



THEODORE R. KULONGOSKI

Governor

May 9, 2008

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First St. N.E., Room 1A
Washington, D.C. 20426

Re: Supplemental Draft Environmental Impact Statement
Bradwood Landing LLC Docket No. CP06-366
Northern Star Energy LLC Docket Nos. CP06-366, CP06-376
and CP06-377

Dear Secretary Bose:

On behalf of the State of Oregon, I request that the Federal Regulatory Energy Commission (FERC) issue a supplemental Draft Environmental Impact Statement (DEIS) for the Liquefied Natural Gas (LNG) import terminal facility at Bradwood Landing and its associated pipelines.¹ I believe that a supplemental DEIS (SDEIS) is required under the regulations of the Council on Environmental Quality (CEQ) on the National Environmental Policy Act (NEPA). 40 CFR § 1502.9(c).

As you know, the State of Oregon previously submitted comments on the Draft Environmental Impact Statement for this project, to help ensure that state standards and concerns are addressed by the developer and by the Federal Energy Regulatory Commission. As we explained in those comments, the Bradwood Landing DEIS is incomplete and flawed in a number of respects. We particularly noted in our cover letter to our comments that “any mitigation plan or other document that will be relied on by FERC to determine that the facility meets licensing criteria must be included in the DEIS and circulated for meaningful review before adoption of the final EIS.” We also stated:

As an example of the inadequacy of the DEIS, large portions of the mitigation for habitat, wetlands, archeological impact, landslide protection and emergency planning are still unknown. Indeed, many supporting documents for the licensing decision will be produced after the opportunity for comment on the DEIS has closed. This is a fundamental process flaw.

¹ The State of Oregon supports the same request made by Columbia Riverkeeper et al. in the letter to FERC dated April 24, 2008.

1. The CEQ regulation requires a Supplemental DEIS in this context.

40 CFR § 1502.9(c) provides:

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

For purposes of NEPA, the concept of “significance” is defined by the regulations of the Council on Environmental Quality.²

² In 40 CFR § 1508.27, CEQ defines the term "significantly" as follows:

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

FERC has its own set of NEPA regulations, *see* 18 CFR §§ 380.1 through 380.16. FERC's NEPA regulations, however, do not appear to explicitly address or implicitly bear on the standard for a supplemental EIS established in the CEQ regulation quoted above.

The policy underpinning of the supplemental EIS requirement was well articulated in *Sierra Club v. Marsh*, 714 F Supp 539, 571 (DC Maine 1989), *appeal dismissed*, 907 F2d 210 (1st Cir 1990):

NEPA is an environmental "full disclosure" law. The supplemental EIS process is designed to ensure that agencies act with "complete awareness . . . of the environmental consequences of [their] action[s]." *Essex County Preservation Ass'n v. Campbell*, 536 F.2d 956, 961 (1st Cir. 1976) (citation omitted), *aff'g*, 399 F. Supp. 208 (D. Mass. 1975) (ordering supplemental EIS despite inability to determine, as a matter of law, that new information would have significant environmental effect; but public should have opportunity to analyze and assess it).

a. The LNG import terminal facility project has changed substantially since the DEIS was issued.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

As noted in the April 24, 2008 letter from Columbia Riverkeeper, the Bradwood Landing LNG import terminal facility and associated pipeline project has changed in four key respects:

1. **Unscreened water intakes:** The DEIS contained a recommended condition that “only LNG ships that are retrofitted to use the screened water supply system at the berth are allowed to unload cargo at the Bradwood Landing LNG terminal.” DEIS at 4-145. The assessment in the DEIS of environmental effects of the project was presumably based on the assumption that all LNG ships would use screened water intakes. The applicants have recently taken the position that not all incoming LNG tankers will use screened ballast and cooling water intakes. As stated in the applicants’ April 8, 2008 letter to FERC,

The goal of Applicants’ on-site water system program is to ensure that as many LNG carriers as practicable have the ability to use the on-site water system. * * *.

Applicants have proposed, as part of the Project, to provide reasonable contract incentives to encourage equipping or retrofitting LNG carriers for compatibility, but it is not in Applicants’ control to require *all* LNG carriers to retrofit. Despite these reasonable contract incentives proposed by Applicants, it is not likely that all LNG carriers making deliveries to the Bradwood Landing terminal under spot market contracts, short term contracts, or as replacement carriers to long term contracts will be equipped for the on-site water system.³

The impacts of unscreened water withdrawals on threatened and endangered salmon were not addressed in the DEIS, and the public has never had a chance to comment on that substantial project change. Hence, the environmental effects of that change must be evaluated in a supplemental DEIS.

2. **Changed pipeline route:** The pipeline route is expected to change. NorthernStar has apparently acknowledged that many alterations of the route are underway. Those changes could significantly alter the nature of the environmental, public-safety-related and economic impacts of the project, which must be evaluated in a supplemental DEIS.

³ Response of NorthernStar Energy LLC and Bradwood Landing LLC to the FERC Staff’s Recommended Mitigation Measure 24 in the DEIS. Letter dated April 8, 2008, pp 2-3.

3. **Deposit of dredge spoils:** Dredge spoils will now be placed entirely on the Bradwood site; it appears that deposition elsewhere in Wahkiakum County will not occur. The environmental effects of that substantial change must be evaluated in a supplemental DEIS.

4. **Open regasification:** The regasification system may be altered to allow open regasification. That substantial change will result in greatly increased amounts of effluent discharged into the Columbia River. The environmental effects of that increased effluent on fish species and other values are unknown and must be evaluated in a supplemental DEIS.

The standard for requiring a supplemental EIS when a project has substantially changed was explained by the United States Supreme Court in *Marsh v. Oregon Natural Resources Council*, 490 US 360 (1989). The decision to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: “If there remains ‘major Federal action[n]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affec[t] the quality of the human environmental’ in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.” *Id.* at 374.

An agency violates NEPA when it fails to give adequate and timely consideration to the significance of new circumstances. *NRDC v. United States Army Corps of Engineers*, 399 F Supp 2d 386, 405 (SDNY 2005) (dredging action alleged to have changed due to EPA consent order requiring a remedial investigation/feasibility study). A party challenging an agency’s failure to prepare a supplemental environmental impact statement need demonstrate only that there is a substantial possibility that the changed agency action may have significant new impacts. *Id.* at 411.

An alternative that entails “a different configuration of activities and locations” from that contained in a previous EIS must be presented in a supplemental EIS. In *Dubois v. United States Department of Agriculture*, 102 F3d 1273 (1st Cir 1996), *cert den* 521 US 1119 (1997), the First Circuit explained that in contrast to “a reduced version of a previously-considered alternative,” a new alternative reflected a different proposed configuration must be publicly aired, because “public commenters might have pointed out, if given the opportunity – and the Forest Service might have seriously considered – wholly new problems posed by the new configuration (even if some of the environmental problems present in the prior alternatives have been eliminated).” 102 F3d at 1292-93.

The four changes listed *ante* (unscreened intake water, changed pipeline route, different location for putting dredge spoils, and open gasification system)

represent substantial changes in the project that are relevant to environmental concerns. The CEQ regulation provides that “[a]gencies [s]hall prepare supplements to either draft or final environmental impact statements if [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns.” 40 CFR § 1502.9(c). Hence, FERC is *required* by the CEQ regulation to issue a Supplemental Draft Environmental Impact Statement.

As noted by the First Circuit Court of Appeals with respect to that CEQ regulation, “[t]he use of the word ‘shall’ is mandatory, not precatory. It creates a duty on the part of the agency to prepare a supplemental EIS if substantial changes from any of the proposed alternatives are made and the changes are relevant to environmental concerns.” *Dubois v. United States Department of Agriculture*, 102 F3d at 1292.

b. Significant new information is relevant to environmental concerns and bears on the proposed action and its impacts.

Significant new information has been generated both by the applicants themselves and by the Oregon Department of Energy concerning the proposed LNG import terminal facility and its environmental effects.

On April 16, 2008, NorthernStar and Bradwood Landing submitted to FERC its Motion for Leave to Respond and Response of NorthernStar Energy LLC and Bradwood Landing LLC to Comments Filed with the Commission Regarding the Draft Environmental Impact Statement. The motion to file a response to comments included four large appendices containing voluminous information, which NorthernStar and Bradwood Landing have characterized as “additional information” or information that has been “revised.”

A sense of the scope of the “additional” and “revised” information contained in the motion submitted by NorthernStar and Bradwood Landing is conveyed in the Index of Attachments:

Index of Attachments

Attachment A: Applicants’ Responses to Comments on the DEIS re General Matters

Attachment A-1: Revised DEIS Table 1.3-1

Attachment A-2: Revised Draft of DEIS Section 2

Attachment A-3: Memorandum re Washington Forested Wetland Conversion

Acreage Discrepancies

Attachment A-4: Revised Frac-out Mitigation Plan

Attachment A-5: FERC Staff's Recommended Mitigation Condition 20 Response

Attachment B: Applicants' Responses to Comments on the DEIS re Air Quality

Attachment B-1: Revised Bradwood Landing Construction Emissions Table

Attachment B-2: Revised DEIS Table 9.1-7

Attachment B-3: Northwest Pipeline LNG Interchangeability Meeting Slides

Attachment B-4: LGN South Coast Air Basin Impact Slides, Jan. 06

Attachment B-5: Revised DEIS Table 4.10.1-4

Attachment C: Applicants' Responses to Comments on the DEIS re Design

Attachment C-1: Applicants' Response to Comments of Jerry Havens

Attachment D: Applicants' Responses to Comments on the DEIS re Water Suitability Assessment

Attachment D-1: Columbia River Navigation Channel – Analysis of Vessel Arrival Patterns

Attachment D-2: Columbia River Navigation Channel – Analysis of Navigation Protocols & Priorities

NorthernStar and Bradwood Landing is seeking leave to file its response to comments, given that such response comments are outside the normal NEPA process. By definition, the additional and revised information that NorthernStar and Bradwood Landing has submitted in its reply comments was not considered in the Draft Environmental Impact Statement. Hence, the public has not had a chance in the NEPA process to evaluate the additional and revised information and comment on it. Such additional and revised information is “significant” within the meaning of the CEQ regulation and must be evaluated in a supplemental DEIS.

The current scenario, in which NorthernStar and Bradwood Landing have submitted additional and revised information that the public has had no opportunity to review within the NEPA process, despite the bearing of that

information to the environmental effects of the proposed project, clearly demonstrates a need for issuance of a Supplemental DEIS.

In *Kettle Range Conservation Group v. United State Forest Service*, 148 F Supp 2d 1107 (ED Wa 2001), the court granted an injunction prohibiting the United States Forest Service from implementing a “Douglas-fir Bark Beetle Project” until the Forest Service had prepared a supplemental EIS. 48 F Supp 2d at 1139-40. And in *Portland Audubon Society v. Babbitt*, 998 F2d 705, 708 (9th Cir 1993), the Ninth Circuit held that a supplemental EIS should have been prepared regarding the effect of timber harvest on the spotted owl, “because the scientific evidence available to the Secretary in 1987 raised significant new information relevant to environmental concerns, information bearing on the impacts arising from the ongoing implementation of the land use decisions driven by the original TMPs [timber management plans].”

In addition to the significant additional and revised information submitted by the applicants, the Oregon Department of Energy has developed the attached report, entitled “Response to Governor Kulongoski’s Request for LNG and Natural Gas Review, ODOE, May 7, 2008.” That report concerns the need for and costs, both fiscal and environmental, of an LNG import terminal facility in Oregon. The report contains significant new information bearing on the impact of the proposed LNG import terminal facility on the human environment. The report discusses the alternative of new pipelines to bring natural gas from domestic Rocky Mountain sources to Oregon at less cost and with fewer adverse effects on the environment. The report addresses the carbon footprint of LNG generally and the carbon dioxide emissions in Oregon caused by the proposed LNG import terminal facility. That new information is significant, as defined by the CEQ regulation, and hence it must be evaluated in a supplemental DEIS.

More specifically, the ODOE report concludes that natural gas will continue to be needed in Oregon for the foreseeable future, but that the three LNG import terminal facilities proposed in Oregon are not the only viable option to assure needed natural gas supplies are available. There is an over-capacity of existing LNG facilities in the United States, and hence Oregon LNG facilities would likely be underutilized. Furthermore, high oil prices and competition from Asian countries competing for natural gas supply mean that the price of Pacific Basin LNG would greatly exceed the price of North American natural gas. Domestic natural gas from North American could provide adequate natural gas to meet Oregon needs for the foreseeable future. Three new proposed pipelines from the Rocky Mountain gas fields, for example, could provide natural gas more

economically for the Oregon and California markets than the three LNG terminals.

In addition, the report indicates that LNG has significantly higher life cycle CO₂ costs than domestic natural gas, due to the processes used to liquefy and re-gasify the natural gas and the large transportation distances involved in shipping LNG to Oregon. It is likely that CO₂ emissions from regasification at an LNG terminal in Oregon would be included in a regional cap and trade system and thus could adversely affect Oregon's ability to meet its CO₂ reduction targets under a state law passed in 2007 (House Bill 3543) and under the Western Climate Initiative. In general, the Rocky Mountain pipelines appear likely to have less environmental impact on Oregon and lower levels of life cycle greenhouse gas emissions than the three LNG facilities proposed for Oregon to serve the same markets. The information contained in the ODOE report is significant new information that must be evaluated in a supplemental DEIS.

In *Blanco v. Burton*, 2006 US Dist Lexis 56533 (ED La 2006) (impacts of Hurricanes Katrina and Rita resulted in new information supporting a call for a supplemental EIS), the court agreed that the plaintiffs were likely to prevail on their NEPA claim that a supplemental EIS was required:

The Court of Appeals has stated, "The principal factor an agency should consider in exercising its discretion whether to supplement an existing EIS because of new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS." *Louisiana Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1051 (5th Cir. 1985) (quoting *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984).

In determining whether to issue a supplemental EIS, FERC is required under NEPA to take a "hard look" at the environmental impacts of substantially changed actions and significant new information. *See Hughes River Watershed Conservancy v. Glickman*, 81 F3d 437, 446 (4th Cir 1996) (Army Corps of Engineers failed to take a "hard look" at problem of zebra mussel infestation resulting from dam project; case remanded for determination regarding supplemental EIS).

CONCLUSION

As Governor of the State of Oregon, I request that FERC issue a Supplemental Draft Environmental Impact Statement to address the substantial

changes in the proposed action and the significant new information relevant to environmental concerns bearing on the proposed action. Such new information includes not only the voluminous material that NorthernStar and Bradwood Landing have themselves identified and submitted to FERC in the form of additional and revised information not previously included in the DEIS, but also the attached report from the Oregon Department of Energy addressing considerations of need, cost and the carbon footprint consequences if the proposed LNG import terminal facility is built in Oregon.

In closing, I reiterate the comment I made in my previous letter accompanying the DEIS comments of Oregon agencies:

Ultimately, the decision to site terminals requires the full engagement of the federal government, the state and the communities where facilities are proposed. Only by working together through the siting, environmental assessment and permitting processes can we make sound decisions about the appropriateness of any proposed LNG terminal.

In that spirit of cooperation and coordination, I look forward to an affirmative resolution of Oregon's request that a Supplemental Draft Environmental Impact Statement be prepared for the Bradwood Landing LNG import terminal facility and associated pipelines.

Sincerely,

A handwritten signature in black ink, appearing to read 'Theodore R. Kulongoski', with a large, sweeping flourish at the end.

THEODORE R. KULONGOSKI
Governor