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DEPARTMENT OF TRANSPORTATION
UNITED STATES OF AMERICA

THE SECRETARY'S DECISION ON
THE DEEPWATER PORT LICENSE APPLICATION
OF NORTHEAST GATEWAY ENERGY BRIDGE LLC

Washington, D.C. February 7, 2007

USCG-2005-22219-463

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I. INTRODUCTION¹

The Deepwater Port Act of 1974, as amended in 1984, 1996, 2002, and 2006 (hereinafter, the Act)² declared it to be the purpose of Congress to "...authorize and regulate the location, ownership, construction, and operation of deepwater ports in waters beyond the territorial limits of the United States."³ Deepwater ports,⁴ as the term has been amended, includes facilities constructed at sea which are used as terminals to transfer natural gas, usually received in the form of liquefied natural gas (LNG) from LNG carriers, to onshore storage facilities and pipelines. According to the U.S. Department of Energy, energy consumption in the United States is expected to increase more rapidly than domestic energy production through 2030.⁵ Further, natural gas demand is expected to exceed domestic production during this period requiring a more than doubling of natural gas imports by 2030. Natural gas can be imported via pipelines from neighboring nations or by ship using specialized LNG carriers. In order to receive LNG, specialized port facilities are required. Currently, four land-based LNG import facilities and one offshore facility exist in the United States. To meet the expected demand for LNG imports, several more import facilities or facility expansions will be necessary. Recognizing the need for new LNG import facilities, the Act was amended to provide American industry with the option of constructing new LNG port facilities in the waters beyond the territorial limits of the United States. The construction and operation of deepwater ports will enhance the options

¹ The application and related public comments and official actions may be viewed on the Department of Transportation's Docket Management System (Docket) at <http://dms.dot.gov/search/> by entering docket number 22219; the official docket number for Northeast Gateway Energy Bridge, LLC is USCG-2005-22219.

² In January 2002, the Act was amended by Public Law No. 107-295, the *Maritime Transportation Security Act of 2002* which, at section 106 amends the Act to cover the importation, transportation, and production of natural gas (116 STAT. 2064 at 2086). The Act was recently amended by Public Law No. 109-241, the *Coast Guard and Maritime Transportation Act of 2006*, to address crew nationalities and vessel flag registries and other requirements (120 STAT. 516). The Act is codified at 33 U.S.C. §§1501 through 1524, and citations in this document are either to sections of the Act (which were numbered 2 through 25) or, whenever possible, to corresponding sections of the United States Code.

³ Section (a)(1), 33 U.S.C. §1501 (a)(1).

⁴ The term deepwater port is defined in section 3(1) of the Act to include only facilities located seaward of the high water mark. As used herein, the term "deepwater port" shall have the statutory meaning while the term "port" shall include the related onshore facilities.

⁵ Energy Information Administration, *Annual Energy Outlook 2007 with Projections to 2030* (release date December 2006), <<http://www.eia.doe.gov/oi/af/aeo/production.html>>.

available for the importation of natural gas into the United States, thus allowing this nation to benefit from the economic and environmental advantages of LNG imports.

Under the Act, persons seeking to own, construct, and operate deepwater ports must submit a detailed application to the Secretary of Transportation, who, by a delegation published in the Federal Register on June 18, 2003, delegated to the Maritime Administrator "the authority to issue, transfer, amend, or reinstate a license for the construction and operation of a deepwater port" as provided for in the Act.⁶ Because this is a delegated authority, all references will continue to be to the Secretary. This delegation did not change the previous delegation of license processing functions to the United States Coast Guard (USCG), now part of the Department of Homeland Security,⁷ and to the Maritime Administration (MARAD), made in 1997,⁸ nor does it change the Secretary's delegation of authority to the Administrator of the Pipeline and Hazardous Materials Safety Administration in 49 CFR §1.53(a)(3) for the establishment, enforcement, and review of regulations concerning the safe construction, operation or maintenance of pipelines on federal lands and the Outer Continental Shelf (33 U.S.C. §1520).

On June 13, 2005, Northeast Gateway Energy Bridge, LLC (hereinafter Northeast Gateway, or the Applicant) - a wholly-owned subsidiary of Excelerate Energy Limited Partnership (hereinafter EELP) submitted to MARAD and to the USCG an application for a license and all federal authorizations required to own, construct, operate, and decommission a deepwater port, known as Northeast Gateway Deepwater Port (hereinafter Northeast Gateway Deepwater Port, or the Port), in federal waters approximately 22 miles northeast of Boston, Massachusetts, in a water depth of approximately 270 to 290 feet.⁹ The proposed Port would consist principally of two submerged turret loading buoys (STL Buoys), flexible risers, pipeline end manifolds

⁶ Vol. 68, Federal Register, No. 117, Wednesday, June 18, 2003, pp. 36496-36497 (68 FR 36496).

⁷ The USCG has the additional statutory responsibility to approve an operations manual for a deepwater port. 33 U.S.C. §1503(e)(1). The USCG retained the statutory and delegated authorities upon its transfer to the Department of Homeland Security (Department of Homeland Security Delegation Number: 0170, Sec. 2. (75), March 3, 2003; Pub. L. 107-296, Section 888).

⁸ Vol. 62, Federal Register, No. 48, Wednesday, March 12, 1997, pp. 11382-11383 (62 FR 11382).

⁹ The Northeast Gateway Deepwater Port would be located within the USCG, Captain of the Port, Boston zone.

(PLEMs), and subsea flow lines leading to a proposed new 24-inch natural gas transmission pipeline that will connect to the existing Algonquin HubLineSM (HubLine). The LNG carriers, Energy BridgeTM Regasification Vessels (EBRVs), will transport and vaporize the LNG using a closed-loop system, and will be equipped to store, transport, and vaporize LNG. The Port will be capable of mooring up to two EBRVs initially with a capacity of 138,000 cubic meters, and will have an initial average throughput capacity of 400 million standard cubic feet per day (mmscfd) and a peak capacity of approximately 800 mmscfd. The applicant provides that the Port will have an increased capacity of handling larger EBRVs. Such that, the initial vessels that will provide service to the Port will have a capacity of 138,000 cubic meters but the later vessels will have a larger capacity of 150,900 cubic meters.

The application was deemed complete on August 19, 2005.¹⁰ On September 2, 2005, a Notice of Application was published in the Federal Register summarizing the application.¹¹ Under section 1508(a)(1) of the Act, the Commonwealth of Massachusetts was designated as the Adjacent Coastal State.¹² Under procedures set forth in the Act, MARAD and the USCG have 240 days from the date of the Notice of Application to hold one or more public hearings in the Adjacent Coastal State.¹³ Sections 1503(c)(8) and 1508(b)(1) of the Act provide that the Secretary may not issue a license without the approval of the governor of the Adjacent Coastal State.¹⁴ The governor of the Adjacent Coastal State must approve, approve with conditions, or disapprove the application within 45 days of the last public hearing. If the governor fails to transmit his or her approval, such approval is conclusively presumed under the Act.¹⁵

In addition to the statutory requirements stipulated under the Act, the Northeast Gateway application requires review under the National Environmental Policy Act (NEPA). NEPA is a federal process which requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of

¹⁰ Docket Entry 23. USCG-2005-22219-23.

¹¹ Vol. 70, Federal Register, No. 170, Friday, September 2, 2005, pp. 52422-52423, (70 FR 52422).

¹² *Id.*

¹³ 33 U.S.C. §1504(g).

¹⁴ 33 U.S.C. §1503(c)(8); and 33 U.S.C. §1508(b)(1).

¹⁵ 33 U.S.C. §1508(b)(1).

proposed actions (and reasonable alternatives to those actions) which may significantly affect the quality of the environment.

A portion of the environmental review process for the Northeast Gateway project falls under the jurisdiction of the Commonwealth of Massachusetts and, by extension, the Massachusetts Environmental Policy Act (MEPA). MEPA mandates an environmental review of the proposed project, led by the Massachusetts' Executive Office of Environmental Affairs (EOEA).

The MEPA review process is mandated by the Commonwealth of Massachusetts and is independent of the federal NEPA process. However, the MEPA process allows for a coordinated review with the federal government toward the development and production of one document that serves as the Environmental Impact Report (EIR) required for the MEPA process and the EIS required for the NEPA process and the Deepwater Port Act (DWPA).¹⁶

The application timeline for Northeast Gateway was suspended twice based on the need for additional information to meet both NEPA and MEPA requirements.¹⁷ Substantial analysis and information were also needed to address mitigation recommendations from the National Oceanic and Atmospheric Administration (NOAA) and the NOAA National Marine Fisheries Service (NMFS). The timeline suspension was lifted as of October 9, 2006, with the publication of the Final Environmental Impact Statement (FEIS), notice of public hearings, and request for comments in the Federal Register on October 26, 2006.^{18,19} Final public hearings were held on November 8 and 9, 2006, in Gloucester and Salem, Massachusetts, respectively.²⁰ MARAD and the USCG received written approval from Governor Mitt Romney of Massachusetts via letter dated December 19, 2006, in support of the Northeast Gateway Deepwater Port license application.²¹

¹⁶ Docket entry 189. USCG-2005-22219-189.

¹⁷ Docket entry 77, USCG-2005-22219-77; and docket entry 197, USCG-2005-22219-197, respectively.

¹⁸ Docket entry 203. USCG-2005-22219-203.

¹⁹ Vol. 71, Federal Register, No. 207, Thursday, October 26, 2006, pp. 62657-62659 (71 FR 62657).

²⁰ *Id.*

²¹ Docket entry 453. USCG-2005-22219-453.

The issue before me is whether to issue a license to Northeast Gateway, to deny the application, or to issue a license subject to certain conditions and the statutory criteria designed to protect and advance the public interest.²² This document sets forth my decision on the application submitted by Northeast Gateway, one of seven currently pending applications under the Act. This is a decision I am required by statute to make within 90 days after the last public hearing, which was held on November 9, 2006.²³

In reaching this decision, I am compelled to evaluate and consider a broad range of expert advice and information from other federal agencies, adjacent states, and the general public. Moreover, I am directed to make specific findings that seek to protect, promote, and, in some cases, reconcile national priorities in energy, the environment, the economy, and freedom of navigation on the high seas. In placing this awesome responsibility on one federal official, the Congress commendably has sought to simplify the complex maze of federal and state jurisdictional responsibilities into a single decision based on a broad range of information and policy perspectives.

The proposed Northeast Gateway Deepwater Port will be located in the federal waters of the Outer Continental Shelf in Blocks NK 19-04 6625 and NK 19-04 6675 (commonly referred to as Block 125), approximately 22 miles northeast of Boston, Massachusetts, and 13 miles south-southeast of Gloucester, Massachusetts, in a water depth of approximately 270 to 290 feet. The proposed port will be capable of providing an initial base load delivery of 400 mmscfd and a peak delivery capacity of approximately 800 mmscfd.

The Northeast Gateway Deepwater Port would consist of two flexible risers, two PLEMs and two subsea flow lines, and approximately 16.1 miles of 24-inch diameter natural gas transmission pipeline to connect to the existing offshore HubLine.

The Port would be capable of mooring up to two 138,000 cubic meter capacity EBRVs. The LNG carriers (or EBRVs) would be equipped to store, transport and vaporize LNG to

²² 33 U.S.C. §1503(a) sets forth specific procedures and standards by which the Secretary must make a determination.

²³ 33 U.S.C. §1504(i)(4).

natural gas, and send out the natural gas. The natural gas would then be delivered to shore from the Port via the 16.1 mile pipeline that connects to the existing HubLine system.

Northeast Gateway proposes to vaporize LNG using a closed-loop shell and tube vaporization system using recirculated, heated fresh water on-board the EBRVs. Natural gas would fuel the regasification facilities, as well as the auxiliary generators to provide the vessel's electrical needs during offloading and for hoteling operations. To keep environmental impacts to a minimum, the Northeast Gateway Deepwater Port will implement emission controls including low-NO_x burners, selective catalytic reduction, and other such preventative devices to reduce air emissions.

Natural gas from the proposed deepwater port would be delivered to Massachusetts consumers and to other parts of New England via the HubLine system.

Once licensed and fully operational, the proposed Northeast Gateway Deepwater Port will be capable of adding approximately 150 to 175 billion cubic feet (Bcf) or approximately 400 mmscfd of natural gas to New England annually. This increase would represent an approximate eight percent increase in the region's overall delivery capacity.

Construction of the pipeline and buoys is expected to take approximately seven months. The total construction costs for these components are estimated at approximately \$200,000,000.

As mentioned, Northeast Gateway is a wholly-owned subsidiary of EELP. EELP is owned by George B. Kaiser and Excelerate Energy LLC (hereinafter EELLC). Northeast Gateway has met all citizenship requirements necessary to receive a license under 33 U.S.C. §1502(4).

II. DECISION

For the reasons set forth in this document, I have decided to issue a license to Northeast Gateway, provided all conditions for license issuance are met, because it meets the basic criteria in the Act, subject to certain conditions designed to protect and advance the national

interest, the demonstration of financial capability, and conditions to preserve and enhance the environment. Several of the conditions are self-evident: the need for an operations manual, the need to submit further technical information and detailed drawings concerning the construction of the deepwater port, etc. Other conditions are the natural product of the application process. I list some but not all conditions here and discuss only a few of them in any detail. The precise conditions will be listed in the license itself. I have determined that the cost of processing applicant compliance with each of these conditions is a cost of processing the application. To reach any other conclusion would invite an applicant to evade the costs of processing the application by delaying certain events and making them conditions of the license rather than a *fait accompli* in the license. Therefore, as the applicant meets each of these conditions, it will continue to pay for the costs of processing the license. In reaching this decision, I have relied heavily--as the Act intends me to do--on the advice and recommendations of other federal and state agencies and on the views of the public as they have been expressed through the public hearing process. The "one window" application review process, created by Congress in the Act to enable a comprehensive, coordinated, and timely decision, vests in me a special responsibility to adhere to the expert advice I receive or to explain fully why I have chosen an alternative course.²⁴

The Environmental Protection Agency (EPA), NOAA, and other federal and state environmental agencies have made sound and constructive recommendations to preserve the marine environment in which this port will operate, and to protect the air and coastal regions from further environmental degradation by on-shore connecting facilities. I have accepted most of these recommendations and will be incorporating them in license conditions or the operations manual that will govern the operation of the Northeast Gateway Deepwater Port complex.

Finally, the U.S. Coast Guard, now a part of the Department of Homeland Security, was instrumental in developing the environmental and marine navigation aspects of the decision, among many other very valuable services rendered.

²⁴ Joint Report, Committees on Commerce; Interior and Insular Affairs; and Public Works, United States Senate, Deepwater Port Act of 1974, S.Rep. 93-1217, 93rd Congress, 2nd Session (1974) (hereinafter, Joint Report) at 45.

Where I have imposed conditions, it has been primarily because I have an obligation to ensure that the port is developed in a way that meets other transportation and environmental objectives, that the efforts of the private sector to undertake this project are not frustrated, and that the Secretary of Transportation, or his delegee, does not perform functions that duplicate or conflict with those vested by Congress in other federal agencies.

In approving this application, I am relying on my broad authority under the Act to impose such conditions as are necessary to carry out the provisions of the Act.²⁵ These conditions create special obligations with which the applicant must agree to comply. For this reason, Northeast Gateway may decide not to accept the license and undertake the project. If not, then I hope other potential applicants will step forward. If Northeast Gateway does accept these conditions and goes forward with the project, I am satisfied that the Northeast Gateway Deepwater Port will be developed in a way that serves the public interest.

III. DECISION MAKING PROCESS

In reaching this decision, I have followed the procedures prescribed by the Act, which are designed to ensure full exposure to a broad range of relevant information and expertise. Also, my decision can only be fully understood if it is placed within the context of the statutory framework of the Deepwater Port Act.

The Deepwater Port Act.

As originally enacted as Public Law No. 93-627 on January 3, 1975, amended on September 25, 1984 by the Deepwater Port Act Amendments of 1984 (Public Law No. 98-419, 98 STAT. 1607), modified on October 19, 1996, by the Deepwater Port Modernization Act (Title V of Public Law No. 104-324, 110 STAT. 3901 at 3925), amended by section 106 of the Maritime Transportation Security Act of 2002, (Public Law No. 107-295, 116 STAT. 2064 at 2086)²⁶ which extended the Deepwater Port Act to natural gas, and further amended by the Coast Guard and Maritime Transportation Act of 2006

²⁵ 33 U.S.C. §1503(e)(1).

²⁶ Section 106 of the Maritime Transportation Security Act of 2002, Public Law No. 107-295, 116 STAT. 2064 at 2086.

(Public Law No. 109-241, 120 STAT. 516), the statute covers a range of activities for deepwater natural gas ports by:

1. Providing that no person may engage in the ownership, construction, or operation of a deepwater port except in accordance with a license issued pursuant to the Act (33 U.S.C. §1503(a));
2. Containing citizenship requirements (33 U.S.C. 1502(4));²⁷
3. Prohibiting the transportation or transfer of any oil or natural gas between a deepwater port and the United States unless such port is licensed under the Act (33 U.S.C. §1503(a));
4. Authorizing the Secretary of Transportation to issue, amend, transfer, and reinstate licenses for the ownership, construction, and operation of deepwater ports (33 U.S.C. §1503(b));
5. Allowing such licenses to be effective unless suspended, revoked, or surrendered (33 U.S.C. §1503(h));
6. Setting forth prerequisites, conditions, application procedures, regulations, and criteria for the issuance of licenses for deepwater ports (33 U.S.C. §1504(a));
7. Requiring public notice and hearings before licenses are issued (33 U.S.C. §1503(g));
8. Allowing adjacent States to set reasonable fees for use of deepwater ports (33 U.S.C. §1504(h)(2));
9. Setting forth criteria for determining what is an adjacent State (33 U.S.C. §§1502(1) and 1508);
10. Requiring the Secretary to prescribe procedures governing the environmental and navigational effect of such ports (33 U.S.C. §1509);
11. Permitting the Secretary to suspend or revoke licenses for noncompliance with the Act (33 U.S.C. §1503(h));
12. Declaring that the laws of the United States and of the nearest adjacent State, as applicable, shall apply to such ports (33 U.S.C. §1518);
13. Requiring the Secretary to issue regulations as necessary to assure the safe construction and

²⁷ "Citizen of the United States" means any person who is a United States citizen by law, birth, or naturalization, any State, any agency of a State or a group of States, or any corporation, partnership, or association organized under the laws of any State which has as its president or other executive officer and as its chairman of the board of directors, or holder of a similar office, a person who is a United States citizen by law, birth or naturalization and which has no more of its directors who are not United States citizens by law, birth or naturalization than constitute a minority of the number required for a quorum necessary to conduct the business of the board.

- operation of pipelines on the Outer Continental Shelf (33 U.S.C. §§1504(a) and 1520);
14. Establishing civil and criminal penalties for violations of the Act (33 U.S.C. §1514(b)(3));
 15. Requiring that communications and documents transferred between Federal officials and any person concerning such ports are available to the public (33 U.S.C. §1513);
 16. Allowing civil actions for equitable relief for violations of the Act by Federal officials (33 U.S.C. §1514(c));
 17. Prohibiting issuance of a license unless the adjacent State, to which the port is to be connected by pipeline, has developed, or is making reasonable progress toward developing an approved coastal zone management program pursuant to the Coastal Zone Management Act of 1972 (33 U.S.C. §1503(c)(9)); and
 18. Directing the Secretary to give priority processing to applicants that will utilize U.S. Flag vessels and requiring applicants to provide information regarding the nationality of the flag state of vessels and the nationality of the officers and crew that will service the deepwater port facility (33 U.S.C. §§1503(i) and 1504(c)(2)(K)).

Regulations.

This application has been processed and this decision is made in conformance with regulations promulgated under the Deepwater Port Act of 1974, as amended. The regulations appear in the Code of Federal Regulations at 33 CFR Parts 148, 149, and 150.²⁸

In addition, it is important to note my authority to enforce the terms and conditions of a license under the law. Failure of the applicant to comply can result in suspension or termination of the license (33 U.S.C. §1511).²⁹

²⁸ Vol. 71, Federal Register, No. 189, Friday, September 29, 2006, pp. 57643-57694 (71 FR 57643).

²⁹ Sec. 1511. - Suspension or termination of licenses

(a) Proceedings by Attorney General; venue; conditions subsequent
Whenever a licensee fails to comply with any applicable provision of this chapter, or any applicable rule, regulation, restriction, or condition issued or imposed by the Secretary under the authority of this chapter, the Attorney General, at the request of the Secretary, may, file an appropriate action in the United States district court nearest to the location of the proposed or actual deepwater port, as the case may be, or in the district in which the licensee resides or may be found, to -
(1) suspend the license; or

The license, when issued subsequent to this Record of Decision, along with any required documentation, will be in a form and substance satisfactory to me, reflecting the terms, criteria, and conditions set forth in this Record of Decision.

Facts.

Northeast Gateway filed its application on June 13, 2005. After a preliminary analysis for completeness, the application was deemed complete on August 19, 2005.³⁰ A Notice of Application was published in the Federal Register on September 2, 2005, to announce the availability of the application for public inspection.³¹ The application was distributed to all federal departments and state agencies having duties and responsibilities under the Act. On September 13, 2005, the application, inclusive of environmental notification forms, provided by Northeast Gateway, was posted on the Department of Transportation's Docket Management System (DMS).³²

The proposed Port would be located approximately 13 miles off the coast of Gloucester, Massachusetts. Pursuant to 33 U.S.C. §1508, Massachusetts was designated as the Adjacent Coastal State, a status conferred by the Secretary, in certain circumstances, which entitles such states to certain rights and privileges, including effective veto power over a deepwater port application.³³

As required by section 1505 of the Act, MARAD and the USCG, in accordance with the requirements of NEPA, prepared an EIS for the Northeast Gateway Deepwater Port project. On

(2) if such failure is knowing and continues for a period of thirty days after the Secretary mails notification of such failure by registered letter to the licensee at his record post office address, revoke such license.

No proceeding under this subsection is necessary if the license, by its terms, provides for automatic suspension or termination upon the occurrence of a fixed or agreed upon condition, event, or time.

(b) Public health or safety; danger to environment; completion of proceedings
If the Secretary determines that immediate suspension of the construction or operation of a deepwater port or any component thereof is necessary to protect public health or safety or to eliminate imminent and substantial danger to the environment, he shall order the licensee to cease or alter such construction or operation pending the completion of a judicial proceeding pursuant to subsection (a) of this section.

³⁰ Docket entry 23. USCG-2005-22219-23.

³¹ Vol. 70, Federal Register, No. 170, Friday, September 2, 2005, pp. 52422-52423 (70 FR 52423).

³² The respective Docket entries for the application commence with document number USCG-2005-22219-2 and end with document number USCG-2005-22219-17.

³³ Vol. 70, Federal Register, No. 170, Friday, September 2, 2005, pp. 52422-52423 (70 FR 52423).

October 5, 2005, MARAD and the USCG published a Notice of Intent in the Federal Register to prepare an EIS and requested public comments, and announced public scoping meetings and informational open houses to discuss issues to be addressed in the Draft EIS (DEIS).³⁴ The scoping meetings and informational open houses were held on October 18 and 19, 2005, in Boston, Massachusetts and Gloucester, Massachusetts, respectively.³⁵ Some of the attendees provided verbal or written comments either in support of or in opposition to the proposed project. A total of twenty eight written comments were also received from agencies and stakeholders at the public meetings. These comments mirrored those received at the public meetings, but also included additional concerns. All comments received were considered during the preparation of the EIS.

On November 18, 2005, a stop clock letter was issued to suspend the statutory clock for processing the license application in order to collect information necessary to complete the EIS.³⁶ Based on the evaluation of additional data provided by the applicant, the regulatory clock was restarted on March 29, 2006.³⁷ On May 16, 2006, the DEIS was issued followed by a Notice of Availability and Request for Public Comment in the Federal Register on May 19, 2006.^{38,39} Public meetings on the DEIS were held June 14, 2006, in Gloucester and on June 15, 2006, in Salem, Massachusetts, to receive public comment on the Northeast Gateway Deepwater Port DEIS.⁴⁰ Numerous individuals provided verbal and/or written comments at the meetings. Several commenters endorsed Northeast Gateway's proposal, generally for reasons of long-term economic and energy advantages to the Commonwealth of Massachusetts and the nation. Other commenters expressed concern about adverse impacts on the environment. Comments submitted to the DMS during the 45-day public comment period were also considered during the development of the Final EIS (FEIS).

On July 24, 2006, MARAD and the USCG suspended the regulatory timeline, for a second time, to provide the

³⁴ Vol. 70, Federal Register, No. 192, Wednesday, October 5, 2005, pp. 58228-58229 (70 FR 58228).

³⁵ *Id.*

³⁶ Docket entry 77. USCG-2005-22219-77.

³⁷ Docket entry 84. USCG-2005-22219-84.

³⁸ The respective Docket entries for the DEIS commence with document number USCG-2005-22219-94 and end with document number USCG-2005-22219-116.

³⁹ Vol. 71, Federal Register, No. 97, Friday, May 19, 2006, pp. 29211-29213 (71 FR 29211).

⁴⁰ *Id.*

applicant an opportunity to submit additional information on several environmental and technical issues, which included pipeline cumulative impacts, mitigations, and alternatives to meet MEPA requirements.⁴¹ Substantial work and information were also needed to address mitigation recommendations from NOAA and to support development of the NMFS Biological Opinion for the ESA Section 7 formal consultation. The application timeline was resumed for Northeast Gateway on October 9, 2006.⁴²

In accordance with 40 C.F.R. §1506.9, a copy of the FEIS was submitted to the EPA. On October 24, 2006, the FEIS was published to the Docket.⁴³ Also, on October 26, 2006, the Notice of Availability of the FEIS, Notice of Public Hearings and Request for comments was published in the Federal Register.⁴⁴ In accordance with the Act, final public hearings on Northeast Gateway's license application were held on November 8, 2006, in Gloucester, Massachusetts and on November 9, 2006, in Salem, Massachusetts.⁴⁵ While the stated purpose of the hearings was to obtain views from interested parties on the license application, comments were also accepted regarding the EIS. By December 26, 2007, 45 days after the last public hearing, MARAD and the USCG received comments from a number of interested federal agencies and from the Commonwealth of Massachusetts.

In addition to the public notification and scoping process, MARAD and the USCG consulted with other federal and state agencies and participated in interagency meetings and telephone calls to identify issues to be addressed in the EIS. Agency consultation included a series of interagency meetings conducted in Boston, Massachusetts in the fall of 2006. The interagency meetings included representatives from MARAD, the USCG, EPA, NOAA/NMFS, the U.S. Army Corps of Engineers (USACE), as well as from the Commonwealth's EOEA office, the Massachusetts Department of Environmental Protection (MDEP), and others.

By letter dated December 22, 2006, Robert W. Varney, EPA Administrator, Region 1, stated that the EPA reviewed the

⁴¹ Docket entry 197. USCG-2005-22219-197.

⁴² Docket entry 203. USCG-2005-22219-203.

⁴³ The respective Docket entries for the FEIS commence with document number USCG-2005-22219-204 and end with document number USCG-2005-22219-227.

⁴⁴ Vol. 71, Federal Register, No. 207, Thursday, October 26, 2006, pp. 62657-62659 (71 FR 62657).

⁴⁵ *Id.*

FEIS for Northeast Gateway's application and recommends approval of Northeast Gateway's application.⁴⁶

MARAD and the USCG received written approval from Governor Mitt Romney of Massachusetts via letter dated December 19, 2006, in support of Northeast Gateway's deepwater port license application.⁴⁷ Governor Romney's approval letter set forth specific conditions regarding environmental monitoring, reporting requirements, a construction completion date, and others. The conditions will be incorporated verbatim in Northeast Gateway's license.

On February 5, 2007, NOAA issued its Biological Opinion⁴⁸ for the Northeast Gateway project under Section 7 of the Endangered Species Act. NOAA concluded, in relevant part, that the project will not jeopardize certain relevant endangered species.

In consultation initiated with NOAA's National Marine Sanctuary program (NMSP), under 16 U.S.C. §1434(d)(2), NMSP recommended that MARAD license a maximum of one of the two deepwater port projects⁴⁹ to be located in Massachusetts Bay because of the potential risk of harm to resources of the Stellwagen Bank National Marine Sanctuary (SBNMS).

IV. POLICY DETERMINATIONS

Having described the application and the process on which this decision is based, I now must address whether the applicant has or will meet the statutory criteria for issuance of a license. I also am concerned with what conditions should be imposed, if the license is issued, to ensure that the construction and operation of the port continues to serve the public interest. Fortunately, section 4(c) (33 U.S.C. §1503(c)) provides explicit guidance on this issue by requiring the Secretary to make nine findings or determinations in reaching a decision.

These determinations require that the Secretary evaluate fully the financial, technical, and management capability of the applicant and its owners to ensure that a licensee is able to comply with all applicable laws, the Act's

⁴⁶ Docket entry 459. USCG-2005-22219-459.

⁴⁷ Docket entry 455. USCG-2005-22219-455.

⁴⁸ National Marine Fisheries Service, Endangered Species Act Section 7 Consultation, Biological Opinion for Northeast Gateway Energy Bridge, LLC, dated February 5, 2007.

⁴⁹ By a Record of Decision dated January 29, 2007, the Secretary approved the application of Neptune LNG, LLC, for license issuance.

criteria, regulations, and license conditions, to weather financial and tropical storms, to meet any contingent liabilities, and to fulfill its obligation to construct and operate the port in a timely and efficient manner. Consequently, the licensee takes on a special obligation to perform, and I must be confident of its ability to do so.

These determinations further require that I ensure that the best available technology is utilized in the development of a facility that is environmentally sound, safe, and energy efficient. These requirements, of course, must be tempered by due respect for international treaties and obligations and recognition of the reciprocal benefits that accrue to all nations from the reasonably free use of the high seas. The reconciliation of proposed unilateral action to protect the environment with the objectives of international navigation requires the patience of those who work through multilateral channels to bring about a lasting and global commitment to environmental enhancement. Moreover, the environmental and safety benefits of removing LNG and other vessels from congested harbors and ports must weigh heavily in assessing the overall environmental desirability of deepwater port construction. The concerns of coastal states and other federal agencies with offshore responsibilities must also be considered seriously in reaching these determinations. The overall national interest must be considered and whether the port is consistent with the nation's goals and objectives.

In making these statutory findings, my task has been complicated by the fact that some of the values involved can be described and quantified with precision, while others, equally important to their advocates, are more hypothetical, speculative, and subjective. It would be plain error, however, to ignore a value simply because it cannot be reduced to numbers, and I have, accordingly, set forth my reasons and findings for each of these requirements in the following sections, drawing upon the substantial record. I further have described the specific license conditions that are designed to address my findings on each issue.

V. CRITERIA FOR ISSUANCE

As discussed above, section 4(c) [33 U.S.C. §1503(c)] provides explicit guidance to the Secretary requiring nine

findings or determinations as criteria for issuance of a deepwater port license. As stated earlier, when issued, the License, along with any required documentation, will reflect the terms, criteria, and conditions discussed in this Record of Decision, and will be in a form and substance satisfactory to me. The first of the nine determinations that I am required to make relates to the financial capabilities of the applicant—that and each of the other eight criteria are discussed below in the order they appear in section 4(c).

1. Financial Responsibility

As provided in section 4(c)(1) of the Act, [33 U.S.C. §1503(c)(1)], the first condition I must determine for issuing a license is that Northeast Gateway, the applicant, "is financially responsible and will meet the requirements of section 1016 [33 U.S.C. §2716] of the Oil Pollution Act of 1990" (OPA 90). Determination of financial responsibility is based upon the following factors:

- 1) The applicant must be financially able to construct, own, and operate the proposed deepwater port, and;
- 2) The applicant must meet all bonding requirements or provide other assurances that the port and its components will be removed upon revocation or termination of the license.

General Obligations.

In granting the first deepwater port license, the Secretary provided insights into the general obligations of the licensee that are still valid today. In the LOOP decision, he wrote:

Perhaps the most important requirement for financial responsibility arises out of the obligations which flow from the rights and privileges under the license. We cannot grant a license without recognition of the importance of the licensee going forward with the project.⁵⁰

I agree with this assessment. The construction and start-up of the Northeast Gateway Deepwater Port will require a

⁵⁰ The Secretary's Record of Decision on the Deepwater Port License Application of LOOP Inc. (Dec. 17, 1976), p. 14.

significant capital investment of approximately \$200,000,000. I must be assured that the applicant and/or its guarantor(s) have the resources necessary to complete the project and have the facility available to meet the energy needs of the people of the United States.

Oil Spill Liability.

Under section 4(c)(1) [33 U.S.C. §1503 (c)(1)], "The Secretary may issue a license...if he determines that the applicant is financially responsible and will meet the requirements of section 2716 of this title [33 U.S.C. Section 2716.- Financial Responsibility]." The USCG administers the requirements of section 2716, enacted by the Oil Pollution Act of 1990 (OPA 90). The USCG issues financial responsibility determinations to entities that demonstrate the financial ability or insurance sufficient to meet the maximum oil pollution liabilities indicated in the statute. Although the Northeast Gateway Deepwater Port will not transport oil, we anticipate that the applicant will have some amount of oil and/or diesel fuel stored at the facility. Since there may be an appreciable amount of oil and/or diesel fuel at the facility, the USCG may conclude that OPA 90 will apply to the Northeast Gateway Deepwater Port. While it is unlikely that the facility could create an oil spill that would require application of the full liability requirements specified in OPA 90, Sec. 2704 sets the limit of liability at \$350,000,000. OPA 90 allows the Secretary of the Department in which the Coast Guard is operating (in this case the Department of Homeland Security) to lower that limit to no less than \$50,000,000. Since a study of the relative operational and environmental risks of deepwater LNG ports that could result in lowering the limit of liability has not been undertaken, I must now consider whether the applicant has the financial capability to demonstrate responsibility to cover the maximum oil spill liability of \$350,000,000. Once the applicant has demonstrated that they will be able to meet the requirements of OPA 90, in addition to all other requirements and conditions outlined in this Record of Decision, the Secretary will issue the deepwater port license.

Removal Requirements.

Pursuant to section 4(e) [33 U.S.C. §1503(e)], the applicant must furnish, prior to the issuance of the deepwater port license, a bond or other assurance(s) that the components of the deepwater port will be removed

(unless such requirement is waived) at the termination or revocation of the license. Accordingly, the applicant, Northeast Gateway, has indicated that all components of the Northeast Gateway Deepwater Port, including the pipeline structures, will be removed and/or abandoned at the termination or revocation of the license; and that the full removal and abandonment costs will total approximately \$12,390,000.

As such, I will require the applicant to secure the full decommissioning amount of \$12,390,000 and mandate that these finances be in place prior to the issuance of the license. For this purpose, I will require a separate bond or guarantee agreement from a credit worthy source. If a guarantee is proposed, the guarantor(s) must be of investment grade quality, as rated by Standard and Poor's (S&P) and/or Moody's rating services. In addition, the guarantor(s) must provide two years of audited financial statements, which must be deemed financially adequate by the Secretary. The bond or guarantee will be adjusted annually by the inflationary percentage rate of the Consumer Price Index (CPI) established by the U.S. Bureau of Labor Statistics. As stated, the bond or guarantee must be in place prior to issuance of the deepwater port license and before commencement of project construction. Once the applicant has met these specific decommissioning requirements, in addition to all other requirements and conditions outlined in this Record of Decision, the Secretary will issue the deepwater port license.

Financial Resources.

Against these requirements for financial responsibility, we have analyzed the financial resources of the applicant. The applicant, Northeast Gateway, is a special purpose company established to own and operate the proposed deepwater port. To date, the company has been marginally capitalized and on its own financial merit, does not have the ability to finance the total costs of the project. Northeast Gateway has advised that George B. Kaiser, its principal and ultimate owner, will provide the necessary financing for both the construction and decommissioning of the Northeast Gateway Deepwater Port; and that the financing will come from cash flow accounts of multiple companies in which George B. Kaiser holds controlling interests. Therefore, we look to George B. Kaiser, as the principal owner of Northeast Gateway, to demonstrate that

he has the necessary financial resources to perform this obligation.

We analyzed the financial resources of George B. Kaiser, which included his 2004, 2005, and 2006 financial statements; and we reviewed public and private information concerning Mr. Kaiser's current financial position within the banking and oil and gas industry. As mentioned, George B. Kaiser is the ultimate and principal owner of Northeast Gateway and Gulf Gateway Energy Bridge LLC (Gulf Gateway), which, in turn, are direct subsidiaries of EELP. George B. Kaiser is also the majority owner of EELP in partnership with EELP's minority owner, Excelerate Energy LLC (EELLC). Further, George B. Kaiser is the principal owner of the privately held GBK Corp., which, in turn, owns Kaiser-Francis Oil Company, a Tulsa, Oklahoma based exploration and production company. George B. Kaiser holds controlling interests in the BOK Financial Corp. and Kaiser-Francis Oil Company holds an approximate 50 percent interest in the stock of North American Palladium Ltd. For the year 2006, Forbes Magazine ranked George B. Kaiser as one of the 30 richest Americans.⁵¹

George B. Kaiser and the collective group of Excelerate entities bring a wealth of technical and managerial expertise to this project as well as a strong and solid financial foundation. It is therefore clear that George B. Kaiser's total net worth and extensive financial resources far exceed the financial requirements of the Northeast Gateway project.

Therefore, we have determined that the proposed guarantor, George B. Kaiser, currently possesses the necessary financial resources to fund both the \$200,000,000 for construction and \$12,390,000 for decommissioning of the Northeast Gateway Deepwater Port. As such, I will grant the applicant, Northeast Gateway, adequate time to complete and present a full financing package that covers all construction and decommissioning costs of the Port.

As I have so stipulated under the decommissioning requirements outlined within this Record of Decision, I will also require that the applicant provide, before issuance of the deepwater port license, evidence, in form and substance acceptable to the Secretary, which assures

⁵¹ <http://www.forbes.com/lists/2006/54/biz_06rich400_George-B-Kaiser_OXNB.html>

that the applicant and its financial guarantor(s) will meet all financial responsibility obligations outlined within this document for the construction and decommissioning of the deepwater port. Specifically, Northeast Gateway and/or its guarantor(s), George B. Kaiser, or any other acceptable entity, must complete two separate financing arrangements for the construction and decommissioning of the proposed deepwater port in the amounts of \$200,000,000 to cover construction and \$12,390,000 to cover decommissioning. Evidence of such financing must be provided to the satisfaction of the Secretary and should include original copies of all agreements for loans, capital contributions, guarantees and other financial commitments. I believe that such financial agreements will provide the applicant with the means to perform responsibly and will assure that the applicant has the sufficient resources to construct and decommission the Port with a firm financial foundation.

Further, if a guarantee is provided to cover the Port's full decommissioning costs, the approved guarantor(s) will be required to provide annual financial statements to MARAD to demonstrate continued financial capability to fund the full costs of decommissioning the Northeast Gateway Deepwater Port. Once the applicant has met these specific financial requirements, in addition to all other requirements and conditions outlined in this Record of Decision, the Secretary will issue the deepwater license.

Finally, while the potential financing agreements may provide Northeast Gateway with the wherewithal in the future to comply with OPA 90 on its own merits or through the purchase of insurance, it does not currently demonstrate the financial capability to cover the maximum oil spill liability of \$350,000,000. As such, MARAD will require that Northeast Gateway or some other credit worthy guarantor(s) demonstrate financial ability to cover the maximum liability of \$350,000,000 in accordance with the requirements of section 2716 of the Act. This requirement must be met before issuance of the deepwater port license.

2. Compliance with Applicable Laws, Regulations, and License Conditions

While the Northeast Gateway proposal does not contemplate any significant advances in the state-of-the-art, the project is of sufficient scope and complexity to require

some inquiry into the ability of the applicant to accomplish successfully what it proposes to do.

The expertise of the applicant (and its staff) draws heavily upon the expertise of contractors and personnel employed by Northeast Gateway, its immediate parent and affiliate companies (collectively, Excelerate). Excelerate is a private company that was formed in 2003 to pursue new LNG importation alternatives into the United States and around the world. Excelerate has the unique distinction of being the first and only company in the United States that has constructed an LNG deepwater port facility, to date. In particular, Excelerate's Gulf Gateway is the only natural gas deepwater port currently in operation in the Gulf of Mexico having delivered approximately 2.9 Bcf of natural gas to the Gulf Coast region.⁵² The applicant has indicated that Northeast Gateway will draw on the experience gained by its affiliate company, Gulf Gateway and will have the same management team, which currently oversees the administration and operation of the Gulf Gateway facility. The applicant further indicates that the Northeast Gateway Deepwater Port will be managed in the same capacity as the operations of Gulf Gateway. In addition, Excelerate currently operates three EBRVs to provide deliveries of LNG to Gulf Gateway and will utilize similar vessels to service the proposed Northeast Gateway facility.

With substantial expertise in all relevant fields, I conclude that Excelerate possesses sufficient technical and management resources to accomplish the task at hand.

Within 90 days of issuance of the license, the licensee must provide evidence acceptable to the Secretary that the owners will furnish such technical and management support necessary to complete construction of the port in accordance with the conditions of the license.

In order to complete the determination under section (c)(2) [33 U.S.C. §1503(c)(2)], I must find "...that the applicant

⁵² Gulf Gateway Energy Bridge LLC was formerly known as El Paso Energy Bridge Gulf of Mexico, L.L.C., and was renamed in December 2004 following the acquisition by Excelerate of the 100 percent membership interest held by El Paso Filed Services L.P. On December 17, 2003, Excelerate acquired all of the rights to the Energy Bridge™ offshore shipboard regasification technology from El Paso Corporation, including the company's Gulf Gateway deepwater port. Following the acquisition of the technology from El Paso Corporation, Excelerate assumed all responsibilities for the construction and operation of Gulf Gateway.

will comply with applicable laws, regulations, and license conditions." Willingness cannot be determined, of course, by the attitude of the applicant or expressions of intent, but must be established by its agreement to comply. This written agreement, stipulated by section (e)(2) [33 U.S.C. §1503(e)(2)] of the Act, must be provided by Northeast Gateway agreeing to comply with the license. Similar assurances, delivered within 90 days of issuance of the license, by the parent or affiliate companies (as applicable) for those license conditions, which they alone can satisfy, must also be provided.

I am thus able to conclude "...that the applicant can...comply with applicable laws, regulations and license conditions."⁵³

3. National Interest

Section(c)(3) of the Act [33 U.S.C. §1503(c)(3)] requires me to find that the construction and operation of the port is "in the national interest" and consistent with other policy goals such as energy sufficiency.

In reaching this determination, I am obliged to reconcile the nation's numerous, and sometimes conflicting, priorities with the consequences of deepwater port construction. I am required to balance the national energy requirements with our national commitment to energy independence and consider the impact of licensing the Northeast Gateway Deepwater Port on our nation's overall environmental, economic, and security requirements.

Estimates indicate that 62 million homes, 5 million businesses, and 205,000 factories in the U.S. use natural gas. Estimates also indicate that in 2030, U.S. natural gas consumption will increase by 18 percent, and demand for electricity will rise by 45 percent. The Department of Energy, Energy Information Administration, further projects that demand for natural gas in the U.S. could reach 26.1 trillion cubic feet (tcf) annually by 2030. This compares to an annual consumption of 22.0 tcf in 2005. Despite forecasts of increased production within the lower 48 states, the Energy Information Administration predicts that increased imports of natural gas will be required to satisfy domestic demand. To meet at least part of this demand, annual LNG imports are expected to increase from

⁵³ 33 U.S.C. §1503(c)(3).

0.6 tcf in 2005 to 4.5 tcf in 2030. With 2006 estimated LNG import capacity at 1.6 tcf, significant addition of import capacity will be needed to satisfy the growing demand for LNG. This will require all the existing facilities to be fully operational with the expansions completed, as well as the construction and operation of new U.S. LNG import terminals.

The current Federal Reserve Chairman, Ben Bernanke, reaffirmed the need for LNG terminals in February 2006 when he recommended building LNG terminals to create a more global market for natural gas.

Intrinsic to the general purpose of the Northeast Gateway Deepwater Port project is the use of worldwide sources of natural gas, thereby diversifying sources of natural gas input into the existing pipeline infrastructure in the United States. The Northeast Gateway Deepwater Port will help meet the growing gas supply need by enabling regasified LNG to be delivered into the existing pipeline infrastructure in Massachusetts Bay, ultimately connecting to the Algonquin HubLine. This gas would then be delivered into the national gas pipeline grid through connections with other major interstate and intrastate pipelines.

Much of the energy our nation uses passes through a vast nationwide network of generating facilities, transmission lines, pipelines, and refineries that convert raw resources into usable fuel and power. That system is currently deteriorating, and is now strained to capacity. Therefore, the construction of a new system of offshore delivery and regasification deepwater port facilities will expand our energy infrastructure to connect new supply sources to a growing energy market in an environmentally sound manner.

Based on the above, it is clear to me that the Northeast Gateway Deepwater Port will fill a vital role in meeting our national energy requirements for many years to come. However, I must also consider whether the Northeast Gateway Deepwater Port contributes to the national objective of energy sufficiency. I must reconcile these vital national energy needs with our firm national desire for energy independence. While these objectives may appear to be conflicting, an increase in the importation of natural gas does indeed meet both objectives.

When Congress amended the Deepwater Port Act to include natural gas, I believe it recognized that the importation of natural gas would provide for a reliable alternative energy source. The Department of Energy's Strategic Plan highlights this point when calling for "supporting the development of a suite of electricity generation options that can promote reasonable and stable prices and a variety of efficiency techniques that will improve energy productivity in all sections of the American economy."⁵⁴ The Executive Branch, by issuing Executive Order 13212 of May 18, 2001 - "Actions to Expedite Energy-Related Projects" - declared that national policy requires energy sufficiency.

With greater diversity of sources, I believe the nation is better able to cope with disruptions in energy supplies that could undermine our economy and place our national security at risk. Essentially, I believe that energy sufficiency means a stronger more diverse energy network that reliably supplies our nation under unpredictable conditions. The Northeast Gateway Deepwater Port project and deepwater natural gas ports fill a vital role in this energy network.

As discussed above, the Northeast Gateway Deepwater Port, in general, will be constructed and operated in the interest of national security by providing diversity within the energy mix. Additionally, locating the import facility in deep water many miles from shore makes it a more difficult target for unscrupulous persons interested in disrupting our energy infrastructure or using the facility to harm the American public. Finally, neither the Department of Defense nor the Department of State has indicated that this project presents any national security problems.

It is our nation's longstanding policy to make the maximum effort to preserve and protect the environment. The Deepwater Port Act specifies that terminals be licensed and operated in a manner that protects the marine and coastal environment by preventing or minimizing any impact that might occur as a consequence of port development. As described later, a substantial effort has been made to evaluate the environmental impact of the Northeast Gateway Deepwater Port project and some localized negative impacts

⁵⁴ U.S. Department of Energy, *2006 Strategic Plan*, <<http://www.energy.gov/about/strategicplan.htm>>.

have been identified. However, I have concluded that the Northeast Gateway Deepwater Port project will contribute to an overall improvement in our environment based on the environmental superiority of natural gas as an energy source as compared to oil and coal.

Over the last decade, numerous new electric power plants have been built with natural gas as their energy source and many more are likely to follow. According to the Energy Information Administration, the natural gas share of electricity generation is projected to increase from 19 percent in 2005 to 22 percent around 2016, before falling to 16 percent in 2030. Without a source of natural gas that the Northeast Gateway Deepwater Port and similar deepwater natural gas ports will supply, fewer gas-fueled power plants will be built or operated in the United States. In addition, the Northeast Gateway Deepwater Port will provide positive impacts compared to a land-based facility or alternative energy imports. In this regard, the port will help reduce congestion and enhance safety in ports throughout the Northeast. I have also concluded that because the activities of the Northeast Gateway Deepwater Port will be closely monitored, and a number of permits and license conditions will be required, any negative impact on the environment will be kept to a minimum.

Nationality of Crews and Flag Nation of Vessels.

To promote the security of the United States, the Deepwater Port Act was recently amended to direct the Secretary to give priority processing to license applicants that will utilize U.S. Flag vessels in port operations. The Act was also amended to require applicants to provide information regarding the nationality of the flag state of vessels and the nationality of the officers and crew that will service the deepwater port.⁵⁵

The enactment of the Coast Guard and Maritime Transportation Act of 2006 places a firm emphasis on the safe and secure transport of LNG to and from our nation's facilities. In keeping with Congressional directives, MARAD encourages the use of U.S. personnel and U.S. flag vessels in the shipment of LNG to help enhance the overall

⁵⁵ Under the Coast Guard and Maritime Transportation Act of 2006 (Pub. L 109-241, Sec. 304), the applicant must provide "the nation of registry for, and the nationality or citizenship of officers and crew serving on board, vessels transporting natural gas that are reasonably anticipated to be servicing the deepwater port."

security of LNG operations by ensuring that vessels are operated by qualified, highly trained, and skilled American personnel.

MARAD recently established manning agreements with two previous deepwater port license applicants to employ and train U.S. officers and mariners aboard LNG vessels that will service the Neptune and Main Pass deepwater port facilities proposed for construction and operation in the Massachusetts Bay area and the Gulf of Mexico, respectively.

By letter dated January 31, 2007,⁵⁶ Excelerate has committed to provide employment opportunities for qualified U.S. citizen officers and mariners to serve aboard Excelerate's existing fleet of LNG vessels, and to continue implementation of its cadet training program by working with the maritime academies in Massachusetts, Maine and Texas to provide increased training opportunities to qualified cadets.

Consistent with its January 31, 2007, letter, Excelerate has further committed that by December 31, 2012, it will work toward achieving the milestone of employing qualified U.S.-licensed or unlicensed mariners at a minimum of: (1) 25 percent of the mariners serving on LNG vessels in its fleet calling on the Northeast Gateway Deepwater Port and serving in port operations, and (2) 10 percent of the mariners serving on Excelerate's overall fleet of LNG vessels and its other deepwater port operations.

In accordance with 33 U.S.C. §1504(c)(2)(K), Northeast Gateway must provide information regarding the nationality of the flag state of vessels, officers, and crew it intends to utilize in its operations to the Secretary for review prior to issuance of the deepwater port license.

4. Navigation, Safety, and Use of the High Seas

Section 4(c)(4) [33 U.S.C. §1503(c)(4)] lists criteria for the issuance of a license upon a finding that "...a deepwater port will not unreasonably interfere with international navigation or other reasonable uses of the high seas, as

⁵⁶ See letter dated January 31, 2007, from Rob Bryngelson, Executive Vice President and Chief Operating Officer, Excelerate Energy LLC, to Sean T. Connaughton, Maritime Administrator.

defined by treaty, convention or customary international law."

As a declaration of policy, the Congress explicitly stated in section 2(b) [33 U.S.C. §1501(b)] "...that nothing in the Act shall be construed to affect the legal status of the high seas, the superadjacent airspace, or the seabed and subsoil, including the Continental Shelf."

The United Nations Convention on the Law of the Sea (UNCLOS)⁵⁷ article 60 grants coastal States the exclusive right to construct and to authorize and regulate installations and structures in its Exclusive Economic Zone (EEZ), including deepwater ports.⁵⁸ Also, the freedom of all nations to make reasonable use of waters beyond their territorial boundaries is recognized by the 1958 International Convention on the High Seas, which defines the term "high seas" to mean all parts of the sea that are

⁵⁷ Even though the United States is not a party to UNCLOS, as a matter of policy, the United States complies with most of its provisions: United States Oceans Policy, Statement by the President (March 10, 1983), Weekly Compilation of Presidential Documents (Vol. 19, No. 10), Administration of Ronald Reagan, 1983 / Mar. 10.

* * *

Today I am announcing three decisions to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention and international law. First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states. Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

* * *

⁵⁸ Title 33 U.S.C. section 1518 precedes the entry into force of UNCLOS article 60. It also precedes the designation of the Exclusive Economic Zone of the United States, which grants us certain rights and jurisdiction under customary international law, as stated in UNCLOS Part V. While Article 60(7) indicates that a deepwater port does not have the status of an island, has no territorial sea of its own, and its presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf, the United States interprets Article 12 to mean that any roadstead located outside the territorial sea and used for the loading or unloading of ships is included in the territorial sea. See letter dated January 12, 2005, from Margaret F. Hayes, Acting Deputy Assistant Secretary for Oceans and Fisheries, United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs to Rear Admiral Thomas H. Gilmour, United States Coast Guard.

not included in the territorial sea or in the internal waters of a state.⁵⁹

Prior to the United States adopting the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) concept of the EEZ, under the Act, a distinction was made between foreign flag vessels using deepwater ports and those only navigating in the vicinity of the ports. At that time, for vessels calling at deepwater ports, the United States exercised the right and authority as the licensing state to condition the use of the ports on compliance with reasonable regulations, including acceptance of the general jurisdiction of the United States.⁶⁰ If such conditions were not accepted by a foreign state, use of the deepwater port must be denied to vessels registered in or flying the flag of that state.⁶¹

The U.S. Department of State addressed the issue of vessels calling at deepwater ports with respect to extended U.S. jurisdiction, as follows.

The DWPA at 33 U.S.C. 1518(a)(3) requires the Secretary of State to notify the government of each foreign state having vessels under its authority or flying its flag that may call at a DWP, that the United States intends to exercise jurisdiction over such vessels. The notification must indicate that, absent the foreign State's objection, its vessels will be subject to U.S. jurisdiction whenever calling at the DWP or an established safety zone (not greater than 500 meters) and using or interfering with the use of the DWP. Further, section 1518(c)(2) states that entry by a vessel into the DWP is prohibited unless

⁵⁹ Prior to UNCLOS coming into force, a rule of reason was applied. For example, whether use of the high seas by a deepwater port is reasonable could be determined by examining, among other things, the extent to which deepwater port facilities do not unreasonably interfere with the high seas freedoms of other nations, including the freedoms of navigation, fishing, laying submarine cables and pipelines, and overflight. In fact, a properly located deepwater port could enhance navigation and safety by reducing the chances of vessel collision and pollution of the marine environment in heavily congested areas. Thus, under the reasonable uses test, one would propose to exercise the international right of the United States to make a permissible use of the high seas in a cautious and restrained manner. The use by foreign nations of the same ocean area can be accommodated if they reasonably respect the rights and interests of the United States. The amount of controversy would be decreased where the deepwater port, although in international waters, had close proximity to our shores, suggesting that there was little danger of interference with actual use of the high seas by other nations.

⁶⁰ Section 19(c), 33 U.S.C. §1518(c).

⁶¹ *Id.*

the flag state does not object to the exercise of U.S. jurisdiction or a bilateral agreement between the flag State of the vessel and the United States permitting the exercise of jurisdiction is in force.⁶²

Thus, any ship calling at a deepwater port in our EEZ would be subject to U.S. jurisdiction as if it were in the territorial sea. Because the Northeast Gateway Deepwater Port would be located in the EEZ, this principle applies here. Any ship flying the flag of a party to UNCLOS would be subject to Articles 12 and 60 and would be bound to the same jurisdictional principles of 33 U.S.C. §1518, thus obviating the need for further bilateral agreements. However, if a ship flying the flag of a non-party to UNCLOS were to call at the deepwater port, the State Department would only object to such calls if the non-party flag State had filed an objection with us.⁶³

Navigation Safety.

In accordance with section 10(d) of the Act (33 U.S.C. §1509(d)), Northeast Gateway has requested a safety zone. The USCG has determined it is reasonable to establish a 500-meter safety zone.⁶⁴

International law plays a role in this area, and the U.S. Department of State commented that under international law, navigation safety zones are governed by three principal sources: UNCLOS, specifically Articles 22, 60 and 211; the International Convention on the Safety of Life at Sea, 1974, Annex, Chapter V, primarily Regulation V/10; and the General Provisions on Ship's Routing, adopted by the International Maritime Organization (IMO) pursuant to Assembly Resolution A.572 (14), as amended.⁶⁵ The Convention on the Continental Shelf of 1958 also provides for the construction and operation of continental shelf installations and the coastal States' establishment of safety zones, which may extend to a distance of 500 meters around such installations.⁶⁶ For those vessels navigating

⁶² January 12, 2005 letter from Margaret F. Hayes, op. cit.

⁶³ *Id.*

⁶⁴ Section 10(d) of the Act requires the designation of a safety zone around and including the deepwater port to insure navigational and environmental safety.

⁶⁵ January 12, 2005 letter from Margaret F. Hayes, op. cit.

⁶⁶ Convention on the Continental Shelf, 15 U.S.T. 471 (1958), Article 5 provides in part: 2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and

in the vicinity of a deepwater port, we are entitled to take measures necessary to avoid collisions and environmental hazards within the safety zone. Outside the 500-meter safety zone, uniform international rules to ensure navigational safety around the deepwater port can best be achieved by seeking appropriate ships' routing measures through the IMO.

Because the USCG is also reviewing an Area To Be Avoided (ATBA) that is beyond the 500 meter domestic safety zone, the IMO will be approached. The Executive Branch, acting through the Department of State and the Coast Guard, will evaluate the applicant's request and prepare a proposal for presentation to the IMO Marine Safety Committee to establish the ATBA. Once approved, the ATBA will be implemented by the IMO and published in an IMO Circular and Federal Register notice. The ATBA, in accordance with 33 CFR 150.905(c), will be a recommendatory routing measure. This comports with advice given by the Department of State.⁶⁷

In addition to these safety measures, the Captain of the Port has authority to introduce additional vessel movement controls to enhance the safety of ship movements to and from the deepwater port.

Moreover, the Operations Manual, which Northeast Gateway is required by regulations to develop for USCG approval, will specify vessel operating procedures for LNG tankers calling at the deepwater port.⁶⁸

Based on the above, I am confident and have determined that the Northeast Gateway Deepwater Port facility is permitted under the principles of international law, and it will not unreasonably interfere with international navigation or

devices and to take in those zones measures necessary for their protection. 3. The safety zones referred to in paragraph 2 of this article may extend to a distance of 500 meters around the installations and other devices which have been erected, measured from each point of their outer edge. Ships of all nationalities must respect these safety zones. 4. Such installations and devices, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.

⁶⁷ January 12, 2005 letter from Margaret F. Hayes, op. cit.

⁶⁸ The USCG has the additional statutory responsibility to approve an operations manual for a deepwater port. 33 U.S.C. §1503(e)(1). The USCG retained the statutory and delegated authorities upon its transfer to the Department of Homeland Security (Department of Homeland Security Delegation Number: 0170, Sec. 2. (75), March 3, 2003; Pub. L. 107-296, Section 888).

other reasonable uses of the high seas, as defined by treaty, convention, or customary international law.

5. Protecting and Enhancing the Environment

As provided in 33 U.S.C. §§1501(a)(2), 1503(c)(3), 1503(c)(5) and 1505, the Secretary, in coordination and consultation with other Federal departments and agencies having jurisdiction over aspects of the construction or operation of a deepwater port, must review and evaluate the environmental impacts of the proposed facility in order to prevent or minimize adverse impacts to the marine and coastal environment associated with the construction, operation, and decommissioning of the proposed deepwater port.

Best Available Technology.

Under 33 U.S.C. §1503(c)(5), the Secretary must determine, in accordance with environmental review criteria established pursuant to 33 U.S.C. §1505, "...that the applicant has demonstrated that the deepwater port will be constructed and operated using the best available technology, so as to prevent or minimize adverse impact on the marine environment."

The Northeast Gateway Deepwater Port proposes to use a closed-loop regasification system which would use a natural gas-fired heat exchanger in which tubes containing LNG pass through a counter-current of heated water or a glycol water solution. The natural gas to heat the water (or glycol and water solution) is extracted from the sendout from the system's vaporizers. The burning of natural gas results in NO^x and other air emissions. To keep environmental impacts to a minimum, Northeast Gateway will implement stringent emission controls.

In analyzing Northeast Gateway's proposal to utilize closed-loop technology, we benefited from information and advice provided by the EPA, the USACE, NOAA, and others. We received and reviewed comments and suggestions in response to the EIS from a number of federal, state, and local governments and agencies, as well as interested persons and groups. The FEIS contains our evaluation and resolution of the comments received during the environmental review process.

The EIS and the review performed by MARAD and the USCG support my decision under section 4(c)(5), [33 U.S.C. §1503(c)(5)] that the proposed closed-loop technology is the best available technology to minimize or prevent adverse impact on the marine environment for this project.

NEPA; Environmentally Preferred Alternative.

The Deepwater Port Act also requires compliance with the National Environmental Policy Act (NEPA). Under NEPA, in order to evaluate which alternative or alternatives could be considered environmentally preferred, I examined a wide range of alternatives through a screening process as discussed in Section 2 of the FEIS. Based upon environmental and technological considerations, I then selected reasonable alternatives to the proposed action, including the No Action alternative. Alternatives examined include port location, pipeline alternatives, regasification alternatives, anchoring alternatives, construction schedule alternatives, and finally, the No Action alternative. Section 4 of the FEIS provides an evaluation of the potential environmental impacts to each resource area for each of the reasonable alternatives evaluated in the FEIS.

In light of the above considerations, I have determined that the Northeast Gateway Deepwater Port facility, as currently proposed, is the environmentally preferred alternative for this project.

Marine Sanctuaries Consultation.

As indicated above, the proposed Northeast Gateway facility would be located in close proximity to the Stellwagen Bank National Marine Sanctuary (SBNMS). Because of the potential risk of harm to resources of the SBNMS, consultation was initiated with NOAA's National Marine Sanctuary Program (NMSP) under 16 U.S.C. §1434(d) to evaluate the potential impacts of Northeast Gateway's project.⁶⁹ As part of the NMSP consultation, under 16 U.S.C. §1434(d)(2), if the Secretary of Commerce finds that a Federal agency action is likely to destroy, cause the loss of, or injure a sanctuary resource, the Secretary (acting through NOAA) must recommend reasonable and prudent alternatives, which can be taken by the Federal agency in

⁶⁹ The Neptune LNG facility will be located approximately three miles north of the Northeast Gateway facility. Because Neptune is also located near the SBNMS, consultation under 16 U.S.C. §1434(d) was conducted for the project.

implementing the agency action that will protect sanctuary resources.

On July 3, 2006, NOAA issued its §1434(d)(2) recommendations. In its first recommendation, NOAA provided:

Given the close proximity of the proposed NEG Project and Neptune to each other and to the SBMNS [sic] and their possible and/or acknowledged adverse impacts on sanctuary resources due to increased vessel traffic, underwater noise, loss of benthic habitat, entanglement, re-suspension of toxic materials, diminished aesthetics, and entrainment of plankton and fishery resources as described in this document and the DEIS, *the NMSP recommends that the USCG/MARAD license a maximum of one of the pending applications for deepwater port and pipeline operation in Massachusetts Bay* (in this case defined as the area bounded by the Massachusetts coast to the east and a line drawn from Cape Ann and Cape Cod to the west). Limiting licensing to one LNG terminal in Massachusetts Bay will limit the negative affects [sic] on sanctuary trust resources (particularly marine mammals), allow for careful monitoring of the impacts of such an industrial activity in this critical habitat for marine mammals located just outside a sanctuary boundary, and permit the full impacts of such an activity to be better understood and applied to future management decisions.⁷⁰ (Emphasis added).

Among NOAA's principal concerns is potential harm to the North Atlantic Right Whale, a protected species under the Federal Endangered Species Act of 1973, which regularly migrates near the location of both the Neptune and Northeast Gateway facilities, as proposed. It is estimated that approximately 300 to 350 Right Whales remain in existence today. A major concern regarding the Right Whale population is the threat of strikes caused by vessels moving to and from the proposed deepwater port locations and within Boston Harbor.

Under 16 U.S.C. §1434(d)(4), if the head of a Federal agency takes an action other than an alternative

⁷⁰ Docket entry 174. USCG-2005-22219-174.

recommended by the Secretary of Commerce, and the action results in the destruction of, loss of, or injury to a sanctuary resource, the head of the agency must prevent and mitigate further damage and restore or replace the sanctuary resource in a manner approved by the Secretary. In its recommendations, supporting documentation, and in interagency discussions, NOAA has maintained that permitting two deepwater port facilities in the vicinity of the SBNMS could harm sanctuary resources and has thus advised against it.

While the EIS and Biological Opinion issued by NOAA NMFS⁷¹ indicate that the risk of harm to the marine environment, including marine mammals, posed by the proposed operation of Northeast Gateway is not likely to be significant, the gravity of the NOAA NMSP recommendation under 16 U.S.C. §1434 and its consequences cannot be ignored. Under 16 U.S.C. §1434(d)(4), the issuance of a license to Northeast Gateway would expose the Federal government, and particularly the Maritime Administration, to potential liability for the restoration or replacement of any sanctuary resources that may be destroyed, lost, or injured as a result of Northeast Gateway's construction, operation, or decommissioning of its deepwater port facility.

Consequently, I have decided that, prior to issuance of a license to Northeast Gateway, NOAA's concerns regarding impacts to sanctuary resources from the issuance of a second license must either be addressed and its §1434(d)(2) recommendation removed or revised, or a mechanism must be established by Northeast Gateway, to the satisfaction of the Secretary of Transportation, to address potential liability for harm to sanctuary resources. NOAA has indicated to MARAD that it may revise its determination upon receipt of further information. MARAD will work with Northeast Gateway and NOAA to address these matters and to reach a resolution that will allow issuance of a license to Northeast Gateway.

License Conditions.

In order to assure that all possible care is taken to protect the environment, the license, if issued, will contain a continuing obligation to employ the best available technology and special environmental conditions. These conditions will control changes in the project,

⁷¹ National Marine Fisheries Service, Endangered Species Act Section 7 Consultation, Biological Opinion dated February 5, 2007.

construction of offshore pipelines, operations of the project, air emissions, industrial and wastewater discharges, potential for impacts to protected marine species, potential for adverse effects on any historical and archaeological sites, and potential for adverse impacts from project decommissioning. The license will also be subject to the conditions listed below as well as additional conditions, consistent with this Record of Decision, all of which will be set forth in detail in the license.

1. Should the Northeast Gateway project be licensed, it is expected that both Northeast Gateway and Neptune LNG, while maintaining their corporate identities, will share, communicate, coordinate activities, and cooperate with regard to the cost sharing of mitigations, support services, and infrastructure associated with the ports. This would also include environmental monitoring, lessons learned, and best practices in reducing impacts, safety/security related issues, and developing common procedures for interfacing with the public, industry, and federal, state, and local agencies. Realization of the synergy that is uniquely possible in this situation of two deepwater ports in close proximity will benefit all stakeholders.
2. Northeast Gateway will comply with the conditions set forth by Massachusetts Governor Mitt Romney in his letter to Maritime Administrator Sean T. Connaughton dated December 19, 2006.
3. All applicable federal, state, and local authorizations and permits must be obtained for the construction and operation of the port. Northeast Gateway will comply with all applicable permit requirements, including monitoring and compliance requirements. These include but are not limited to the following.
 - a. Clean Water Act (CWA) National Pollution Discharge Elimination System (NPDES) Permit. Northeast Gateway will obtain a NPDES permit and will comply with all conditions and mitigation measures identified as conditions of the permit. Northeast Gateway will provide copies of the permit to MARAD and the USCG.

- b. Clean Air Act (CAA) Title I Minor Preconstruction Permit and Title V Operating Permit. If required, Northeast Gateway will obtain Title I and Title V permits from the EPA and will comply with all conditions and mitigation measures identified as conditions of the permits. Northeast Gateway will obtain other air permits, if required by the EPA, prior to installation of deepwater port components and pipelines and prior to operations. Northeast Gateway will comply with all applicable permit requirements, including monitoring and compliance requirements and will provide copies of the permits to MARAD and the USCG.

 - c. U.S. Army Corps of Engineers Section 10/Section 404 Permits. If required, Northeast Gateway will coordinate with the appropriate USACE District Office to obtain a Section 10 permit and a Section 404 permit. Northeast Gateway will obtain the permit(s) and adhere to all conditions of the permit(s), including an approved anchoring plan. Upon completion of pipeline construction activities, Northeast Gateway will follow all applicable federal and state regulations and guidelines to properly restore temporary and permanent work spaces to their pre-existing conditions. Northeast Gateway will provide copies of the permit(s), including all conditions and requirements, to MARAD and the USCG.
4. Deepwater Port Operations Manual. In order to enhance safety both in ship movements to and from the deepwater port as well as in operating the port, Northeast Gateway will prepare a Deepwater Port Operations Manual in accordance with 33 CFR Part 150. The Operations Manual will describe measures that will be followed by Northeast Gateway to promote and protect health, safety, security, and the environment during the operation of the facility.
- a. The Operations Manual will include the procedures and strategies set forth in (1) the Final Northeast Gateway Deepwater Port Risk Assessment Phase II Final Report dated December 22, 2006, approved by the Commandant and Federal Maritime

Security Coordinator, and (2) the Federal Maritime Security Coordinator (FMSC) Assessment and Recommendations: the Northeast Gateway Deepwater Port Deepwater Port Facility Proposal dated December 11, 2006.

- b. The Operations Manual will address such areas as engineering, design, and construction information; communications systems and plans; personnel qualifications, training, and instruction; navigation procedures and aids to navigation; operating and maintenance procedures, notifications, equipment, and training; occupational safety and health; emergency response and security procedures; and waste management.
- c. The Operations Manual will address regulated navigational areas to be determined by the USCG, including Safety and Security Zones, No-Anchoring Areas, Areas To Be Avoided, and Precautionary Areas as applicable. It will address simultaneous operations protocols (communications, identification, safety and security, etc.) to ensure coordination between port operations and other vessels to manage risks through coordination, controlled access, and operational restrictions.
- d. The Operations Manual will include a safety and environmental management system to address implementation, understanding, and commitments by Northeast Gateway contract and company employees and management to properly manage risks and to ensure compliance with regulations, industry practices, and company procedures. The safety and environmental management system should include specific strategies to mitigate human error through proper human system integration.
- e. Northeast Gateway will submit the Operations Manual with all required documentation and site specific information to the USCG for review and approval. Operations may not commence prior to final approval of the Operations Manual. The Operations Manual will be updated by Northeast Gateway at least every five years and at any time

major changes are made to the facility or its operation or if required by MARAD and/or the USCG.

5. Additional Coast Guard Requirements. Northeast Gateway must meet the requirements of Title 33 CFR, subchapter NN, parts 148, 149, and 150 and Coast Guard Navigation and Vessel Inspection Circular No. 03-05 governing design, plan review, fabrication, installation, inspection, maintenance, and oversight of the deepwater port.
6. Inspections and Monitoring. Representatives from MARAD and the USCG are authorized to inspect the facility at any time to ensure that the deepwater port is being operated in accordance with the terms and conditions of the license. MARAD and/or the USCG can, at their discretion, be represented by or accompanied by inspectors from private entities or public agencies. In addition, given proper notification and credentials, Northeast Gateway shall allow all authorized representatives of the EPA to enter upon or through any premises of the Northeast Gateway Deepwater Port, including vessels and other facilities and areas where records required under EPA-issued permits are kept. Northeast Gateway shall allow such authorized representatives, at reasonable times, to access and copy any records that must be kept under the license and associated permits, to inspect facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the license and associated permits, and to sample or monitor substances or parameters for the purpose of assuring compliance with the license and associated permits.
7. Avoidance of Geologic Hazards. Any significant geologic hazard encountered during installation of facility components will be avoided. A hazards survey will be conducted for the pipeline route selected for licensing. Hazard surveys shall also include such areas as pipeline barge anchoring, STL buoy anchoring, and anchor sweep areas. A pre-construction debris/cultural resource survey will be performed before conducting construction activities.

8. Protection of Cultural/Archeological Resources. All cultural areas of significance will be avoided. Northeast Gateway will follow the Unanticipated Discoveries Plans and comply with Minerals Management Service (MMS) regulations in the event of an archaeological discovery in federal waters. Northeast Gateway will cease all construction operations in the vicinity of the discovery and notify the USCG and MMS regional director and the State Historic Preservation Office (SHPO) (if the discovery is in state waters). An Unanticipated Discoveries Plan consistent with the Massachusetts Historical Commission (MHC) and the Board of Underwater Archaeological Resources (BUAR) guidelines will be implemented if any cultural resources are accidentally encountered.

9. Port and Pipeline Construction. Northeast Gateway will use ramp-up procedures prior to operation of equipment, monitor for protected species in the vicinity of the active construction (using qualified observers), and monitor noise levels during construction and operations. Construction practices will also be implemented to minimize the duration of construction by using the most efficient and effective construction equipment and methods available. Northeast Gateway will provide MARAD with verification of LNG supply contracts prior to the start of construction. Northeast Gateway will notify MARAD and the USCG in writing at least thirty (30) days prior to commencement of any marine construction authorized by the license.

10. Pipeline and Hazardous Materials Safety Administration Office of Pipeline Safety Requirements. The pipelines will be designed, constructed, installed, tested, and operated according to applicable existing procedures as defined by MMS in coordination with the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety, and tested to the satisfaction of the PHMSA Office of Pipeline Safety. Pipelines will be periodically inspected to ensure conditions have not changed that would put the pipelines in jeopardy.

11. Decommissioning. Northeast Gateway will conduct all decommissioning activities in accordance with approved plans required by the licensing authority, and in compliance with all applicable and appropriate regulations and guidelines in place at the time of the decommissioning.

12. Project Changes. Major changes to construction and/or operation of the deepwater port must be reviewed and approved by MARAD, the USCG, and other applicable agencies. Major changes include, but are not limited to: (1) changes in technology, mechanical systems, or infrastructure that will have any significant effect on the environment; (2) any change that would require a modification of federal, state, or local permits; and (3) any change that would require modifications to the Deepwater Port Operations Manual. This would include significant pipeline route changes for which the environmental impacts were not analyzed in the FEIS/FEIR or were not consistent with the analysis in the FEIS/FEIR.

13. Prevention, Monitoring, and Mitigation Plans. For elements of the project not already covered by the USCG, MMS, USACE, NMFS, or EPA requirements, Northeast Gateway will work with MARAD, the USCG, NOAA, the State of Massachusetts, and other federal and state cooperating agencies, as appropriate, to establish a program for monitoring and mitigating environmental impacts. This program should encompass all phases of the project and should include a pre-construction monitoring baseline. The plans are subject to MARAD and USCG approval. The plans will be performance-based and include periodic evaluation of effectiveness to recommend improvements and address duration and administration of the program. The prevention, monitoring, and mitigation plans will include, at a minimum, the outlined measures discussed below. Further details will be developed and approved by MARAD and will be included in the license conditions and/or Operations Manual and will continue to be developed through further consultation with appropriate agencies.

a. National Marine Sanctuaries Act Section 304(d).

- i. *Detection Buoys in Boston Traffic Separation Scheme (TSS)*. Ten near-real-time acoustic detection buoys to be located in the Boston TSS should remain there at the expense of the licensee (or licensees) for the life of the deepwater port (subject to alternative technologies that would be approved by NOAA). A cost/benefit analysis that evaluates the effectiveness of these mitigations will be conducted at periodic intervals. Specific speed, visual awareness, and reporting provisions will be included in the Operations Manual.
- ii. *Use of Boston TSS*. Northeast Gateway has voluntarily committed to using the Boston TSS on its approach to and departure from the deepwater port at the earliest practicable point of transit (subject to appropriate discretion of the ship's captain to respond to safety concerns or for safety reasons or exigent circumstances) to lower the risk of whale strikes. This commitment will be documented in the Operations Manual.
- iii. *Speed Restrictions*. Northeast Gateway has voluntarily agreed to follow any speed restrictions that may become mandatory for all vessel traffic and to follow the proposed seasonal restrictions that NOAA may adopt by regulation. Project EBRVs and support vessels will reduce travel speeds to 10 knots maximum when transiting to/from the deepwater port outside the TSS; vessels will travel at speeds of 10 to 12 knots (or less) in the vicinity of the deepwater port. EBRVs will reduce their transit speeds to 10 to 14 knots (10 knots between March 1 and April 30), or if required by NMFS, throughout the entire year in the proposed Off Race Point North Atlantic Right Whale Ship Strike Management Zone.
- iv. *Detection Buoys for Construction*. Northeast Gateway will install and operate an array of six near-real-time acoustic detection buoys to localize vocally active marine mammals

relative to construction-related sound sources.

v. *Noise Monitoring.* Northeast Gateway will install and operate an array of autonomous recording units to monitor and evaluate underwater sound output from the project before construction and for at least five years of port operation.

vi. *Water Quality Monitoring.* Northeast Gateway will implement a water quality monitoring plan which will be developed and coordinated with MARAD, the USCG, USACE, and the EPA and include reporting requirements.

b. Additional Protected Species Harm Avoidance Measures. Northeast Gateway will consult with NOAA, NMFS, and the Stellwagen Bank National Marine Sanctuary (SBNMS) on harm avoidance for protected marine species and resources to include operating restrictions, equipment noise reduction, minimizing risk of entanglement, monitoring, training, and reporting requirements.

i. Lighting will be used in accordance with federal regulations and in accordance with USFWS guidelines. Additional detail will be provided in the license conditions and/or Operations Manual.

ii. Northeast Gateway will restrict construction activities to the period between May 1 and November 30 so that acoustic sound disturbance to the endangered North Atlantic Right Whale can largely be avoided.

iii. Wherever practicable, Northeast Gateway should integrate studies, research, or surveys into construction or operations that maximize detection of whales and sea turtles and better determine direct effects of port operations.

c. Incidental Take and Reporting Requirements. Northeast Gateway may be required to obtain an incidental take authorization per the MMPA prior

to start of construction and/or operation. If (1) the amount or extent or incidental take is exceeded; (2) a new species is listed or a critical habitat designated that may be affected by the Northeast Gateway Deepwater Port; (3) the action is subsequently modified in a manner that causes an effect to listed species or critical habitat not considered; or (4) new information reveals effects on listed species or critical habitat not previously considered, then Endangered Species Act Section 7 consultation with NOAA will be reinitiated.

- d. Essential Fish Habitat (EFH). Northeast Gateway will ensure that impacts on EFH from construction and operation of the port and pipeline are avoided, minimized, and compensated to the maximum extent practicable.
- i. Pre-construction biological surveys were conducted to determine which deepwater port and pipeline alternatives would result in the least environmentally impacting construction techniques. This includes a video survey and core samples of the substrate conditions to evaluate the benthic community habitat. Post-construction monitoring will be conducted in years one and two to verify benthic community recovery along the transmission line.
 - ii. The entire pipeline corridor and stations within the proposed terminal area will be evaluated for the presence and relative densities of lobsters prior to and post construction using video survey technologies.
 - iii. Northeast Gateway will use the northern pipeline route as proposed to minimize adverse impacts to benthic habitats.
 - iv. Wherever possible, pipelines should be buried to adequate depths and covered with compatible material to avoid need for additional armor stone and impacts to EFH.

- v. Additional sampling, monitoring, and surveys for radioactive and hazardous wastes during construction will be conducted to avoid suspension of contaminants.

6. Advice of the Administrator of EPA

Section 4(c)(6) [33 U.S.C. §1503(c)(6)] provides that the license may be issued if the Secretary "...has not been informed, within 45 days following the last public hearing on a proposed license for a designated application area, by the Administrator of the Environmental Protection Agency that the deepwater port will not conform with all applicable provisions of the Clean Air Act, as amended, the Federal Water Pollution Control Act, as amended, or the Marine Protection, Research and Sanctuaries Act, as amended." While I have not been informed by the Administrator of the EPA that the deepwater port will not conform with all applicable provisions of the Clean Air Act, the Federal Water Pollution Control Act (f/k/a the Clean Water Act), or the Marine Protection Research and Sanctuaries Act, the EPA has recommended that the Northeast Gateway license be approved subject to conditions as specified in its letter dated December 22, 2006.⁷² The conditions will be included in Northeast Gateway's license.

7. Consultations with the Secretaries of State, Defense, and Army

One of the primary purposes of the Act is to cut through the maze of federal agency jurisdictions, each of which has a legitimate interest in some aspect of deepwater port development, and to provide a single point of coordination and review. Under section 4(c)(7) [33 U.S.C. §1503(c)(7)], we have consulted with the Departments of State, Defense, and Army to determine their views on the adequacy of the application, and its effect on programs within their respective jurisdictions.⁷³

⁷² Docket entry 459. USCG-2005-22219-459.

⁷³ Consultation also took place pursuant to section 106(e)(1) of the Maritime Transportation Security Act of 2002 (Extension of Deepwater Port Act to Natural Gas), wherein Congress declared "(1) Agency and department expertise and responsibilities— not later than 30 days after the date of the enactment of this Act, the heads of Federal departments or agencies having expertise concerning, or jurisdiction over, any aspect of the construction or operation of deepwater ports for natural gas shall transmit to the Secretary of Transportation written comments as to such expertise or statutory responsibilities pursuant to the Deepwater Port Act of 1974 (33 U.S.C. §§1501 et seq.) or any other Federal law." 116 STAT. 2087.

By letter dated February 1, 2007,⁷⁴ the Department of State (DOS) concluded that the Northeast Gateway application is adequate and that the project will have no adverse effect on the programs within the jurisdiction of DOS.

The Departments of Defense did not provide comments on the proposed Northeast Gateway Deepwater Port project; however, the USACE provided extensive comments and recommendations on the application. The USACE's recommended license conditions have been referenced in large part in this Record of Decision, and will be included as conditions in Northeast Gateway's license.

8. Approval of Adjacent Coastal State Governor

Section 4(c)(8) [33 U.S.C. §1503(c)(8)] conditions issuance of a license on the approval(s) of the Governor of the "Adjacent Coastal State or States." The rights and responsibilities of states have been made a special subject of Congressional concern in the Act.⁷⁵ Special status is conferred on certain States under 33 U.S.C. §1508(a)(1), which provides for designation of certain States as "Adjacent Coastal States." 33 U.S.C. §1508(a)(1) also provides that the Secretary must:

[D]esignate as an 'Adjacent Coastal State' any coastal State which (A) would be directly connected by pipeline to a deepwater port as proposed in an application, or (B) would be located within 15 miles of any such proposed deepwater port.

In addition, 33 U.S.C. §1508(a)(2) provides:

The Secretary shall, upon request of a State, and after having received the recommendations of the Administrator of the National Oceanic and Atmospheric Administration, designate such State as an "Adjacent Coastal State" if he determines that there is a risk of damage to the coastal environment of such State equal to or greater than the risk posed to a State directly connected by pipeline to the proposed deepwater port.

⁷⁴ See letter dated February 1, 2007, from Margaret F. Hayes, Director, Office of Oceans Affairs, Bureau of Oceans, Environment and Science, U.S. Department of State, to Sean T. Connaughton, Maritime Administrator.

⁷⁵ Section 2(a)(4), 33 U.S.C. §1501(a)(4).

The governor of any state so designated by the Secretary as an Adjacent Coastal State can, by timely notification to the Secretary of his/her disapproval, prevent the issuance of a deepwater port license. Other interested states are to be given full consideration in the licensing process, as specifically provided in section (b)(2) [33 U.S.C. §1508(b)(2)].

Massachusetts was designated as the Adjacent Coastal State for the Northeast Gateway Deepwater Port project.⁷⁶ The Commonwealth of Massachusetts has been involved in the Northeast Gateway Deepwater Port project since its inception. Section (b)(1) [33 U.S.C. §1508(b)(1)] states: "If the Governor fails to transmit his approval or disapproval to the Secretary not later than 45 days after the last public hearing on applications for a particular application area, such approval shall be conclusively presumed."

By letter dated December 19, 2006,⁷⁷ Governor Mitt Romney of Massachusetts approved, with conditions, Northeast Gateway's project. Governor Romney's approval letter set forth specific conditions regarding environmental monitoring, reporting requirements, a construction completion date, and others. The conditions will be incorporated verbatim in Northeast Gateway's license.

9. Coastal Zone Management Act

Section 4(c)(9) [33 U.S.C. §1503(c)(9)] authorizes issuance of a license if the state or states adjacent to the proposed deepwater port are making reasonable progress toward developing an approved coastal zone management program. A state is considered under section 9(c) [33 U.S.C. §1508(c)] to be making such progress if it is receiving a planning grant pursuant to section 305 of the Coastal Zone Management Act.⁷⁸ Northeast Gateway has submitted a request for a CZM federal consistency certification to the Commonwealth of Massachusetts, Executive Office of Environmental Affairs, and Office of Coastal Zone Management. As a condition of its license, Northeast Gateway must receive a consistency determination.

⁷⁶ Vol. 70, Federal Register, No. 170, Friday, September 2, 2005, pp. 52422-52423, (70 FR 52422.

⁷⁷ Docket entry 453. USCG-2005-22219-453.

⁷⁸ 16 U.S.C. §1451 et seq.

VI. CONCLUSION

In analyzing and evaluating the Northeast Gateway Deepwater Port project proposed by Northeast Gateway, I have reached the following conclusions, subject to certain conditions.

Under recent amendments to the Deepwater Port Act, Northeast Gateway must provide information to the Secretary regarding the nationality of the flag state of vessels and the nationality of officers and crew that will service the deepwater port prior to issuance of the license. Northeast Gateway is currently working with MARAD to develop programs for the training and use of U.S. mariners on LNG vessels that will service the Northeast Gateway Deepwater Port facility. MARAD will monitor crew complements to ensure safe and secure port operations.

Imbalance between natural gas supply and demand would lead to higher natural gas prices and the possible substitution of other energy sources (e.g., coal, oil, and nuclear). Depending on market conditions and the availability of substitute energy sources, the substitute fuels might not be as clean burning as natural gas.

The United States will continue to be dependent, in part, on the importation of foreign natural gas for the foreseeable future, and the development of more economical and environmentally sound means of importing natural gas is therefore not inconsistent with this nation's commitment to increasing our domestic resources and securing greater energy independence.

Deepwater ports will contribute to greater energy independence by enhancing our natural gas reserves and increasing our flexibility by enabling the U.S. to receive large amounts of natural gas. This is important in light of the fact that overseas exploration has developed significant natural gas resources. Much of this gas has no local market due to lack of demand, infrastructure, and/or ability to pay for gas. Without access to export markets, this gas is effectively stranded.

The construction of the Northeast Gateway Deepwater Port will have a positive impact on the employment levels in Massachusetts. The port will also create numerous permanent jobs for the region primarily in the operations


of the port and on support vessels that will service the port. If American personnel are employed on the LNG vessels, further jobs will be created.

I have accepted generally the advice and recommendations of other federal and state agencies. Where I have not adopted specific recommendations, I have selected an alternative course that, in my judgment, will work to achieve the objective more effectively.

I recognize that the conditions that have been designed to ensure that the port is constructed and operated in accordance with the national interest may not be acceptable to the applicant. If so, then the license will not be issued, and other potential applicants will have another opportunity to consider submitting a proposal. If the license conditions are accepted and the license is issued, by the authority delegated to me by the Secretary of the Department of Transportation, I am directing all Departmental modes to exercise their responsibilities with due diligence, in cooperation with other federal and state agencies, to ensure that the letter and spirit of the license requirements are followed.

Consequently, I conclude, provided all conditions for license issuance are met, that construction and operation of the Northeast Gateway Deepwater Port will be in the national interest and consistent with national security and other national policy goals and objectives, including energy sufficiency.

Dated: February 7, 2007



Sean T. Connaughton
Maritime Administrator
Washington, D.C.