met with representatives of Weaver’s Cove and key federal and state agencies (including the U.S. Army Corps of Engineers (“Corps of Engineers”), the Coast Guard, the Massachusetts Office of Environmental Protection, the Massachusetts Energy Facilities Siting Board, the Massachusetts Executive Office of Environmental Affairs, the Rhode Island Coastal Resources Management Council, and the Rhode Island Department of Environmental Management), to discuss the proposed project and the environmental review process that would take place. *See* C044 PP 6, 7 and n.3. Furthermore, the Commission invited any federal, state, and local agencies with jurisdiction or special expertise to cooperate in preparing the EIS, and also invited all interested parties to submit written comments and to attend a public scoping

meeting to be conducted jointly by the Commission and Massachusetts officials on July 29, 2003. *See* C044 P 7.

B. Weaver's Cove's Application

On December 19, 2003, Weaver's Cove filed an NGA § 3 application requesting authority to site, construct and operate an LNG terminal in Fall River, Massachusetts. JA 906-1171. The proposed facilities, which would include a marine berth, an LNG storage tank, regasification facilities, and an LNG truck distribution facility, would receive LNG from ocean-going ships either for transport by truck to peak shaving storage facilities and industrial customers in New England or for regasification and delivery by pipeline to the Algonquin system for further transportation throughout New England. *See* C002 P 9; C044 P 8.

1. Need For The Project

The application explained that New England's "access to natural gas has historically been constrained because it is remote from North America's traditional supply basins." JA 916. Moreover,

While the New England interstate pipeline system can comfortably accommodate average daily demand at present, it falls short on peak days. On a peak winter's day demand can exceed pipeline capacity by more than 1 [billion cubic feet]. For the past 32 years, New England has relied on LNG storage facilities (and a few propane air plants) to bridge the gap between peak pipeline supply and peak market demand.

JA 916; *see also* JA 1060-61 (noting that New England “has been the focus of aggressive energy conservation programs,” but “forecasts of demand in New England indicate there will be a growing need for additional supplies of energy, and especially natural gas.”). Thus, “the proposed Project will bring an important new supply of natural gas to Massachusetts and New England,” and “will also provide a competitive source of trucked LNG for LNG storage facilities throughout the region.” JA 917.

2. Alternative Sites

In attempting to determine the appropriate location at which to site the project, Weaver’s Cove “conducted a comprehensive review of numerous alternative locations for the proposed Project.” JA 1087; *see also* JA 1065-87 (discussing potential alternative sites). The review established that “each alternative [site] ha[d] one or more drawbacks that made it an unacceptable alternative to Fall River.” JA 1087.

3. Project Safety

The application also presented an extensive report regarding the safety of the proposal. JA 1117-71. As the report noted:

Worldwide, there are 21 LNG export (liquefaction) terminals operating or under construction, 49 import (regasification) terminals, and 193 LNG ships in operation or construction. The LNG ships in operation are expected to handle about 121 million metric tons of LNG this year. There are currently about 200 peak shaving LNG

storage facilities worldwide, some operating since the mid-1960s. The US has the largest number of LNG facilities in the world. There are 114 active LNG facilities spread across the US, with a higher concentration of the facilities in the northeastern region.

JA 1120 (internal citations omitted). In addition, the report pointed out, “LNG ships frequently transit high traffic density areas. For example, in 2000, one LNG ship entered Tokyo Bay every 20 hours, on average, and one LNG ship a week entered Boston Harbor.” JA 1121.

The report also explained that “LNG has been safely handled for many years and has an excellent safety record.” JA 1120. In fact, over the last 50 years, no member of the public has been injured as a result of any incident arising from LNG operations like those proposed here. JA 1120.¹ Moreover, for “30 years, LNG operations have been safely conducted in the United States and during 2001 a total of 102 cargoes were imported into the United States.” JA 1146.

¹ *See also* JA 1121 (“During the past 40 years there have been over 40,000 LNG ship voyages, covering more than 60 million miles, without major accidents or safety problems either in port or on the high seas.”); JA 1146-47 (“as of December 31, 2002, LNG ships have made more than 33,000 voyages and safely delivered more than 2.77 billion cubic meters of LNG. This includes about 1,500 voyages to or from a United States terminal”); JA 1147 (“Since the inception of LNG maritime transportation there have been very few major incidents involving LNG ships, none of which ha[s] resulted in spills or loss of containment due to breach of cargo tanks. Many occurred in the earlier years of the industry, more than 20 years ago, and lessons learnt coupled with technology improvements have either eliminated or engineered out many of the root causes.”).

Weaver's Cove further explained that, in order to ensure the public safety, the proposed LNG terminal was designed with a multitude of systems and equipment to prevent any harm to the public if any LNG spills or leaks. JA 1123. For example, the LNG storage tank will consist of two layers, with the outer layer designed to hold more than the entire contents of the inner tank in the event the inner tank leaks. JA 1124. Additionally, the storage tank will be surrounded by an earthen embankment, and impoundment systems, *i.e.*, sloped trenches and sumps, will be used to channel to and contain in safe locations any spilled LNG. JA 1126.

To further prevent any harm to the public, the proposed facility was designed in accordance with Department of Transportation thermal radiation and flammable vapor exclusion zones, 49 C.F.R. sections 193.2057 and 193.2059, respectively. JA 1123, 1126. The thermal radiation and flammable vapor exclusion zones are both located within the earthen embankment inside the project boundaries. JA 1126.

Weaver's Cove's application addressed LNG vessel safety as well. "All LNG vessels are of double hull construction. As the LNG containment tanks occupy the entire center of the vessels' hull, all of the structural strength steel is concentrated in the side shell and bottom. This concentration of strength makes the sides and bottom of LNG vessels more resistant to collision or grounding than conventional oil tankers." JA 1150.

Additionally, “[t]he movement of LNG ships entering Narragansett Bay and proceeding to the proposed terminal will be under the direction and control of the [Coast Guard]. As part of its duties, the [Coast Guard] will define, for the transit from Narragansett Bay to Fall River, a moving exclusion zone around the LNG ships, restricting the movements of other vessels, both large and small, preventing them from approaching too close to the LNG ships and presenting either a safety or security risk.” JA 1151. The Coast Guard also will establish and enforce an exclusion zone for when an LNG ship is docked at the terminal. JA 1154.

C. The Environmental Analysis

On July 30, 2004, after conducting an extensive analysis regarding environmental and safety matters, the Commission, in cooperation with the Coast Guard, the Department of Transportation, the National Marine Fisheries Service, the Corps of Engineers, and the Environmental Protection Agency, issued for public comment a Draft EIS. JA 1524-2168; *see also* C018 P 78. The Commission received 729 written comments on the Draft EIS, the vast majority of which were mass mailings such as comment cards or form letters. *See* C004 P 17; C018 P 79; C044 P 9. The Commission also held public comment meetings in Massachusetts and Rhode Island on September 8 and 9, 2004. *See* C044 P 9. Sixty-seven people provided comments at those meetings. *See* C018 P 79.

Furthermore, the Coast Guard, in coordination with the Commission, conducted a series of workshops with local law enforcement agencies and port stakeholders to develop an initial vessel transit security plan to manage safety and security during vessel transit through Narragansett Bay and while docked at the LNG terminal. *See* C001 P 3.

Also, on January 24, 2005, FERC's Commissioner Kelly and then-Chairman Wood held a public meeting at which Fall River's Mayor, Senators Edward Kennedy and John Kerry, Congressman James McGovern, Massachusetts Representative David Sullivan, and Massachusetts Governor Mitt Romney's representative presented their views regarding the proposal. *See* C006 P 26.

After considering all the comments presented in the proceeding, as well as the additional information the Commission requested from Weaver's Cove based on those comments, a comprehensive Final EIS was prepared and issued on May 20, 2005. JA 3408-4501. As discussed more fully below, the Final EIS concluded that:

if it is constructed and operated in accordance with Weaver's Cove Energy's proposed mitigation and [the Final EIS'] recommended mitigation measures, the proposed action would meet federal safety standards, can be operated safely, and would have limited adverse environmental impact. Also, the implementation of the Coast Guard's security plan that controls the LNG vessels operating through Narragansett Bay to/from the proposed terminal will further ensure the public safety.

JA 3442.

III. The Conditional Approval Orders

After reviewing the entire record, and adopting the analysis and recommendations in the Final EIS, the Commission found Weaver's Cove's application to site, construct, and operate the proposed LNG terminal to be in the public interest and, therefore, approved it. C002 P 5, C012 P 51, C018 P 77, C025 P 112, C045 P 11, C052 P 48, C056 P 65. That approval, however, was subject to numerous environmental and other conditions and prerequisites to construction. C032-42.

As the Commission explained, consistent with the NGA and precedent, it “typically issues certificates under its NGA jurisdiction subject to conditions that must be satisfied by an applicant or others before the grant of a certificate can be effectuated by constructing and operating the project.” C065 P 108 (citing *East Tennessee Natural Gas Company*, 102 FERC ¶ 61,225 at P 23 (2003), *aff'd sub nom. Nat'l Committee for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004)). The Commission “found that the Weaver's Cove project will be in the public interest and be environmentally acceptable only if Weaver's Cove complies with the conditions set forth” in its orders. C065 P 109; *see also* C002 P 5.

The Commission considered numerous factors in making its public interest determination, including the need for the project, project alternatives, and safety and security.

A. Need For The Project

As the Commission found:

The New England region's demand for natural gas is growing, driven largely by the increasing use of natural gas for electric power generation. The U.S. Energy Information Administration (EIA) projects that total gas consumption in New England will increase at an annual average rate of 1.38% between 2004 and 2024, but that U.S. domestic gas production will grow at a slower rate than demand. A recent report to the New England Governors' Conference (Governors' Conference Report)^[2] found that the regions should have adequate delivery infrastructure to meet winter cold day peak demands through 2010, but that to ensure reliable delivery of natural gas to the region after that time there must be a substantial amount of demand reduction or infrastructure development.

C002 P 6; *see also* JA 3513 (explaining that “a recent FERC study suggests that by 2009 there will be demand during peak periods of use in New England for an additional 500 [million cubic feet per day] of natural gas above what the current infrastructure is able to provide”). Moreover, “[b]ecause the interstate pipeline system is currently running at nearly full capacity during the winter, and because there are no geological gas storage formations in New England, LNG storage plays

² The Power Planning Committee of the New England Governors' Conference, Inc., *Meeting New England's Future Gas Demands: Nine Scenarios and Their Impacts*, March 1, 2005.

a significant role in meeting winter peak day heating demands for natural gas.”

C002 P 7. In fact, “on an average winter peak day[,] demand can exceed pipeline capacity by over 1 [billion cubic feet].” *Id.*

The Commission further found that:

The LNG terminal facilities proposed here will enable the introduction of new gas volumes from new sources of supply into the New England area where substantial market growth is expected. The March 2005 Governors’ Conference Report found that an on-shore LNG facility the size and scope of the proposed Weaver’s Cove facility would contribute significantly to reserve margins and service reliability because it can provide additional storage in an area that is critically dependent on storage to meet peak day gas demands. Moreover, because the facility will be located near existing major interstate pipeline facilities, only minimal new pipeline construction will be required to connect the LNG terminal with the interstate pipeline system. The location of the terminal will ensure ready access to local and regional markets and to substantial gas-fired generating capacity along the Algonquin [pipeline] system. Another significant aspect of the proposal is that the terminal’s location will facilitate deliveries of LNG by motor carrier to LNG peak shaving storage facilities and other customers across New England.

C012 P 51; *see also* JA 3512 (explaining that the Governors’ Conference Report’s resource development scenarios include construction of one or more new onshore, in-region LNG terminals like the project proposed here).

B. Alternatives

In analyzing the proposed project, the Commission, through the Final EIS, extensively evaluated a number of alternatives to determine if any were reasonable and environmentally preferable to the proposed project. C054 P 57; JA 3509-59,

3581-90. The alternatives considered included: no action or postponed action (including conservation and other sources of energy), JA 3509-13; onshore and offshore system alternatives (*i.e.*, existing or alternative proposed LNG or natural gas facilities that could be used to meet the proposed project’s stated objectives with fewer potential environmental impacts), JA 3513-36; onshore and offshore LNG terminal site alternatives, JA 3536-58; terminal layout alternatives, 3558-59; and dredge disposal alternatives, JA 3581-90. C054 P 57.

After this detailed analysis, the Commission determined that none of the alternatives was preferable to the proposed project, for one or more of the following reasons: it did not meet the purposes of the proposed project; it could not be developed by 2010, when the proposed project was expected to be operational; it involved greater environmental impacts; or the property was not available for development. C022-023 P 100, C024 n.58, C057 P 68.

C. Safety And Security

The Commission emphasized that its “most important duty in determining the public interest is ensuring that the project that is authorized is safe and secure,” and that it “would not authorize an LNG facility under [NGA] section 3 if [it] continue[d] to have questions about safety.” C056 P 66; *see also* C008 P 32 (“The primary consideration before us here is whether the proposed Weaver’s Cove facilities can be constructed and operated safely”). For example, the Commission

noted, it recently rejected a proposal by Keyspan LNG, L.P., to construct a new LNG facility in Rhode Island that would have incorporated an existing LNG facility whose components did not meet current federal Department of Transportation safety standards for new LNG import facilities. *Id.* (discussing *Keyspan LNG, L.P.*, 112 FERC ¶ 61,028 (2005), *order on reh'g*, 114 FERC ¶ 61,054 (2006), *appeal pending*, D.C. Cir. No. 06-1097 (rejecting LNG proposal because: (1) the impoundment site for the LNG storage tank was designed for only 100 percent, rather than 110 percent, of the tank contents; (2) the thermal radiation and flammable vapor exclusion zones would extend offsite onto adjacent properties; and (3) a detailed evaluation by a seismic consultant regarding the existing tank's compliance with the current standards was not submitted)).

“Here, in contrast, [the Commission] found that the Weaver’s Cove proposal would meet all federal and state safety standards prior to construction and operation,” and “that, if built according to Commission requirements, the terminal can be operated safely and that the Coast Guard security plan for LNG vessels will ensure the public’s safety.” C056-57 P 66; *see also* C008 P 32 (“We have carefully studied all aspects of the safety of the Weaver’s Cove proposal, and for the reasons set forth [in the Commission’s orders] and in more detail in the [Final EIS], we are convinced that, if the project is constructed and operated in

accordance with the conditions attached to our approval, the Weaver's Cove project will be safe").

IV. The Motions To Reopen

When Weaver's Cove originally filed its application, the existing Brightman Street Bridge, which has a horizontal clearance of 98 feet, was scheduled for demolition upon completion of a new Brightman Street Bridge, with a horizontal clearance of 200 feet. C051 P 44; JA 4387. As the Commission recognized in the Conditional Approval Rehearing Order, however, in 2005 Congress enacted legislation (*The Safe, Accountable, Flexible, Efficient Transportation Equity Act*, Pub. L. No. 109-59 §§ 1702 and 1948 (2005)) prohibiting the existing bridge's demolition. C051 P 44. Because the existing Brightman Street Bridge will not accommodate the 150-foot wide vessels Weaver's Cove originally intended to use to transport the LNG, on February 9, 2006, Weaver's Cove notified the Coast Guard that it intended to use smaller, specifically designed LNG vessels that would be able to pass through the 98-foot wide opening of the existing bridge. JA 810-69.

Petitioners moved to reopen the record in this proceeding, asserting that the Commission should conduct additional analysis of the proposed project in light of Weaver's Cove's intent to use smaller, more numerous LNG vessels. *See* C079 P 2.

V. The Orders On Motions To Reopen

In considering the motions to reopen the record, the Commission first set out the applicable standard of review:

In determining whether there is good cause to reopen the record in a proceeding based on changes after the record is closed, the Commission considers whether or not the party requesting reopening has demonstrated the existence of extraordinary circumstances that outweigh the need for finality in the administrative process. To persuade the Commission to exercise its discretion to reopen the record, the requesting party must demonstrate a change in circumstances that is more than just material – the change must go to the very heart of the case.³

C081 P 10.

Next, the Commission explained the different roles Congress assigned to the Commission and the Coast Guard regarding LNG facilities. While the “Commission is responsible for authorizing the siting and construction of onshore LNG facilities under section 3 of the NGA,” the “Coast Guard exercises regulatory authority over LNG facilities that affect the safety and security of port areas and navigable waterways.” C081 P 11. Thus, “[t]he Coast Guard is responsible for matters relating to navigation safety, vessel engineering and safety standards, and

³ Citing, e.g., *Georgia Strait Crossing Pipeline LP*, 105 FERC ¶ 61,190 (2003), *pet. denied sub nom. Fuel Safe Washington v. FERC*, 389 F.3d 1313 (10th Cir. 2004); *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. Cir. 1988) (the Commission need reopen the record only where it clearly appears the new evidence would compel a contrary result); and *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999).

all matters pertaining to the safety and security of facilities or equipment located in or adjacent to navigable waters.” *Id.*

“Pursuant to Coast Guard regulations, an owner or operator that intends to construct an LNG facility must submit a Letter of Intent to the Coast Guard describing, as pertinent, the characteristics of the vessels intended to visit the facility and the frequency of such visits,” and “must notify the Coast Guard of any change in the information submitted.” C082 P 14 (citing 33 C.F.R. § 127.007). The applicant also must submit a Water Suitability Assessment to the Coast Guard, identifying any potential security threats and safety hazards to marine transportation and appropriate risk management measures.⁴ *Id.* The Coast Guard will then “make[] a determination on the suitability of the waterway for LNG vessels. This determination is called a Letter of Recommendation.” *Id.* The Commission noted that “[t]he Coast Guard has not yet issued a Letter of Recommendation for the project, and no ship operations may take place until it does so.” *Id.*

In these circumstances, the Commission found that the movants had not established good cause to reopen the record. C082 P 16. As the Commission

⁴ Weaver’s Cove is required, under Condition 75 of the Commission’s Conditional Approval Order, C042, to update its Water Suitability Assessment annually to reflect any changed conditions. *Id.*

explained:

At issue here is whether there is now a new or materially altered proposal before the Commission that calls into question the premises upon which our approval was based so that additional analysis and review by the Commission are required. Contrary to assertions by Fall River and Conservation Law Foundation, however, there is no new or significantly changed project before the Commission for it to assess either under NEPA or under section 3 of the NGA. Weaver's Cove has proposed to the Coast Guard a change in its method of navigating the waterways by which vessels will deliver the LNG to the approved terminal in Fall River. . . . [B]ecause the Coast Guard is the government agency with the appropriate jurisdiction to review navigational issues, the Coast Guard, not the Commission, is the appropriate agency to review this matter.

C085 P 7; *see also* C082 P 16 (same).

Moreover, the Commission found, “[t]he navigational changes Weaver’s Cove has proposed to the Coast Guard do not affect the[] conditions or [the Commission’s] approval of the project.” C082 P 16. The Commission “note[d], however, that if the Coast Guard’s review of this matter results in changes to the project that require a change to [the Commission’s] authorization, [the Commission] would determine at that time what additional review [it] might be required to undertake in connection with such changes.” *Id.*; *see also* C085 P 8 (same). “Unless or until the Coast Guard approves a plan for such transit that differs from the proposal approved by the Commission,” the Commission concluded, “there is no reason for the Commission to conduct additional review. To do so would serve no purpose, as the Coast Guard could approve the original

plan, the smaller ship proposal now before the Coast Guard, some other plan that would satisfy Coast Guard responsibilities, or possibly no plan at all.” C085-86 P 9.

SUMMARY OF ARGUMENT

After comprehensive review of the voluminous record, including an extensive environmental and safety analysis, the Commission reasonably approved, in the public interest, Weaver’s Cove’s proposed LNG project subject to numerous environmental and safety conditions.

Despite Fall River’s claims to the contrary, the Commission did not act prematurely in conditionally approving the project. Rather, consistent with the Natural Gas Act and longstanding practice, the Commission typically approves projects subject to conditions that must be satisfied by an applicant or others and reviewed by the Commission before construction can begin. Nor did the Commission improperly delegate authority to its Staff to determine compliance with the approval conditions, as those determinations are subject to Commission review.

In addition, the Commission appropriately considered, and provided mitigation to address, all potential risks. For example, to prevent accidental or intentional breaches from occurring or harming the public, the Commission made

sure that adequate design, safety, and security measures would be in place before construction of the project begins.

The Commission also reasonably exercised its discretion regarding Petitioners' motions to reopen the record. The change cited in support of the motions -- that Weaver's Cove notified the Coast Guard that it intended to use smaller and more numerous vessels than originally proposed -- did not upset the basis of the Commission's conditional approval. In fact, the Commission found that, at this point, the proposed change did not affect its approval at all.

Finally, because Mr. Miozza did not raise his remaining contentions to the Commission on rehearing, there is no jurisdiction to address them on judicial review. In any event, none of those contentions has merit.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *Knott v. FERC*, 386 F.3d 368, 372 (1st Cir. 2004). The Commission's factual findings are conclusive if supported by substantial evidence in the record. *Id.* at 371. In addition, the Court "defer[s] to the agency's expertise . . . so long as its decision is supported by 'substantial evidence' in the record and reached by 'reasoned decisionmaking,' including an examination of the relevant data and a reasoned explanation supported by a stated

connection between the facts found and the choice made.” *Id.* (quoting *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 944 (1st Cir. 1993)). “Substantial evidence means more than a mere scintilla.” *Visiting Nurses Ass’n Gregoria Auffant v. Thompson*, 447 F.3d 68, 72 (1st Cir. 2006) (internal quotation omitted).

Furthermore, the Courts “apply a rule of reason in determining whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.” *Dubois v. Department of Agriculture*, 102 F.3d 1273, 1287 (1st Cir. 1996); *see also City of Carmel-By-The-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1150-51 (9th Cir. 1997) (the Court “make[s] a pragmatic judgment whether the [EIS’] form, content and preparation foster both informed decision-making and informed public participation. Once satisfied that a proposing agency has taken a ‘hard look’ at a decision’s environmental consequences, [the Court’s] review is at an end.”); *Fuel Safe*, 389 F.3d at 1331 (the Court’s “job is to examine the administrative record, as a whole, to determine whether the [agency] made a reasonable, good faith, objective presentation of those impacts sufficient to foster public participation and informed decision making”); *Nat’l Committee*, 373 F.3d. at 1327 (“Under NEPA, the court’s role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious”).

II. THE COMMISSION APPROPRIATELY CONDUCTED ITS ENVIRONMENTAL ANALYSIS

NEPA § 102, 42 U.S.C. § 4332, requires each federal agency, for all major actions significantly affecting the quality of the human environment, to prepare an EIS concerning “the environmental impact of the proposed action” as well as “alternatives to the proposed action.” “NEPA does not mandate particular substantive results, but instead imposes only procedural requirements.” *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 1999) (quoting *Laguna Greenbelt, Inc. v. U.S. DOT*, 42 F.3d 517, 523 (9th Cir. 1994)); *Fuel Safe*, 389 F.3d at 1323. Under NEPA, FERC must adequately consider and disclose the environmental impact of its actions. *Id.* at 1194-95.

The Commission’s analysis of the environmental impacts of Weaver’s Cove’s LNG proposal was comprehensive and detailed, and complied with NEPA and the guiding regulations of the Council on Environmental Quality. C010 P 41 (citing 40 C.F.R. § 1500 *et seq.*). That analysis included both a Draft EIS and a Final EIS which addressed, in more than 1,700 pages, among other things, the purpose and need for the proposed facilities, alternatives to the proposed facilities, and potential impacts on the environment, including safety and security matters. JA 1524-2168 (Draft EIS); JA 3408-4501 (Final EIS).

Despite this, Petitioners make various assertions challenging the sufficiency of the Commission's environmental analysis. As discussed below, none of these issues has merit.

A. The Project Purposes Were Appropriately Defined

In accordance with NEPA and Commission policy, the Commission evaluated a number of potential alternatives to the Weaver's Cove project to determine if any were reasonable and environmentally preferable alternatives to the proposed action. JA 3509. In evaluating the potential alternatives, the Commission considered, among other things, whether they "meet the project objectives of providing[:] a new LNG import terminal, including a new LNG storage facility, in New England and [a] source of imported LNG for New England markets; access to natural gas reserves in production areas throughout the world; a new supply of natural gas for New England, and the ability to deliver LNG by truck to LNG storage facilities throughout the region." JA 3509.

Fall River and Conservation Law Foundation complain that the Commission defined the project's purpose too narrowly by including in it "the ability to deliver LNG by truck to LNG storage facilities throughout the region." FR Br. 48-52; CLF Br. 29-30 37, 39-40, 42-43. The Commission reasonably found otherwise.

"In identifying and defining a project's objective and goal for NEPA purposes, the Commission generally adopts the project sponsor's proposal in the

NGA application that implicates the need to conduct the environmental review.”

C054 P 58.

[W]here a federal agency is not the sponsor of a project, the Federal government’s consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project. In formulating the EIS requirement, the Congress did not expect agencies to determine for the applicant what the goals of the applicant’s proposal should be.

C054 P 58 (quoting *City of Grapevine v. Department of Transportation*, 17 F.3d 1502, 1506 (D.C. Cir. 1993) (internal quotation and citation omitted); *see also Fuel Safe*, 389 F.3d at 1324 (same); *Nat’l Committee*, 373 F.3d. at 1332 (same). The Commission recognized that “[t]his general principle, however, is subject to the admonition that the goals of a project may not be so narrowly defined as to preclude consideration of what may actually be reasonable choices.” C055 P 58 (citing *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), and *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991)).

In the circumstances here, the Commission appropriately included in the definition of the project’s purpose Weaver’s Cove’s goal of providing truck delivery to LNG storage facilities throughout the region. As the Commission found, “LNG truck service is more than simply an option for meeting New England’s gas needs. It is, instead, a critical component in meeting those needs.”

C055 P 61.

New England relies heavily on the transportation of LNG by truck to above-ground peakshaving storage facilities located at nearly 50 sites across New England. The [Final EIS] explained that LNG storage is critical to meeting New England’s winter peak needs for gas because there are no underground storage facilities in the area and the pipeline system is already operating at close to capacity.⁵ At the present time, these LNG storage facilities are served by truck shipments of LNG from a single source, the Distrigas LNG facility in Everett, Massachusetts. The [Final EIS] reports that in 2003 trucks from Distrigas provided approximately 14 [billion cubic feet] of LNG to these facilities, which are relied upon to supply as much as 30 percent of the region’s peak day needs. . . . [A]dditional peakshaving facilities would help to ensure more reliable service until additional pipeline capacity is constructed. . . . [T]ruck service from the Weaver’s Cove LNG terminal would provide a new source of supply to LNG storage facilities, which are critical to maintaining a reliable source of natural gas to the region during peak use periods and to maintaining price stability.

C055 P 60.⁶

While acknowledging that “[t]ruck deliveries of LNG play an important role in meeting peak day needs,” FR Br. 50, Fall River asserts that the “only

⁵ Citing JA 3449-53.

⁶ *See also* JA 4251 (“as supply areas in eastern Canada are further developed (which have recently slowed due to lower than expected success in finding significant new offshore discoveries), additional natural gas pipelines or LNG terminals will be built. These new facilities would be a long-term energy solution to meet New England’s natural gas supply needs. In the interim, construction of additional peakshaving facilities in areas of high natural gas demand would provide the greatest short- and mid-term system benefits;” and “both gas pipeline and LNG trucking are necessary for delivery of natural gas and LNG to the New England service area. In particular, gas pipelines have not been constructed to date that can deliver gas to all the peakshaving facilities. Therefore, delivery to these plants must be by LNG truck”).

justification advanced in support of the need for an alternative truck delivery capability is the desirability of introducing competitive pressure to constrain Distrigas prices,” FR Br. 51. To the contrary, while the Commission mentioned price competition, its primary concern was the additional service reliability the project’s truck deliveries would provide to the New England region during peak demand periods.

For example, the Commission found that “additional peakshaving facilities would help to ensure more reliable service,” and that “truck service from the Weaver’s Cove LNG terminal would provide a new source of supply to LNG storage facilities, which are critical to maintaining a reliable source of natural gas to the region during peak use periods and to maintaining price stability.” C055 P 60; *see also* JA 3453 (same); C012 P51 (noting that the “March 2005 Governors’ Conference Report found that an on-shore LNG facility the size and scope of the proposed Weaver’s Cove facility would contribute significantly to reserve margins and service reliability because it can provide additional storage in an area that is critically dependent on storage to meet peak day gas demands”); JA 4251 (“construction of additional peakshaving facilities in areas of high natural gas demand would . . . help to ensure more reliable service until additional pipeline capacity is constructed”).

Fall River and Conservation Law Foundation also contend that Weaver's Cove need not provide LNG truck deliveries because Distrigas purportedly can provide all the LNG truck deliveries required to serve New England's ever increasing peak energy needs. FR Br. 50; CLF Br. 30. The Commission determined in its Final EIS, however, that "it is not feasible for Distrigas to meet the LNG trucking services proposed by [Weaver's Cove] (a maximum of 100 trucks per day) in addition to its current LNG trucking services without significant loading station expansion," JA 4278, which Distrigas has not proposed, JA 3515. Moreover, "[t]here is no space on the existing 24-acre [Distrigas] site to construct the additional facilities" required for such an expansion, "nor is there available adjoining property to accommodate these facilities and the associated exclusion zones." JA 3515.

Fall River further complains that the Commission ignored a discussion in the Governors' Conference Report regarding the possibility of meeting peak day needs through fuel switching. FR Br. 50 n.49. Similarly, Conservation Law Foundation complains that the Commission reviewed only in a cursory manner energy efficiency measures, development of renewable energy, and fuel switching. CLF Br. 43-44, 49-50.

In fact, however, the Commission fully considered, and rejected, fuel switching, energy efficiency measures and development of renewable energy as reasonable alternatives to the proposed project:

The [Governors' Conference Report] concluded that the region must substantially reduce demand or increase its development of infrastructure before 2010 to ensure reliable delivery of natural gas in the winters beyond 2010 The report also concluded that various demand reduction or resource development scenarios could be pursued, each providing a different degree of success, to meet the region's energy and other public policy goals of reliability of fuel delivery infrastructure, fuel diversity, price mitigation or reduction, price stabilization, and security. The demand reduction scenarios evaluated in the report include expansion of fuel switching (this scenario assumes gas electric generation plants will be able to switch to oil for limited periods for the purpose of serving peak day demand); expansion of energy efficiency programs beyond those currently in place; [and] construction of new renewable electric generation The resource development scenarios include . . . construction of one or more new onshore, in-region LNG terminals like the proposed Weaver's Cove LNG Project The report found that expansion of fuel switching (power plants engaging in short-term switching from natural gas to oil), energy efficiency, and renewable energy programs may be the least expensive ways to improve gas supply reliability while improving fuel diversity. . . . The expansion of LNG delivery and storage terminals, however, would provide considerably greater improvements to gas supply reliability than any of the other scenarios.

JA 3511-12; *see also* C055 P 60 (noting that the Governors' Conference Report "recognized the importance of stored natural gas [as] 'allowing for an economic means to meet winter peak day requirements'").

Next, Fall River asserts that "offshore LNG installations and the expansion of pipeline capacity into the region" could satisfy New England's need "for an

incremental supply of natural gas.” FR Br. 51-52; *see also* CLF Br. 30, 37, 39-40, 42-46, 48-49. The Commission recognized that, “[i]n its broadest sense, the goal of the Weaver’s Cove project is to provide an additional supply of natural gas to the New England region to help meet that area’s increasing need for natural gas.” C055 P 59. In fact, “[b]oth the [Final EIS] and the order[s] “recognize[d] that there are other potential projects, such as offshore LNG facilities, onshore LNG terminals in Canada or Maine, and/or increased pipeline infrastructure to transport natural gas from more remote locations, that can play a role in meeting this overall need.” *Id.*; *see also* JA 3536 (“When considered together, however, several of the projects in or outside of the region could meet many of the project objectives”); JA 4273 (explaining, in response to Draft EIS comment ALT-19, that Final EIS section 3.2 discusses whether two or more existing or proposed systems could meet the objectives of the Weaver’s Cove project).

Those potential projects, however, could not satisfy one of the critical, specific purposes of the Weaver’s Cove project -- delivery of LNG by truck to peak shaving facilities. *See* C008 (“transportation of LNG by truck . . . is an important and appropriate goal of the proposed project that must be considered in evaluating the ability of alternatives to satisfy a purpose of the project proposed by the applicant”); C012 P 51 (a “significant aspect of the proposal is that the terminal’s location will facilitate deliveries of LNG by motor carrier to LNG peak

shaving storage facilities and other customers across New England”); C023 P 102 (the offshore alternatives could not provide an additional source of LNG for truck delivery, which is critical in meeting peak winter demand); JA 3519-37 (analyzing potential system alternatives).

B. No Potential Alternative Was Rejected Solely Because Its Projected In-Service Date Was Later Than Weaver’s Cove’s

Conservation Law Foundation contends that the Commission erred “[i]n adopting the projected in-service date of 2010 as one of the objectives by which alternatives were evaluated or summarily dismissed” because, purportedly, “FERC failed to consider significant information relating to how long it realistically would be expected to take for the project to be developed.” CLF Br. 31; *see also* CLF Br. at 38-39 (claiming that the Commission erred in rejecting offshore alternatives because of in-service date concerns). Conservation Law Foundation’s contention is baseless.

The 2010 target date for the commencement of service at the proposed facilities was not critical to the Commission’s authorization of the project. C086 P 11. Rather, the Commission explained, “[p]rojects of this nature require substantial lead time for construction and securing additional permits and approvals,” and, therefore, the Commission “cannot predict with certainty how

long the process will actually take from Commission approval to commencement of operations” C086 P 11. In fact, the Conditional Approval Orders:

specifically recognized that the U.S. Army Corps of Engineers (COE) is the agency responsible for issuing dredging permits and can impose additional time-of-year restrictions beyond those recommended in the [Final EIS]. [The Commission] also implicitly recognized that these restrictions could lengthen the construction process and extend the in-service date for the project. As the Commission was aware of this at the time [it] approved the project, this [did] not affect [its] decision.

C086 P 12 (footnote omitted); *see also* C024 P 108 and n.58; C046 P 16; C047 PP 19, 20, 22; C048 P 22; JA 3581-84, 4267.

The Commission found the potential alternative projects “could not serve as alternatives to the exclusion of the Weaver’s Cove project for various reasons, chief among them that they could not provide needed gas storage or LNG truck deliveries to peak shaving storage facilities and industrial customers throughout New England. Even if it were true that these other projects could begin operations prior to Weaver’s Cove,”⁷] the Commission determined, “they would still not be able to satisfy the objectives of the Weaver’s Cove project.” C086-87 P 13 and n.8.

⁷ Noting that “none of these ‘alternative’ projects has received any necessary government approval.”

C. The Commission Appropriately Conducted Its Dredging Analysis

Conservation Law Foundation contends that the Commission ignored resource agency recommendations for additional time-of-year dredging restrictions to protect aquatic resources. Br. 50. To the contrary, after full analysis in the Final EIS the Commission found that “additional dredging time-of-year restrictions [beyond those recommended in the Final EIS] to protect anadromous fish resources [were] not warranted.” C046 P 16 (citing C024 P 108 and JA 3687-97).

The Commission emphasized, however, “that Weaver’s Cove’s dredging program falls under the jurisdiction of [the Corps of Engineers] through its permitting process under section 404 of the Clean Water Act. It is [the Corps of Engineers] that will ultimately issue any dredging permits, and . . . [the Corps of Engineers] could impose additional time-of-year restrictions for anadromous fish resources should it find such measures warranted.” C046 P 16 (footnote omitted).

Conservation Law Foundation also complains that the “Project’s plans for disposal of dredge spoils are as yet unknown, rendering highly speculative the dredge disposal component of the Project as compared to alternatives.” Br. 33-35. The fact that Weaver’s Cove has indicated that it is in the process of pursuing offshore disposal of dredged materials instead of depositing them at the terminal

site as it originally proposed, *see* C047 P 22,⁸ does not undercut the Commission’s analysis as Conservation Law Foundation posits.

The Commission “analyzed, as part of [its] resource agency consultation, the offshore, open water disposal in the [Final EIS]” C047 P 22; *see* JA 3583-90, 4292-93, 4298, 4300. The Commission explained, however, that “[o]ffshore disposal was not previously considered a viable alternative during preparation of the [Final EIS]” because the Corps of Engineers and the Environmental Protection Agency had not yet determined whether the dredge sediments were suitable for ocean disposal. C047 P 22.

As the Commission found, “additional environmental approval will be required if Weaver’s Cove ultimately goes forward with any offshore disposal proposal or changes its proposed LNG terminal site design” C047 P 22 (citing JA 3495). Accordingly, if Weaver’s Cove were to file a proposal for offshore disposal with the Commission, the Commission would conduct an appropriate environmental analysis regarding that proposal.

⁸ Contrary to the Conservation Law Foundation’s implication, Br. 33-34 n. 18, Weaver’s Cove’s November 2, 2005 letter to the Commission, R. 1724, did not propose offshore disposal, but, merely advised the Commission that it was “in the process of pursuing the alternative of offshore ocean disposal for over 95 % of the dredged material,” C047 P 22.

D. The Geographic Scope Of The Commission’s Alternative Site Analysis Was Reasonable

Conservation Law Foundation asserts that the Commission “erred in unduly limiting the geographic scope of its terminal siting alternatives[’] analysis in the [Final EIS].” Br. 35; *see also* Br. 41. In Conservation Law Foundation’s view, “[t]he [Final EIS] provides no justification whatever for its bald assertion that ‘an LNG import facility located north of the southern terminus of the M&N pipeline system or west of the Iroquois Pipeline system would not efficiently serve the New England market.’” Br. 35 (quoting JA 3536). In fact, however, the justification is included in the beginning of that very same quoted sentence: “Due to the limitations in the existing pipeline systems serving the region as well as the other disadvantages discussed in section 3.2.3 [JA 3531-35], we believe an LNG import facility located north of the southern terminus of the M&N pipeline system or west of the Iroquois Pipeline system would not efficiently serve the New England market.” JA 3536.

Equally baseless is Conservation Law Foundation’s complaint that the Commission’s geographic limitation for considering alternative LNG terminal site alternatives prevented it from considering the proposed Broadwater LNG facility in Long Island Sound or two proposed Canadian LNG facilities. Br. at 35. The

Final EIS fully considered the Broadwater and Canadian facilities, but as a potential system, rather than site, alternatives. JA 3529-31, 3534-35, 3537.

E. The Commission’s Process For Analyzing Alternatives Was Reasonable And In Compliance With NEPA

Conservation Law Foundation states that, “[i]n order to comply with NEPA, an environmental impact review *must* rigorously explore and evaluate all *reasonable* alternatives.” Br. 36 (second emphasis added); *see also* Br. 45. That is what the Commission did here.

“[P]ursuant to NEPA requirements[,] all alternatives were compared with the Weaver’s Cove proposal,” and “once [the Commission] determined that a suggested alternative was not viable, did not meet project objectives, or would result in greater environmental impacts than the proposed action, [the Commission] did not review [that] alternative further.” C057 P 68; *see also* JA 3509. As Conservation Law Foundation seems to recognize, Br. 36 (referring to “reasonable” alternatives), “NEPA does not require a detailed analysis of every alternative proposed.” C023 P 104. Rather, consistent with NEPA, the Commission reviewed in the greatest detail the alternatives that were reasonable and had less than or similar levels of environmental impact. C023 P 104; *see also Fuel Safe*, 389 F.3d. at 1324 (“the agency is only obligated to consider reasonable, non-speculative alternatives”).

Despite Conservation Law Foundation’s claim to the contrary (Br. 36-37, 44-45), the Commission considered numerous alternatives that could meet the proposal’s goals only in part. JA 3514 (“The analysis below examines other potential existing, modified, or proposed LNG and pipeline systems and considers whether these systems could meet some or all of the project objectives); JA 3513-35 (Final EIS section analyzing system alternatives); JA 4271 (noting that Final EIS section 3.2 analyzes system alternatives that would satisfy at least some of the project objectives).

F. The Commission Reasonably Determined That It Would Not Be Appropriate To Conduct A Programmatic Environmental Impact Analysis In The Circumstances Here

Conservation Law Foundation contends that “FERC abused its discretion by refusing to produce a programmatic environmental impact statement.” Br. 17 (capitalization in heading altered), *see also* Br. 18-25. FERC reasonably found, however, that “[a] programmatic EIS [was] neither required nor useful under the circumstances existing here.” C056 P 64.

First, the Commission explained:

A programmatic EIS, as the name implies, reflects the broad environmental consequences attendant upon a wide-ranging federal program.⁹ Under [Council on Environmental Quality] regulations, a

⁹ Citing *Foundation on Economic Trends v. Heckler*, 756 F.2d 143 (D.C. Cir. 1985).

single EIS should be prepared if actions are “connected” to other actions, that is they [are] closely enough related that they should be discussed together, if they are “cumulative,” or if they are sufficiently “similar” to other reasonably foreseeable or proposed agency actions (such as by geography or timing) that a single EIS is the “best way” to assess the combined impacts.^{10]}

C056 P 63. In addition, “[t]he question of whether to prepare a programmatic EIS is initially that of the federal agency.” *Id.* (citing *Kleppe v. Sierra Club*, 427 U.S. 390 (1976)). “[I]n making this determination an agency should consider whether a programmatic EIS would contribute to the decisionmakers’ basic planning of the overall program, and whether segmenting the overall program will unreasonably constrict the scope of the environmental consideration.” *Id.* (citing *Heckler*, 756 F.2d at 159).

“The application here [was] not part of a coordinated federal program that will involve multiple actions with similar or cumulative environmental consequences that should be discussed together.” C056 P 64. Instead, the Commission was presented with “a discrete proposal for an energy project filed under a specific federal statute, the NGA.” *Id.*; *see also* C006 P 27 (“The Commission is a regulatory agency entrusted with the responsibility to review applications for specific proposals for individual terminal sites under section 3 of

¹⁰ Citing 40 C.F.R. § 1508.25(a).

the NGA and NEPA as they are filed to ensure timely and efficient development of much needed natural gas infrastructure”).

Nor was the project “connected, within the meaning of [Council on Environmental Quality] regulations, to other projects that may or may not be developed, or that may or may not be under this Commission’s jurisdiction”

C056 P 64. As the Commission explained:

While there [were] other projects on the horizon in the development stage, [the Commission did] not know at [that] point which, or if any, of these concepts will advance beyond that stage to an actual application with the Commission, or even which projects would be subject to [Commission] jurisdiction. On the other hand, [the Commission had] before [it] here a project which the Commission has been analyzing for approximately two years. Especially in view of the substantial construction period necessary for LNG projects, the substantial environmental compliance that must occur, and the other permits that must be obtained before construction can even begin, [the Commission found] that delaying disposition of this application in order to consider it with proceedings not yet filed is neither necessary nor a viable approach to helping solve New England’s recognized need for new gas supplies and the infrastructure to deliver those supplies.

C007 P 30; *see also* C055 P 62 (citing Deepwater Port Act of 1974, 33 U.S.C. § 1501 *et seq.*) (explaining that offshore LNG projects fall under Coast Guard and Department of Transportation jurisdiction, not FERC’s).

In any event, “regional issues and needs already play[ed] an important role in the Commission’s decision-making process.” C006 P 27; *see also* JA 4252 (same). As Conservation Law Foundation acknowledges, the Final EIS analyzed

“potential alternatives to the Project in the Northeast, including Distrigas, Keyspan, Neptune, Northeast Gateway, Broadwater, Quoddy Bay, and expansion of pipeline deliveries from Canada.”¹¹ Br. at 18 (citing JA 149-98/3529-78); *see also* JA 3515-28. Moreover, the Commission determined that, “[w]hen considered together . . . several of the projects in or outside of the region could meet many of the project objectives.” JA 3536 (citing JA 3537 (Table 3.2.4-1)). Nonetheless, they were not appropriate alternatives to the Weaver’s Cove project because they would not provide the LNG trucking services, which are so critical to meeting New England’s gas needs, that the Weaver’s Cove proposal will provide. C055 PP 60-61, JA 3515, 3537, 4281.

Although Conservation Law Foundation professes concern that “FERC’s approval of this Project may have the effect of precluding other projects from coming to fruition,” Br. 18, the Commission made clear that “[its] approval of the Weaver’s Cove project does not foreclose other energy options for the region,” C055 P 62. *See also* C008 P 31 (“we indeed invite additional proposals to provide natural gas to New England, but there is no reason to delay this proceeding for future projects to catch up”); C081 n.8 (the Commission “did not find that the

¹¹ The Commission also analyzed potential alternative sites for the project, including Boston Harbor, Brayton Point, Providence Harbor, Quonset Point, Coddington Cove/Melville, New London Harbor, and New Haven Harbor. JA 3536-58.

Weaver's Cove LNG terminal facilities would satisfy all [of] New England's natural gas needs to the exclusion of a need for other supply sources. . . . [T]he availability of natural gas from other projects can play an important role in meeting New England's overall need"); C086 P 13 (same); JA 4415 ("the Commission will continue processing proposals to prevent any undue delay of the development of LNG facilities which are in the public interest and are environmentally acceptable").

Conservation Law Foundation cites a number of cases in support of its contention that "[i]n situations similar to the one here presented Courts have repeatedly reversed agency decisions not to produce a [programmatic EIS]." Br. 19-20. None of the cited cases is similar to the instant one.

The first case, *Carmel-By-The-Sea*, 123 F.3d 1142, CLF Br. 19, is inapposite, as it did not involve a programmatic EIS issue. Rather, that case involved the sufficiency of the EIS' discussion of cumulative impacts, *Carmel-By-The-Sea*, 123 F.3d at 1150, 1160-61, which is not at issue here.

City of Tenakee Springs v. Clough, 915 F.2d 1308 (9th Cir. 1990), CLF Br. 19, is inapposite as well. Because that case involved large scale plans by the Forest Service for regional development (*i.e.*, old growth timber harvesting) in the Tongass National Forest in Southeastern Alaska, the Court determined that a

programmatic EIS was required. *Tenakee Springs*, 915 F.2d at 1309-19, 1312-13.

As already discussed, however, the instant case did not involve a coordinated federal program involving multiple actions.¹² C056 P 64.

Laflamme v. FERC, 852 F.2d 389 (9th Cir. 1998), CLF Br. 19-21, does not help Conservation Law Foundation either. In *Laflamme*, the Court found unreasonable the Commission's decision, without first having prepared any EIS, to approve an application for a hydroelectric project. 852 F.2d at 395, 399, 401. Also, because the proposed project was only one part of the development pending in the South Fork of the American River Basin, the Court found that the Commission needed "to prepare an EIS on the project's cumulative impacts" *Id.* at 401-02. Here, by contrast, the Commission prepared a comprehensive and detailed EIS which addressed cumulative impacts, *see* JA 3887-904, and the proposed LNG project was not only one part of connected development pending in the area.

¹² Similarly inapposite are *Sierra Club v. United States*, 23 F. Supp. 2d 1132, 1133 (N.D. Ca. 1998), CLF Br. 20, which involved large scale plans by the National Park Service for regional development in Yosemite National Park; *National Wildlife Federation v. Benn*, 491 F. Supp 1234, 1236, 1250 (S.D. NY 1980), CLF Br. 20, which involved the Coast Guard's treatment of numerous existing projects that dump dredged materials at an ocean Mud Dump Site; and *American Public Transit Association v. Goldschmidt*, 485 F. Supp 811, 813, 833 (D.D.C. 1980), CLF Br. 20, which involved the promulgation by the Department of Transportation of regulations governing provisions for handicapped persons in federally-assisted mass transit.

G. The Commission Did Not Defer Its Environmental Analysis To Market Forces

Fall River and Conservation Law Foundation contend that the Commission deferred its environmental analysis to market forces. FR Br. 52-55 (citing C008 P 31); CLF Br. 19, 23-24 (citing C056 P 65). As the above discussion regarding the Commission's extensive environmental analysis makes clear, however, the Commission did not defer its environmental analysis to market forces. C056 P 65.

Rather, the Commission explained, in accordance with NGA § 3, the Commission conducts its environmental analysis and approves projects it finds are consistent with the public interest. *Id.* Only then does the Commission leave it to the market to decide whether the project will actually go forward. *Id.*, *see also* JA 4252 (“If the project is found in the public interest, it is the customers that will ultimately determine whether the approved project is commercially viable enough to move forward in light of the complicated global issues surrounding financing, supply, and market”); JA 4275 (same), 4402 (same).

III. FERC'S CONDITIONAL APPROVAL OF THE PROJECT PROPERLY ACCOUNTS FOR WILD AND SCENIC RIVERS ACT REQUIREMENTS

Under the Wild and Scenic Rivers Act, 16 U.S.C. § 1278(b), once a river has been identified for potential designation as a wild and scenic river, the Commission may not approve “any water resources project that would have a direct and adverse

effect on the values for which such river might be designated” The “intent of the [Act] is not to stop development and use of a river but to preserve the character of a river. Development that does not damage the outstanding resources of a designated river, or curtail its free flow, is usually allowed.” JA 3757.

The Final EIS concluded that construction and operation of the proposed project would not have an adverse effect on the Taunton River’s potential designation as a wild and scenic river. C066 P 117 (citing JA 3756-58).

Nevertheless, recognizing the Department of the Interior’s (“Interior”) Congressionally-granted primary role in this process, the Commission conditioned construction of the Weaver’s Cove project as follows:

Prior to construction, Weaver’s Cove shall file with the Secretary documentation of concurrence from the U.S. Department of the Interior that the project would not have a substantial adverse effect on the Taunton River’s potential designation as a Wild and Scenic River (WSR) and that the project would be consistent with the Wild and Scenic River Act if the Taunton River were designated a Wild and Scenic River.

C036 Condition 25; C067 PP 117, 120.

Conservation Law Foundation contends that, “[g]iven [Interior]’s conclusion that the project cannot be made compatible with the Act, JA 0544a, this condition cannot be met.” Br. 56; *see also* Br. 51, 52-55. The cited statement, which was made in Interior’s comments on the Draft EIS and indicated that Interior did “not feel that the proposed development can be made compatible with Wild and Scenic

River designation of the lower Taunton River in the vicinity of the project area,” did not constitute Interior’s final Wild and Scenic Rivers Act determination. Rather, as Interior further stated in the same document, “[u]ntil Congress has made a final determination on whether to designate some, all, or none of the Taunton River as a component of the Wild and Scenic River System, we may not be able to render a finding of no adverse impact related to the potential Wild and Scenic Rivers designation.” JA 0544A. *See also* C068 P 121 (explaining that Interior had not yet made its finding regarding the impact of the Weaver’s Cove project under the Wild and Scenic Rivers program).

In any event, the limitation imposed by the Wild and Scenic Rivers Act, 16 U.S.C. § 1278(b), is inapplicable here. C066 P 116. That provision addresses the licensing, “under the Federal Power Act,” 16 U.S.C. § 791a *et seq.*, of a “water resources project” The proposal at issue here, however, was for an NGA § 3 LNG project for the importation of natural gas from a foreign country. C012 P 48. Furthermore, 16 U.S.C. § 1278(b) applies only to a “river which is listed in section 1276(a) of this Title,” which the lower portion of the Taunton River, on which the Weaver’s Cove project is to be located, was not. C066 P 116 (“the lower Taunton River in the vicinity of the proposed project is not currently a Congressionally authorized study river segment and is not under Interior’s jurisdiction”).

IV. THE COMMISSION DID NOT ACT PREMATURELY IN CONDITIONALLY APPROVING THE PROJECT OR INAPPROPRIATELY DELEGATE ITS RESPONSIBILITIES

Fall River asserts that the Commission prematurely approved the project because it did not yet know the conditions other agencies would impose on the project and inappropriately delegated its responsibilities to other agencies and to the FERC Director of the Office of Energy Projects (“Projects Office Director”). Br. 25-29, 40-42. Fall River is incorrect.

The Commission did not act prematurely in conditionally approving this project. C065 P 108. Rather, “consistent with longstanding practice, and as authorized by NGA section 7(e), [15 U.S.C. § 717f(e),] the Commission typically issues certificates under its NGA jurisdiction subject to conditions that must be satisfied by an applicant or others before the grant of a certificate can be effectuated by constructing and operating the project.” C065 P 108 (citing *East Tennessee*, 102 FERC at P 23; *Nat’l Committee*, 373 F.3d at 1326, 1328); *see also Department of Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992) (recognizing that “a perfect information standard would hamstring the agency. Virtually every decision must be made with some uncertainty; the question is whether the Commission’s response, *given uncertainty*, is supported by substantial evidence and not arbitrary and capricious”). Moreover, NGA § 3 explicitly permits the

Commission to “grant such application . . . upon such terms and conditions as the Commission may find necessary or appropriate”

“As is the case in virtually every certificate issued by the Commission that authorizes construction of facilities, the approval [here] is subject to Weaver’s Cove’s compliance with the environmental conditions set forth in the order[s]. In this proceeding there are 77 such conditions.” C065 P 108. For those matters requiring other agency review and approval, the Commission “conditioned Weaver’s Cove’s authorization so that it cannot commence construction until the other agencies have completed their review of matters within their particular expertise and responsibility, thereby ensuring that the project will not proceed until there is satisfactory resolution of any remaining factors that could alter [the Commission’s] finding that the project will not have significant environmental impacts.” C065 P 109.

The Commission had “sufficient information regarding the proposed action to be able to fashion adequate mitigation measures to support a determination that the Weaver’s Cove project will cause no significant environmental impacts upon compliance with those mitigation measures.” C065 P 109. Moreover, the Commission “found that the Weaver’s Cove project will be in the public interest and [will] be environmentally acceptable only if Weaver’s Cove complies with the

conditions set forth in the [Conditional Approval Order]. *Id.*¹³

“This approach was approved in *City of Grapevine*, [17 F.3d 1502].” C065 P 110. In that case, the Court rejected a challenge to an agency’s approval of a proposed runway before completion by another entity of National Historic Preservation Act review “because the [agency’s] approval . . . was expressly conditioned upon completion of [that review] process” *Grapevine*, 17 F.3d at 1508-09.

This approach was “also in accordance with the interagency agreement between FERC, the Coast Guard, and [the Department of Transportation] to coordinate the review of safety and security issues, including NEPA review,” C065 P 111, and the statutory scheme, C066 P 112. The “Weaver’s Cove LNG terminal cannot be placed in service without the approval and operational oversight of the Coast Guard.” C066 P 112.

“Th[e] Commission gives considerable deference to the Coast Guard in vessel security matters because of its considerable expertise and given that the Coast Guard has authority over navigation safety, vessel engineering and safety standards, and all matters pertaining to the safety of facilities or equipment located

¹³ Thus, for example, if adequate evacuation and emergency response plans cannot be developed, as Fall River fears, Br. 40-42, the Commission will not authorize construction of the project, as all the conditions on its authorization will not have been satisfied. *See* C040 Condition 67; C063 P 98.

in or adjacent to navigable waters.” C066 P 112. Nonetheless, the Commission did “not improperly delegate[] responsibilities to the Coast Guard. [It] adopted several conditions ensuring the Coast Guard’s adoption of security, vessel operation, and emergency operation plans, and coordination of security responsibilities relating to personnel and protecting the ships in the terminal area.” C066 P 112.

In addition, the Commission “undertakes its own independent assessment of the other agencies’ studies and results prior to accepting or rejecting their recommendations.” C066 P 113. “To the extent any of the pending consultations or studies in this case indicate a need for further review, or indicate a potential for significant adverse environmental impacts, the [Projects Office Director] will not provide the necessary clearances for commencement of construction.” *Id.*

Nor did the Commission improperly delegate authority to the Projects Office Director to determine compliance with the approval conditions. C066 P 114.

In accordance with our longstanding and usual practice in construction proceedings, the Commission has determined what conditions should apply for construction and operation of the proposed facilities, and ha[s] delegated authority in certain circumstances to determine whether those conditions have been met. The matters delegated to the [Projects Office Director] are matters within the particular technical expertise of the Director and his staff. [The Commission] has not, however, given the Director “unfettered discretion” over these matters, as Fall River asserts. Rather, determinations by the [Projects Office Director] are subject

themselves to a request for rehearing under the Commission’s regulations.

C066 P 114.

While Fall River believes that all mitigation plans need to be completed and reviewed by the Commission before it can approve a project, Br. 25-29, matters such as “mitigation plans . . . can be appropriately developed and implemented following the Commission’s approval process, as long as there is a mechanism for review and approval by the Commission.” C022 P 99.

[T]here is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, . . . and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. . . . [I]t would be inconsistent with NEPA’s reliance on procedural mechanisms - as opposed to substantive, result-based standards - to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-53 (1989).

V. THE COMMISSION APPROPRIATELY CONSIDERED, AND PROVIDED FOR MITIGATION TO ADDRESS, ALL POTENTIAL RISKS

A. The Commission Properly Understood The Purpose Of, But Did Not Rely Solely On, Exclusion Zones To Protect The Public

Fall River claims the Commission’s statement that “the very nature of the [thermal radiation and flammable vapor exclusion] zones is to ensure that a hazard does not exist outside the zones, regardless of the population density, whether it be

light, moderate or heavy” is “both nonsensical and at odds with the plain language of the regulations.” Br. 30 (quoting C059 P 81). As the Department of Transportation, which promulgated the exclusionary zone safety regulations, has explained, however, the exclusionary zone safety “standards protect [the] population from the consequences of a possible LNG failure without regard to whether the people live or work in remote or urban areas.” *Re: Petition for Rulemaking by the Commonwealth of Massachusetts and the State of Rhode Island* at 5, No. PHMSA-2004-19208 (Oct. 25, 2006); *see also* JA 3839 (explaining that the DOT has considered and rejected the contention that a 1,600 Btu/ft²-hr thermal radiation exclusion zone may not be sufficient to protect the public).

Fall River also erroneously indicates that the Commission blindly relied upon DOT exclusionary zones without conducting an independent analysis of safety issues. Br. 32-33. To the contrary, the “Commission conducted an extensive independent evaluation of all safety issues relating to the Weaver’s Cove project,” and “adopted a number of requirements relating to construction, design, and operation of the terminal facilities.” C059 P 79; *see also* C001-002 P 4; C019 P 81. While “the public outside the exclusion zones is . . . protected from potential harm resulting from a release of LNG from the terminal,” the Commission did not rely solely on exclusion zones for their safety. C059 P 81. Rather, “[e]xclusion

zones represent only one of the ten safety categories evaluated in the [Final EIS].”

Id. (citing JA 3820-86).

B. The Commission Appropriately Applied Flammable Vapor Zone Regulations

Department of Transportation regulations require flammable vapor dispersion exclusion zones to be calculated using the DEGADIS model. 49 C.F.R. § 193.2059(a). The regulations further provide that, “[a]lternatively, in order to account for additional cloud dilution which may be caused by the complex flow patterns induced by tank and dike structure, dispersion distances may be calculated in accordance with” the FEM3A model. *Id.*

Fall River complains that “FERC has attempted to take into account the effect of the onsite tank and dike on the spread of the LNG vapor cloud without using FEM3A or an equivalent approved model” Br. 34. Fall River misunderstands the Commission’s analysis here.

The Final EIS, prepared in cooperation with DOT, first explained that the FEM3A model could not be used because concerns regarding its application first needed to be “resolved in the proper forum of the technical standards committee or the DOT regulatory process” JA 3840. Then, the Final EIS explains, the Commission did not take into account the effect of the onsite tank and dike on the spread of the LNG vapor cloud; rather, the Commission chose, conservatively, to

use a model that would not account for those effects. JA 3841; *see also* JA 3840-41, 4410. Because “modeling which does not take into account the flow-field obstacles presented by tank and dike structures would yield further dispersion distances,” and therefore, a larger flammable vapor exclusion zone, the analysis here “provide[d] a more conservative assessment of the downwind dispersion than would a model [such as FEM3A] which accounts for complex topography and flow-field obstacles.” C060 P 86.¹⁴

Fall River also contends, in a footnote, that it “submitted the testimony of a recognized expert explaining why the procedure used by the Commission is scientifically wrong.” Br. 35 n. 33 (citing Dr. Havens’ testimony regarding the Draft EIS). That testimony, however, referred to the procedure used in the Draft EIS, which the Commission revised in the Final EIS based on Dr. Havens’ testimony. JA 4397.

C. The Commission Assured There Was Appropriate Mitigation To Address The Threat Of Accidental Or Intentional Breach

1. The Commission’s Analysis And Mitigation Measures

“The FERC closely coordinate[d] its pre-certificate review of the proposal with the Coast Guard, which has authority over the safety of LNG vessels and the

¹⁴ To assure that the exclusion zone would not extend off the project site, the Commission required Weaver’s Cove to deepen the concrete sump so that it could accommodate the entire contents of the largest design spill. JA 3835-39, 3841; C038 Condition 39.

marine transfer area as well as the security of the LNG vessels and the entire LNG facility.” JA 3841. Numerous steps were taken to ensure that the proposed project will be constructed and operated safely.

First, Weaver’s Cove will use a full containment LNG storage tank consisting of two layers. JA 3822. The outer concrete layer, *i.e.*, the impoundment system, will be able to hold more than the entire contents of the inner tank, and will provide controlled venting in the event the inner tank leaks. JA 3829, 3835. As the Commission found, the “protection of the external wall of a full containment storage system could significantly enhance the safety of the project in the event of a credible attack on the facility.” JA 3822; *see also* JA 3833 (“recognition must be given to the benefits of a concrete secondary container with respect to external events, such as projectiles or small aircraft”).

Additionally, the storage tank will be surrounded by a 15 foot high earthen embankment, the capacity of which will exceed 100 percent of the LNG tank’s maximum capacity. JA 3833. This barrier system, which includes trenches and sumps that will channel to and contain in safe locations any spilled LNG, “would confine LNG on the project property in the event of any hypothetical catastrophic

event, and would also prevent process area spills from leaving the plant.” JA 3833; *see also* JA 3835-36.

To further prevent any harm to the public, the Commission ensured that the proposed facility was designed in accordance with Department of Transportation thermal radiation and flammable vapor exclusion zones, 49 CFR sections 193.2057 and 193.2059, respectively. JA 3834-41. In fact, the project’s impoundment was sized based on the assumption that a potentially catastrophic event would occur. JA 3835; C050 P 40.

Security at the facility would be provided by both active and passive systems. JA 3847.

The entire site would be surrounded by a protective enclosure (i.e., a fence) with sufficient strength to deter unauthorized access. The enclosure would also be illuminated [and] [i]ntrusion detection systems and day/night camera coverage would identify unauthorized access. A separate security staff would conduct periodic patrols of the plant, screen visitors and contractors, and assist in maintaining security of the marine terminal during cargo unloading.

Id.

LNG vessel safety was fully addressed as well. Although “[t]he history of LNG shipping has been free of major incidents, and none ha[s] resulted in significant quantities of cargo being released,” the Commission recognized that “the attacks of September 11, 2001, have made the public keenly aware of additional risks that must be considered in the evaluation of marine safety and

security: a deliberate attack on an LNG ship by a terrorist group.” JA 3842; *see also* JA 3846.

The Final EIS extensively discussed the numerous mitigation measures that will be used to prevent both accidental and intentional breaches from occurring or harming the public. JA 3841-70. For instance, LNG ships will be constructed and operated in accordance with international and U.S. requirements, including special codes adopted in 2003 “to prevent and suppress terrorism against ships, improve security aboard ships and ashore, and reduce the risk to passengers, crew, and port personnel on board ships and in port areas, for vessels and cargos.” JA 3842-43. Thus, LNG tankers and port facilities must have extensive security and safety plans, systems, equipment, and personnel. JA 3843-44, 3857.

Furthermore, as a result of Coast Guard security workshops with port stakeholders and federal, state, and local agencies, an initial Vessel Transit Security Plan was developed, upon which appropriate security measures will be based. JA 3858; C021 P 91; C062 P 93. “Prior to [an] LNG vessel being granted permission to enter Narragansett Bay, both the vessel and facility must be in full compliance with the appropriate requirements of the Maritime Transportation Security Act and International Ship and Port Security Code, and the security protocols established by the [Coast Guard] Captain of the Port in the Vessel Transit Security Plan.” *Id.* C019-20 P 85.

The Coast Guard's detailed security plan includes an offshore safety check and security sweep by a Coast Guard boarding team, aerial surveillance, and an escort to the dock by armed security boats to enforce a safety and security zone. JA 3844, 3857, 3859. While the vessel is docked, a combination of resources, including Coast Guard security boats with state and local police details, will be used to complement the Facility Security Plan. JA 3859.

The Coast Guard also will require 96- and 24-hour notification before vessels arrive at Narragansett Bay and, before entering Narragansett Bay, LNG vessels, which will travel during daylight hours, will be boarded by a Northeast Marine Pilot who will direct the vessels' entire transit to the terminal facility. JA 3844. A second pilot will board the ships to assist in transit through the Brightman Street Bridge. *Id.* In addition, a Coast Guard escort and tractor tug will escort the ships up Narragansett Bay to Sandy Point, where two additional tractor tugs will join the escort. *Id.* Furthermore, the Coast Guard will inspect the dock safety systems and monitor all operations until the ship departs. JA 3844, 3857.

The Coast Guard will enforce a moving safety and security zone that will clear the channel of all ships in the vicinity of the LNG vessel both while en route and while docked. JA 3844, 3846, 3857-58, 3860. Specifically, the moving safety and security zone will restrict other vessels two miles ahead, one mile behind, and 1,500 feet on either side of the LNG vessel. JA 3860; C063 PP 101-02. Only

personnel or vessels authorized by the Coast Guard's Captain of the Port will be permitted in the safety and security zone. JA 3846, 3858.

Thus, the "operational restrictions to be imposed by the Northeast Marine Pilots on LNG vessel movements throughout this area, as well as the requirements that the Coast Guard would impose in its operating plan will minimize the possibility of a hazardous event occurring along the vessel transit." JA 3870.

Nonetheless, in the unlikely event that an intentional attack were able to occur, several studies regarding intentional breach scenarios were evaluated, and their guidance applied, in developing LNG vessel operating restrictions and in determining the potential impact areas to be considered in preparing the emergency response and evacuation plans. JA 3847. For example:

A detailed analysis of the consequences of a terrorist attack on a modern membrane LNG tanker was prepared by Lloyd's Register North America for the Weaver's Cove LNG Project The study evaluated the consequences of attacks on an LNG ship by missiles and explosives. Finite element analysis was used to evaluate the effect of various sized charges on both the outer and inner hulls. A 1-meter diameter hole of the inner hull at the waterline was found to be the average most probable "worst case" scenario for hazard consequence assessments. This finding was consistent with the attack on the double-hull oil tanker *Limberg* which caused greater than a 5-meter diameter hole on the outer hull but only minor damage to the inner hull.

JA 3868; *see also* JA 3847.

The Commission also considered and applied the analysis and findings in a 2004 report by Sandia National Laboratories (“Sandia Report”). C019 P 82; C062 P 92. That report included:

an LNG cargo tank breach analysis using modern finite element modeling and explosive shock physics modeling to estimate a range of breach sizes for credible accidental and intentional LNG spill events. The analysis of accidental events found that groundings and low speed collisions could result in minor ship damage but not a cargo spill; while high speed collisions could cause a 0.5 to 1.5 m² cargo tank breach area. For intentional scenarios, the size of the cargo tank hole depends on the location of the ship and source of threat. Intentional breach areas were estimated to range from 2 to 12 m². In most cases, an intentional breaching scenario would not result in a nominal hole of more than 5 to 7 m², which is a more appropriate range to use in calculating potential hazards from spills.

JA 3868; *see also* JA 3847. “The Sandia Report also included guidance on risk management for intentional spills, based on the findings that the most significant impacts to public safety and property exist within approximately 500 meters (1,640 feet) of the spill due to thermal hazards from a fire, with lower public health and safety impacts beyond 1,600 meters (5,250 feet). Large, unignited LNG vapor releases were found to be unlikely, but could extend to 2,500 meters (8,200 feet) for [a] nominal intentional spill.” JA 3868.

The Commission then calculated thermal radiation and flammable vapor dispersion distances for several holes ranging in diameter from 1 to 3.9 meters (*i.e.*, the 8-12 square meter holes discussed in the Sandia Report) based on the

methodology in the ABSG Study, as revised by Commission staff in response to comments. JA 3868-69; C062 P 92. As a result of this analysis, the Commission found that some areas of development would be exposed to a potential transient hazard for 10 to up to 30 minutes during vessel transit and docking at the terminal site. JA 3848, 3869-70.

The Final EIS emphasized that this potential would be greatly minimized, however, by the transit and other security measures imposed by the Coast Guard. JA 3848. Moreover, the Final EIS explained, “it should not be assumed that the hazard distances identified are the assured outcome of an LNG vessel accident or attack, given the conservatisms in the models and the level of damage required to yield such large scale releases.” JA 3870. In addition, the Final EIS noted, “by focusing on the ‘worst case’ intentional breach scenarios for LNG transportation, there is a tendency to dismiss the potential hazards for other fuels and projects commonly transported on our waterways. Some of the previously identified studies that calculate long hazard distances for LNG cargo fires also estimate similarly long distances for gasoline, propane and jet fuel fires.” *Id.*

The Final EIS also explained that “these estimated ‘worst case’ intentional breach scenarios should not be misconstrued as defining an exclusionary zone.”^[15]

¹⁵ Fall River asserts that the Department of Transportation exclusion zones should apply to LNG vessels. Br. 38 n.36. Department of Transportation exclusion zones apply to LNG onshore facilities over which DOT has jurisdiction.

Rather they provide guidance in developing the operating restrictions for LNG vessel movements . . . , as well as in establishing potential impact areas for emergency response and evacuation planning.” *Id.*

Although emergency procedures are typically prepared after facilities are constructed, as additional safety and security measures to mitigate for potential transient hazards in this case, the Final EIS recommended, and the Commission required, the preparation and Commission approval of emergency response, evacuation, and funding plans before construction of the project facilities can even begin. C038 Condition 34; C039 Condition 42; C040 Condition 67; C022 PP 98-99; C063 P 98; JA 3848. Fall River ignores these prerequisites in arguing that “the consequence of an intentional breach would be cataclysmic.” Br. 38.

2. The Commission Findings Regarding The Clarke Report Were Reasonable

Despite this extensive analysis and the many safety and security measures imposed as conditions of the Commission’s approval, Fall River challenges some of the Commission’s findings regarding the Clarke Report. Br. 36-37. First, Fall River challenges the Commission’s finding regarding the Clarke Report’s conclusion that terrorist organizations will be more interested in attacking LNG

Coast Guard regulations which, by contrast, govern LNG vessels do not provide for similar exclusion zones. *See* C060 P 82.

terminals as LNG imports become a more important sector of the economy. Br. 36.

As the Commission explained, however, the Clarke Report’s “assertion that the facilities would be an especially attractive terrorist target is based on general information in the public domain that can apply equally well to many sectors of our society, rather than [on] specific evidence of threats on LNG facilities or vessels.” C061 P 91; *see also* C020-21 P 89. Moreover, the Commission added, “to date [it] has authorized twelve terminals or expansions, and is currently evaluating an equal number of new applications. As more LNG import terminals are placed in service, the attractiveness of any particular target and the national impact of a single plant outage, whether caused by the forces of nature or malicious intent, will be further reduced.” C061 P 91; *see also* C020-21 P 89; JA 3875 (“the likelihood of future acts of terrorism or sabotage occurring at the proposed LNG import terminal, or at any of the myriad natural gas pipeline or energy facilities throughout the United States is unpredictable given the disparate motives and abilities of terrorist groups. The continuing need to construct facilities to support the future natural gas pipeline infrastructure is not diminished from the threat of any such unpredictable acts”).

Fall River also asserts that the Commission erroneously “takes issue with the Clarke analysis’ assumption that an attack on a tanker could result in a breach of

two tanks, with a third tank breached by cascading damage.” Br. 36-37. The Clarke Report, however, did not identify a three tank breach as a credible threat scenario. C021 PP 92-93. In any event, the Commission considered in its analysis the Sandia Report’s finding that cascading damage could involve two or three tanks. C060 P 83; JA 3868.

In short, the Commission’s detailed review and analysis of the potential risks related to the proposed project, and the appropriate mitigation measures to address those potential risks, was reasonable and based on substantial evidence in the record and, therefore, should be upheld. *See B&J Oil and Gas v. FERC*, 353 F.3d 71, 77 (D.C. Cir. 2004) (“This data-rich evidentiary record easily satisfies our ‘more than a scintilla, less than a preponderance’ standard. Moreover, FERC’s decision rests on just the type of highly technical evidence that this court is least equipped to second guess”).

VI. THE COMMISSION APPROPRIATELY CONSIDERED LOCAL AND REGIONAL DEVELOPMENT PLANS AND THE SOCIOECONOMIC IMPACTS OF THE PROJECT

Fall River contends that the Commission ignored local and regional development plans. Br. 42-43. To the contrary, the Commission determined that “the proposed project is generally consistent with the historical uses, current zoning, and planned marine-industrial uses at the site.” C064 P 106 (citing JA 3723-30).

As described in the [Final EIS], the proposed terminal site would make use of an existing industrially zoned property that was previously used as a petroleum products facility. The proposed site for the terminal is located within [an area] designated by the state for the purposes of promoting and protecting marine industrial activities and supporting uses. The LNG vessels would transit to the site along an existing federal navigational channel. In addition, the LNG terminal is immediately across the Taunton River from the Montaup Power Plant, which currently receives coal ship deliveries.

Id.

Fall River also erroneously asserts that the Commission did not consider the socioeconomic impacts of the project, including impacts on recreational boating, cruise ship activity, and tourism. Br. 43. These and other socioeconomic impacts were fully addressed by the Commission. C064 P 105; *see also, e.g.*, JA 3758-61, 3767-88.

VII. THE COMMISSION APPROPRIATELY APPLIED THE DEPARTMENT OF TRANSPORTATION'S REGULATIONS GOVERNING SITING OF PROPOSED LNG FACILITIES

Despite acknowledging that Congress tasked the Department of Transportation with promulgating LNG siting regulations which the Commission must apply in siting an LNG facility, Br. 44, Fall River contends that the Commission's approval here violates the Pipeline Safety Act. Br. 44-47. Fall River is mistaken.

As part of the Pipeline Safety Act of 1979, Congress directed the Department of Transportation to prescribe minimum safety standards for

determining the location, design, and installation of onshore LNG facilities. 49 U.S.C § 60103(a) and (b); *see also* C009 P 38. In response, the Department of Transportation promulgated comprehensive safety standards for onshore LNG facilities. 49 C.F.R Part 193; *see* C009 P 38; JA 3883, 3874.

To ensure that both the public and property outside facility boundaries are protected in the event there is an LNG spill and either a fire or a vapor cloud forms,¹⁶ the regulations establish safe separation distances, *i.e.*, thermal radiation and flammable vapor dispersion exclusion zones, 49 C.F.R. §§ 193.2057 and 193.2059, for the siting of LNG facilities. *See* C009 P 38; JA 3834, 3503. The exclusion zones are based on National Fire Prevention Association Standards sections 2.2.3.2-2.2.3.4. 49 C.F.R. §§ 193.2057 and 193.2059; *see also* C009 P 38; JA 3503. As the Department of Transportation has explained, “the safety advantages of ‘remote siting’ are essentially obtained by compliance with the exclusion zone provisions, without incurring such potential drawbacks as poor positioning relative to existing pipelines, gas markets, or navigational needs.”

¹⁶ If LNG is released from its containment vessel and/or transfer system, it will first produce a vapor or gas, which, if ignited, represents the primary potential hazard to the public. JA 3821. “If a large quantity of LNG is spilled in the presence of an ignition source, the resulting LNG pool fire could cause high levels of thermal radiation.” JA 3837. “A large quantity of LNG spilled without ignition would form a flammable vapor cloud that would travel with the prevailing wind until it either dispersed below the flammable limits or encountered an ignition source.” JA 3839.

Liquefied Natural Gas Facilities: Reconsideration of Safety Standards for Siting, Design, and Construction, 45 Fed. Reg. 57402, 57404 (Aug. 28, 1980).

In September 2004, Fall River petitioned the Department of Transportation to modify its LNG siting standards to require that LNG facilities be located in remote areas. *See* C009 P 37. As there was no indication that the Department of Transportation would grant the petition, the Commission reasonably processed this proposal under the existing Department of Transportation siting regulations.¹⁷ C009 P 38.

**VIII. THE COMMISSION APPROPRIATELY DETERMINED
PETITIONERS HAD NOT DEMONSTRATED GOOD CAUSE TO
REOPEN THE RECORD IN THE CIRCUMSTANCES HERE**

Petitioners challenge, as an abuse of discretion, the Commission's determination that they did not establish good cause to reopen the record in the circumstances here. FR Br. 17-23; CLF Br. 57-66; Miozza Br. 10-11. To establish good cause for the Commission to reopen the record, "the requesting party must

¹⁷ The Department of Transportation has since denied the petition. *Petition for Rulemaking*, No. PHMSA-2004-19208. In addition, this Court recently dismissed in part, and denied in remaining part, Fall River's September 8, 2006, petition for a writ of mandamus to compel the Department of Transportation to issue the requested regulations or, alternatively, to compel the agency to issue a decision on their rulemaking petitions. *In re City of Fall River, et al. v. Department of Transportation*, No. 06-2310 (November 28, 2006).

demonstrate a change in circumstances that is more than just material – the change must go to the very heart of the case.” C081 P 10 (citing, *e.g.*, cases listed *supra* n.3).

Petitioners did not satisfy that standard here. As the Commission found, Weaver’s Cove merely “proposed to the Coast Guard a change in its method of navigating the waterways by which vessels will deliver the LNG to the approved terminal in Fall River” (C085 P 7; *see also* C082 P 16), which neither “affect[ed] the[] conditions [n]or [the Commission’s] approval of the project” (C082 P 16). “Unless or until the Coast Guard approves a plan for such transit that differs from the proposal approved by the Commission,” the Commission concluded, “there [was] no reason for [it] to conduct additional review. To do so would serve no purpose, as the Coast Guard could approve the original plan, the smaller ship proposal now before the Coast Guard, some other plan that would satisfy Coast Guard responsibilities, or possibly no plan at all.” C085-86 P 9.

IX. THERE IS NO JURISDICTION TO REVIEW THE REMAINING MATTERS RAISED BY MR. MIOZZA

Under NGA § 19(a), 15 U.S.C. § 717r(a), “[a]ny person . . . aggrieved by an order of the Commission . . . may apply for a rehearing The application for rehearing shall set forth specifically the ground or grounds upon which such application is based.” In addition, “[n]o proceeding to review any order of the

Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.” NGA § 19(a).

Furthermore, NGA § 19(b), 15 U.S.C. § 717r(b), provides that “[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.”

Thus, “[a] petitioner cannot raise an issue before the court that it did not first present before the Commission.” *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 424 n.6 (1st Cir. 2001) (citing NGA § 19(b)); *see also Wabash Valley Power Association, Inc. v. FERC*, 268 F.3d 1105, 1114 (D.C. Cir. 2001) (“Petitioners seeking review of a FERC order must first ‘petition for rehearing of those orders and must *themselves* raise in that petition *all* of the objections urged on appeal”); *Fuel Safe*, 389 F.3d at 1320-22, 1327 (same); *Panhandle Co. v. FPC*, 324 U.S. 635, 649 (1945) (same).

As the D.C. Circuit has explained:

Use of the definite article . . . (‘in *the* application for rehearing,’ instead of ‘in *an* application for rehearing’) makes it plain that what is referred to is the same application for rehearing mentioned earlier in subsection (b), which in turn (by reason of the same use of the definite article) clearly refers to the same application for rehearing mentioned in subsection (a), to wit, the application *of the party who seeks judicial review.*”

Asarco, Inc. v. FERC, 777 F.2d 764, 774 (D.C. Cir. 1985). This jurisdictional requirement cannot be waived by the Courts. *Wabash Valley*, 268 F.3d at 1114 (citing *Platte River Whooping Crane v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989); *Asarco*, 777 F.2d at 774).

Mr. Miozza's rehearing petitions, JA 730, 4762, and his request to reopen the record (R. 1771, included in the appendix to this Brief), which Mr. Miozza incorporated into his second rehearing petition, asserted only: (1) matters relating to the existing Brightman Street Bridge, JA 730, JA 4762, R. 1771; and (2) that the Commission had not determined whether a viable emergency response plan could be developed for the project, JA 730. Even the most liberal construction of those assertions would not have alerted the Commission that Mr. Miozza was asserting, as he does now on appeal, that: (1) "FERC abused its discretion in authorizing the operation of an LNG terminal in the heart of a densely populated urban center," Br. 7-9 (capitalization in heading altered); (2) FERC violated NEPA, Br. 9-10, 11-15; (3) FERC violated Executive Order #12898, Br. 15-17; and (4) FERC abused the CEII process, Br. 18-20.

Accordingly, the Court does not have subject matter jurisdiction to address these contentions. *See Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005). In any event, for the reasons already provided in this Brief, the orders,

and the Final EIS (*e.g.*, C074 P 174, JA 3782, 4330, 4350, 4362), none of these contentions has merit.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

John S. Moot
General Counsel

Robert H. Solomon
Solicitor

Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6048
Fax: 202-273-0901

December 18, 2006

**City of Fall River, Massachusetts, *et al.*,
v. FERC
1st Cir. Nos. 06-1203, *et al.***

Docket No. CP04-36, *et al.*

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 16,628 words, not including the tables of contents and authorities, the certificates of counsel, or the addendum.

Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-6048
Fax: (202) 273-0901
Email: beth.pacella@ferc.gov

December 18, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have, this 18th day of December 2006, served the foregoing by causing copies to be mailed to the counsel listed below.

**CITY OF FALL RIVER, ET AL.
ATTORNEY GENERAL, MA
ATTORNEY GENERAL OF
THE COMMONWEALTH OF MA
ATTORNEY GENERAL FOR
THE STATE OF RHODE ISLAND
EAST LONGMEADOW, MA
MA ENERGY FACILITIES
SITING BOARD**

James R. Milkey
Carol Iancu
MA Attorney General's Office
McCormack Building
1 Ashburton Place, 20th Floor
Boston, MA 02108

Terence J. Tierney
Paul J. Roberti, Chief, Reg. Unit
RI Attorney General's Office
Appellate Division
150 S. Main Street
Providence, RI 02903

Edward Berlin
Swindler, Berlin, Shereff, Friedman
3000 K Street, NW
Suite 300
Washington, DC 20007

Thomas F. McGuire, Jr.
70 S. Main Street
Fall River, MA 02720

Lester S. Hyman
Robert S. Taylor
P.O. Box 25528
Washington, DC 20027

Steven E. Tillman
5400 Westheimer Ct.
Houston, TX 77251

Steven E. Hellman
P.O. Box 1642
Houston, TX 77251

Daniel J. Duncan
Stuart Caplan
Jenner & Block
601 13th St., NW, 12th Floor
Washington, DC 20005

Nicholas P. Brontas
Lisa Tonery
1185 Avenue of the Americas
New York, NY 10036

MA Division
100 Cambridge
Boston, MA 02202

Jason Leif
Jay Dibble
Craig Chancellor
717 Texas Avenue
Suite 3300
Houston, TX 77002

Edward Lambert
1 Government Court
Fall River, MA 02722

Stephanie Jones
600 N. Dairy Ashford
Houston, TX 77002

Keith Trostle
820 N. French St.
Wilmington, DE 19801-3509

Robert A. Nailing
1 Liberty Square
Boston, MA 02109

Gordon J. Smith
1200 17th St., NW
Washington, DC 20036

Kevin M. Sweeney
John & Hengerer
1200 17th St., NW
Suite 600
Washington, DC 20036

Demonica D. Gladney
P.O. Box 2180
Houston, TX 77002

Sarah E. Tomalty
FPL Energy Maine Hydro, LLC
801 Pennsylvania Ave., NW
Suite 220
Washington, DC 20004

Timothy Bennett
P.O. Box 144
Fall River, MA 02724

Kenneth T. Maloney
1101 14th St., NW
Washington, DC 20005

Beth Webb
Dickstein, Shapiro, Morin &
Oshinsky, LLP
2101 L St., NW
Washington, DC 20037

Catherine Nesser
Joseph Vaszily
One MetroTech Ct.
Brooklyn, NY 11201

Steven I. Venezia
Division of Energy Resources
70 Franklin Street, 7th Floor
Boston, MA 02110

Selma Urman
MA Dept. of Telecommunications
One South Station
Boston, MA 02110

Douglas H. Wilkins
Anderson & Kreiger
43 Thorndike Street
Cambridge, MA 02141

Bruce F. Keily
Baker & Botts
1299 Pennsylvania Ave., NW
Washington, DC 20004

Gordon Shearer
1 New Street
Fall River, MA 02720

Terry Schwennesen
New England Electric
25 Research Drive
Westboro, MA 01582

William Glew
601 Pennsylvania Ave., NW
Washington, DC 20004

Richard Dale
Cleveland, Waters & Bass
2 Capitol Plaza
PO Box 1137
Concord, NH 03302-1137

David Mercier
1176 Howell Street
Newport, RI 02841

David Black
100 Weybosset Street
Providence, RI 02903

James Lewis
1331 Lamar, Suite 1360
Houston, TX 77002

Kendra Beaver
John Torgan
Save the Bay
434 Smith Street
Providence, RI 02908

Kelly Morton
101 Ash Street
San Diego, CA 92101-3017

Charles H. Shoneman
Bracewell & Patterson, LLP
2000 K St., NW
Suite 500
Washington, DC 20006

Michael Moore
Latham & Watkins
555 11th St., NW
Suite 1000
Washington, DC 20004-1304

Michael Van Norden
Greenberg Traurig
800 Connecticut Ave., NW
Suite 500
Washington, DC 20006

James Johnston
1900 Fifth Avenue
Birmingham, AL 35203

David Wochner
Sutherland, Asbill & Brennan
1275 Pennsylvania Ave., NW
Washington, DC 20004-2415

Bruce Henderson
800 Gessner, Suite 700
Houston, TX 77024-4238

Irma Jarrett
John Grube
Bruce F. Kiely
Gordon Shearer
5444 Westheimer Rd.
Houston, TX 77020

Jollette A. Westbrook
100 Cambridge Street
Boston, MA 02202

Stephanie Jones
600 N. Dairy Ashford
Houston, TX 77079-1175

CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC.

Susan M. Reid
Christopher A. D'Ovidio
Conservation Law Foundation
62 Summer St.
Boston, MA 02210

MICHAEL L. MIOZZA

Michael L. Miozza
84 Holland Street
Fall River, MA 02720

TOWN OF JAMESTOWN, RI

Carolyn A. Mannis, Esq.
J. William W. Harsch, Esq.
The Town of Jamestown
170 Westminster St., Suite 800
Providence, RI 02903

Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-6048
Fax: (202) 273-0901