

133 FERC ¶ 61,054
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Weaver's Cove Energy, LLC

Docket No. CP04-36-006

ORDER DENYING, IN PART, AND GRANTING, IN PART,
REQUEST FOR REHEARING

(Issued October 21, 2010)

1. On July 15, 2005, the Commission authorized, subject to conditions, Weaver's Cove Energy, LLC (Weaver's Cove), under section 3 of the Natural Gas Act (NGA), and Mill River Pipeline, LLC (Mill River), under section 7 of the NGA, to construct and operate a liquefied natural gas (LNG) terminal and related sendout pipeline in Fall River, Massachusetts (the Weaver's Cove Project).¹
2. In a letter order issued August 26, 2009, the Chief of the LNG Compliance Branch of the Commission's Office of Energy Projects (LNG Compliance Chief) granted, in part, requests by Weaver's Cove to modify certain aspects of the design for the Weaver's Cove LNG terminal site. The letter order also found that Weaver's Cove has satisfied Condition 40 of the July 2005 Order relating to a parcel of land known as the Wedge Lot.
3. On September 25, 2009, the City of Fall River, Massachusetts and the Commonwealth of Massachusetts (Massachusetts Intervenors) jointly filed a request for rehearing of the August 26 letter order. On October 20, 2009, Weaver's Cove submitted a motion for leave to answer and an answer to Massachusetts Intervenors' request for rehearing, to which Massachusetts Intervenors replied. On January 15, 2010, Weaver's Cove filed additional material supplementing its arguments that it has satisfied Condition 40. Although the Commission's procedural rules do not allow replies of this nature, we may, for good cause, waive this provision.² We find good cause to do so here in order to ensure a complete record and an informed decision.

¹ *Weaver's Cove Energy, LLC*, 112 FERC ¶ 61,070 (2005) (July 2005 Order), *order on reh'g*, 114 FERC ¶ 61,058 (2006) (January 2006 Order).

² *See* 18 C.F.R. § 385.213(a)(2) (2010).

4. For the reasons set forth below, we are granting, in part, and denying, in part, the Massachusetts Intervenors' request for rehearing.

Background

5. On December 19, 2003, Weaver's Cove filed an application proposing to construct an LNG terminal with a peak day sendout capacity of 800 MMcf a day on a site located on the Taunton River in the City of Fall River, Massachusetts. The proposed facilities included a marine berth for LNG vessels, an LNG storage tank, regasification facilities, and an LNG truck distribution facility. As proposed, the terminal would receive LNG for storage directly from ocean-going ships that would navigate several miles of the Taunton River. Vaporized LNG would be delivered from the terminal as pipeline-quality natural gas into pipeline laterals to be constructed by Mill River for transportation to interconnections with Algonquin Gas Transmission LLC's pipeline system. In addition, when needed, LNG would be transferred, still in liquid form, from the terminal into trucks for transportation to peak-shaving storage facilities and industrial customers throughout New England.

6. The Commission's July 2005 Order found that the proposed new LNG terminal will promote the public interest by increasing the availability of natural gas supplies in the New England market.³ The July 2005 Order provided, however, that before construction of the project may begin, Weaver's Cove must satisfy a number of environmental and safety conditions relating both to construction and operation of the LNG terminal facilities and to safety and security along the LNG vessel transit route.

7. After the Commission issued the July 2005 Order, Massachusetts objected to the project under the Coastal Zone Management Act (CZMA),⁴ and Weaver's Cove appealed the objection to the U.S. Secretary of Commerce (Secretary of Commerce). The Secretary of Commerce sustained the state's objection to the project, noting that his decision operates as a bar under the CZMA to federal agencies issuing licenses or permits necessary for the construction and operation of the project.

8. On October 24, 2007, the United States Coast Guard issued a letter of recommendation (LOR) that portions of the waterway to be used for delivery of LNG to the Fall River terminal be considered unsuitable for LNG tanker traffic, primarily because of navigation safety issues relating to the two Brightman Street bridges over the Taunton River and the lack of a turnaround capability north of Mt. Hope Bridge.⁵

³ July 2005 Order, 112 FERC ¶ 61,070 at P 5.

⁴ See 16 U.S.C. § 1456(c)(3)(a).

⁵ For a discussion of issues relating to the Brightman Street bridges, see *Weaver's Cove Energy*, 115 FERC ¶ 61,058 (2006); *order denying reh'g*, 116 FERC ¶ 61,041 (2006).

9. On January 30, 2009, Weaver's Cove filed an application to amend the NGA section 3 authorization issued in the July 2005 Order by altering the method for delivering LNG from the tanker vessels to the LNG terminal. Weaver's Cove now proposes to construct and operate (a) an offshore berth in Mount Hope Bay in Massachusetts waters near the mouth of the Taunton River that would receive LNG from tanker vessels, and (b) an LNG transfer system consisting of insulated pipeline using pipe-in-pipe (PiP) technology that would transport the LNG, still in liquid form, from the offshore berth beneath the Taunton River to the LNG storage facility in Fall River. Weaver's Cove states that the proposed modification (known as the Bay Berth Project) will remove ongoing environmental and safety concerns associated with LNG vessel navigation of the Taunton River. The Bay Berth Project does not propose any significant changes to the LNG terminal in Fall River. Commission staff are currently conducting an environmental and safety analysis of the proposal.

The August 26, 2009 Letter Order

10. In response to several filings by Weaver's Cove, the LNG Compliance Chief, pursuant to delegated authority, approved several changes to the design of the LNG terminal site. Specifically, the August 26, 2009 letter approved the following modifications:

- a. dredged material from the Taunton River will not be placed on the terminal site (a revised sediment placement plan, identifying alternative location(s) for placement of the sediments and any related permitting approvals, must still be filed with the Secretary for review and approval by the Director of the Commission's Office of Energy Projects (OEP), consistent with Condition 18 of the July 2005 Order);
- b. the LNG storage tank will be relocated 94 feet northwest to comply with Condition 36 of the July 2005 Order and plant equipment will be realigned.
- c. the administration building will be relocated from the North Parcel to the South Parcel;
- d. the firewater tank will be relocated and resized to comply with Condition 37 of the July 2005 Order; and
- e. the electrical substation will be relocated within the South Parcel.

11. The August 26, 2009 letter order also found that Condition 40 of the July 2005 Order has been satisfied with respect to ownership and control issues regarding the property adjacent to the terminal site referred to as the Wedge Lot.

12. The August 26, 2009 letter order withheld approval of proposed changes to the LNG terminal site spill containment system requested by Weaver's Cove and described several additional items needed by Commission staff to complete its review of Weaver's Cove's request.

13. The August 26, 2009 letter order also included the following statement in bold type: **"Please note that this approval involves routine engineering modifications and does not authorize commencement of site construction activities or any other activities that could affect a coastal use or resource."**

Massachusetts Intervenors' Request for Rehearing

A. Authority to Issue Letter Order

14. Initially, Massachusetts Intervenors contend that the letter order itself should be vacated on the grounds that the Commission's July 2005 Order delegates authority regarding review and approval of terminal design and construction details to the Director of OEP, but the letter order was issued by OEP's LNG Compliance Chief. Massachusetts Intervenors argue that the LNG compliance officer did not have authority to address these matters, and they assert that the letter order of the LNG Compliance Chief is unauthorized.

Commission Response

15. Massachusetts Intervenors' argument that the August 26, 2009 letter order is not valid because it is not actually signed by the Director of OEP, but rather by his designee, lacks merit. In accordance with longstanding Commission practice, the Commission routinely delegates responsibility for addressing compliance with environmental and other conditions in its orders to the Director of OEP. The Commission expects that the Director may further delegate such authority to a designee in instances where the Director considers it appropriate.⁶

16. Here, the Commission's July 2005 Order specifically delegated authority regarding review and approval of Weaver's Cove's LNG terminal design and construction details to the Director of OEP, who, in turn, delegated authority to act on these subjects to the LNG Compliance Chief, a member of his staff who has direct daily responsibility over matters of this nature. We find that the Director of OEP acted appropriately in accordance with Commission practice, and we adopt the OEP Director's delegation in this instance as our own.

⁶ See *Rockies Express Pipeline, LLC*, 128 FERC ¶ 61,045, at P 21 (2009) (discussing and affirming authority of Director's designee to act); and *East Tennessee Natural Gas Company*, 106 FERC ¶ 61,159, at P 11-12 (2004).

B. Effect of The Secretary of Commerce's Coastal Zone Management Act Decision

17. Massachusetts Intervenors argue that the LNG Compliance Chief's letter order is invalid because the modifications approved in the letter order are barred by the Secretary of Commerce's decision sustaining the objections by Massachusetts to the project under the CZMA. Massachusetts Intervenors contend that the Secretary's decision prohibits the Commission from issuing any construction-related approvals.

Commission Response

18. The CZMA provides states with federally-approved coastal management programs the opportunity to review a proposed project requiring federal licenses or permits if the project will affect any land or water use or natural resource of the state's coastal zone. A timely objection raised by a state precludes federal agencies from issuing licenses or permits for the project, unless on appeal of the state's objection to the Secretary of Commerce, the Secretary finds that the activity is either: (a) consistent with the objectives of the CZMA; or (b) necessary in the interest of national security.⁷ A finding by the Secretary of Commerce that a project satisfies either ground overrides a state's objection.

19. A project is consistent with the objectives of the CZMA if it satisfies all three of the following elements: (1) the activity furthers the national interest (as set forth in CZMA sections 302 or 303) in a significant or substantial manner; (2) the national interest furthered by the activity outweighs the activity's adverse coastal effects (separately or cumulatively); and (3) there is no reasonable alternative that would permit the activity to be conducted in a manner consistent with the enforceable policies of the state's coastal management program.⁸

20. The Secretary of Commerce found that the project would further the national interest in a significant and substantial manner (element 1), but concluded that the national interest factors do not outweigh the project's adverse coastal effects (element 2). Accordingly, the Secretary of Commerce found the proposed project was not consistent with the objectives of the CZMA, and sustained Massachusetts' objection.⁹ The Secretary of Commerce explained that his decision operates as a bar under the CZMA to federal agencies issuing licenses or permits necessary for the construction and operation of the project. The Secretary of Commerce's decision, however, expressly left open the

⁷ 16 U.S.C. 1456(c)(3)(A) (2006).

⁸ 15 C.F.R. § 930.121(a)-(c) (2010).

⁹ The Secretary of Commerce also found that the record did not establish that the project is necessary in the interest of national security.

possibility of Weaver's Cove's revising the project so that its adverse coastal effects do not outweigh the national interests it furthers.¹⁰

21. The Commission's July 2005 Order found that the Weaver's Cove Project was in the public interest provided that Weaver's Cove satisfied certain environmental conditions. The Commission ordered that construction could not begin until Weaver's Cove satisfied these conditions. One of those conditions (Condition 23) requires successful completion of CZMA requirements. Weaver's Cove has not been able to secure approval under the CZMA for its original proposal, and, in accordance with the July 2005 Order, the Commission will not issue any authorization to begin construction unless and until Weaver's Cove satisfies all CZMA requirements.

22. The August 2009 letter order of the LNG Compliance Chief does not authorize any construction. The letter order, in fact, expressly states in bold type that the letter order does not authorize commencement of site construction activities or any other activities that could affect a coastal use or resource. Continuing to process matters related to the project does not conflict with the CZMA or the Secretary of Commerce's decision. Indeed, as the Secretary of Commerce suggested as a possibility in his decision, Weaver's Cove has amended its proposal with regard to delivery of LNG to the Fall River terminal along the Taunton River with the objective of answering Massachusetts' concerns regarding the potential impact of its project on the Massachusetts coastal zone.

C. The Wedge Lot and Condition 40 to the July 2005 Order

Background

23. The Wedge Lot is a small, triangular-shaped piece of property consisting mostly of wetlands formed by its borders with the Taunton River, the proposed LNG terminal facility, and a steep embankment to Massachusetts State Route 79. The Wedge Lot abuts the terminal property and falls within the thermal exclusion zone for the project mandated by the U.S. Department of Transportation's (DOT) regulations.

24. DOT regulations require that an LNG container (the LNG storage facility) and LNG transfer system must have a thermal exclusion zone in accordance with National Fire Protection Association (NFPA) standards (incorporating NFPA standards by

¹⁰ *Decision and Findings by the Secretary of Commerce in the Consolidated Consistency Appeals of Weaver's Cove Energy, L.L.C. and Mill River Pipeline, L.L.C. from Objections of the Commonwealth of Massachusetts*, at 38 (June 26, 2008).

reference).¹¹ DOT regulations further define the term exclusion zone as “an area surrounding an LNG facility in which an operator *or government agency* legally controls all activities in accordance with § 193.2057 and § 193.2059 of DOT regulations for as long as the facility is in operation.”¹² Weaver’s Cove stated in its application, however, that legal title to the Wedge Lot was unclear and could be difficult to establish.

25. The Commission’s Final Environmental Impact Statement (FEIS) determined that no activities prohibited in exclusion zones by NFPA standards could reasonably occur on the property.¹³ Nevertheless, in accordance with DOT requirements, Condition 40 of the July 2005 Order requires Weaver’s Cove to provide evidence of its ability to exercise legal control over activities on the Wedge Lot prior to initial site preparation. Acknowledging Weaver’s Cove’s argument that it might have difficulty establishing title to the property, Condition 40 alternately provides that Weaver’s Cove can satisfy the exclusion zone control requirement by obtaining a waiver of this requirement from DOT that spells out alternative mitigation methods that would assure an equal or greater level of thermal protection within the exclusion zone. The FEIS noted that in September 2004 Weaver’s Cove had requested such an exemption or waiver from the requirement of legal control over activities on the Wedge Lot from DOT. That request is still pending before DOT.

26. In a request for rehearing of the July 2005 Order, Weaver’s Cove requested that the Commission remove Condition 40 from its authorization of the project, arguing that, while Weaver’s Cove may not be in technical compliance with the DOT exclusion zone provision because it does not hold legal title to the Wedge Lot, its proposal meets the intent of that requirement because it effectively can control public access to the Wedge Lot. The unique location of the Wedge Lot, it stated, makes it unusable, as there is no public access and no structures can be built on the property.

27. The Commission denied Weaver’s Cove’s rehearing request.¹⁴ The Commission found that, although it agreed with the discussion in the FEIS that it is unlikely that prohibited activities can reasonably occur on the wedge lot, the Commission may not waive or apply requirements weaker than those found necessary by DOT to insure public

¹¹ 49 C.F.R. § 193.2057 (2010).

¹² 49 C.F.R. § 193.2007 (2010) (emphasis added).

¹³ See FEIS, section 4.12.4, *Siting Requirement – Thermal and Dispersion Zone*, pages 4-248 – 4-249. The FEIS noted that the site is difficult to access, that there is a potential for negative impact to wetlands from any access, and that Fall River’s zoning regulations prohibit construction on the property because it lacks street line frontage.

¹⁴ January 2006 Order, 114 FERC ¶ 61,058 (2006).

safety. Accordingly, it concluded, the July 2005 order properly required Weaver's Cove to comply with the DOT site control requirement or obtain a waiver of that requirement from DOT.

April 27, 2006 Request by Weaver's Cove

28. On April 27, 2006, Weaver's Cove submitted a letter to the Commission requesting a determination that Condition 40 has been satisfied. In support of its request, Weaver's Cove cites a March 13, 2006 filing by David Frederick, an intervenor in this proceeding, of a copy of a document dated in 1960 purporting to be an official record of the Commonwealth of Massachusetts describing the taking by Massachusetts of a parcel of land approximately 10,125 square feet in size "supposed to be owned" by the Sagamore Manufacturing Company (Sagamore), for the purpose of draining and maintaining a highway. The land is bordered by the Taunton River, the Weaver's Cove LNG terminal site, and a highway. Weaver's Cove stated that, on the basis of Mr. Frederick's filing, the record now shows that Massachusetts holds legal title to the Wedge Lot, which it acquired for purposes relating to State Highway 79, one of the boundaries of the Wedge Lot.¹⁵ Weaver's Cove contends that because the land is owned or controlled by a government agency which can control access to that land, the Condition 40 requirement is satisfied. Weaver's Cove asserts that DOT regulations assume that either the operator of an LNG facility or a responsible government entity that owns property underlying an exclusion zone will be able to and will take the steps necessary to prevent access to the property in light of the required safety restrictions.

29. In reply, the Massachusetts Intervenors argue that Weaver's Cove has not satisfied the requirements of Condition 40. They state that by its terms Condition 40 can be satisfied in only one of two ways: 1) Weaver's Cove can provide evidence of its ability to exercise control over activities within the thermal exclusion zone outside the terminal property line, or 2) Weaver's Cove may obtain a waiver of its thermal exclusion zone regulation from DOT. Massachusetts Intervenors state that Weaver's Cove has done neither, but has instead proposed an alternate theory – that the condition is satisfied simply because the Wedge Lot is owned by the state. Massachusetts Intervenors assert that the letter order, in effect, inappropriately revises Condition 40 to accept this alternative. They argue that only the Commission can revise the condition.

30. The Massachusetts Intervenors also assert that the record shows that only a small portion of the Wedge Lot was taken by Massachusetts. They argue that there is no evidence that the remaining portion of the Wedge Lot is owned by the state.

31. In its response to the Massachusetts Intervenors, Weaver's Cove states that in the January 2006 Order the Commission states, in discussing the Wedge Lot and Condition

¹⁵ The Massachusetts Intervenors do not dispute that the filing from Mr. Frederick relates to a portion of the Wedge Lot.

40, that “the July 15 Order properly requires Weaver’s Cove to comply with the DOT site control requirement or obtain a waiver of that requirement from DOT.¹⁶ Weaver’s Cove argues that DOT siting requirements provide that *either* the operator *or* a government agency must have legal control of the areas that fall within the exclusion zone for as long as the facility is in operation. Weaver’s Cove asserts that by providing evidence that Massachusetts owns the Wedge Lot, it has complied with DOT’s siting requirement.

32. Weaver’s Cove states that it had already satisfied the applicable NFPA siting requirements for the Wedge Lot. It points out that the Commission’s order approving the project found that “no excluded uses are within these areas [the exclusion zones], although a small section of the thermal exclusion zone would extend off the property.”¹⁷

33. Weaver’s Cove further states that although the deed conveys title for only a small part of the Wedge Lot (10,125 sq. ft. out of 51,836 sq. ft.), Massachusetts in fact is the owner of the whole Wedge Lot. Weaver’s Cove asserts that the land not covered by the 1960 taking did not exist at the time of the taking, but has “accreted” to the original lot, a not uncommon occurrence along a tidal river.¹⁸ Weaver’s Cove asserts that ownership of this portion of the Wedge Lot is not unknown: the Wedge Lot belongs to Massachusetts.

34. In their reply to Weaver’s Cove, Massachusetts Intervenors argue that Weaver’s Cove’s accretion argument to explain the discrepancy between the portion of the Wedge Lot actually condemned by Massachusetts in 1960 and the size of the lot as it is now described, is a material, factual issue that must be proved. The Massachusetts Intervenors assert that Weaver’s Cove only offers unsupported argument and speculation, not evidence. Massachusetts Intervenors contend that the Weaver’s Cove statement that accretion is “not uncommon along a tidal river” and should be “presumed” is unsupported and insufficient to justify the letter order’s determination that Condition 40 has been satisfied.

Commission Response

35. There are essentially two issues regarding the Wedge Lot: (1) who owns the Wedge Lot; and (2) has Weaver’s Cove satisfied DOT’s exclusion zone regulations? We can answer neither of these questions at this point and, accordingly, we cannot find that Weaver’s Cove has satisfied Condition 40.

¹⁶ January 2006 Order, 114 FERC ¶ 61,058 at P 138.

¹⁷ July 2005 Order, 112 FERC ¶ 61,070 at P 81.

¹⁸ Weaver’s Cove, citing Massachusetts case law, states that accretion is the gradual deposit of sand, clay and the like to the boundary between the water and the land by either natural processes or human intervention, that land is presumed to have accreted in absence of evidence demonstrating the contrary, and that additions to shores by accretion belong to the owner of the shore.

36. While the parties here appear to agree that a portion of the Wedge Lot is owned by Massachusetts, there is no such agreement regarding the remaining and larger portion of the Wedge Lot. While Weaver's Cove's arguments concerning the doctrine of accretion and its application here may ultimately prove to be correct, we are in no position to make that determination. The Commission explained in the July 2005 Order conditionally approving the Weaver's Cove Project that the interpretation of property deed provisions is outside this Commission's expertise and jurisdiction, and that resolution of such matters is a matter of property and contract law within the province of a Massachusetts court of appropriate jurisdiction.¹⁹ Similarly, we lack the requisite jurisdiction here to determine ownership of the disputed portion of the Wedge Lot. That issue must be addressed by a Massachusetts court under Massachusetts law.

37. Should it be determined that Massachusetts does own the entire Wedge Lot, there would still remain the question of whether Weaver's Cove has complied with DOT's exclusion zone regulations.²⁰ Weaver's Cove contends that Massachusetts ownership of the entire Wedge Lot would, by itself, demonstrate compliance. Massachusetts disagrees, contending that Weaver's Cove would need permission from the government agency with title to the property to use the property for part of an exclusion zone. Whether or not a government agency must agree that its property will serve as part of an exclusion zone is not specifically spelled out in DOT's regulation defining the term or in DOT's rulemaking proceeding adopting the government agency control language.²¹

38. Recently, DOT issued an interpretation letter addressing a similar government control issue relating to the Calais LNG Project (Calais LNG) proposed on December 18, 2009, and pending Commission review in Docket No. CP10-32-000.²² As in this proceeding, the Calais LNG situation involves a storage tank that would have a thermal

¹⁹ See July 2005 Order, 112 FERC ¶ 61,070 at P 47.

²⁰ Although Condition 40, as set forth in the July 2005 Order, states that Weaver's Cove must show that it has the "ability to exercise control over activities" within the exclusion zone, we explained in the January 2006 Order on rehearing, as noted above, that the real concern is that Weaver's Cove demonstrate that it is in compliance with the DOT site control requirement.

²¹ See Notice of Proposed Rulemaking, 44 Fed. Reg. 8142, at 8148 (Feb. 8, 1979). The only reference to the government control language in that DOT rulemaking proceeding is the following: "' Exclusion zone' is revised to permit governmental control as well as control by an operator of activities within the zone ... This change would allow means others [sic] than ownership by an operator to provide the restrictions on land development around an LNG facility."

²² Prior to filing its application, Calais LNG utilized the Commission's prefiling process in Docket No. PF08-24-000.

exclusion zone that overlaps property adjacent to the Calais LNG terminal property. The overlapped property is owned by the City of Calais, subject to a conservation easement. DOT found that, although the City may control activities on the property within the meaning of the DOT regulation, Calais LNG is ultimately responsible for ensuring compliance with the thermal exclusion zone requirements for its LNG facility and that this responsibility is not alleviated by the fact that the City controls activities on the property. DOT stated that if ownership or use of the land should change, Calais LNG would still be responsible for ensuring that its facility remains in compliance with the DOT exclusion zone requirements.²³ This suggests to us that more than ownership of the land by a state or governmental entity may be necessary to satisfy the site control provision of DOT's LNG regulations.

39. In the January 2006 Order in this proceeding the Commission explained that we may apply another agency's regulations when they are clear and there is no dispute regarding their proper application, but that we cannot interpret regulations of other agencies or otherwise resolve issues raised by parties relating to the appropriate application of those regulations.²⁴ The issue here illustrates clearly why this is so. Interpretation of the exclusion zone site control requirement is a matter for DOT, not this Commission.

The Commission orders:

The Massachusetts Intervenors' request for rehearing of the August 26, 2009 letter order is granted, in part, and denied, in part, as set forth above in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²³ See July 1, 2009 letter from John A. Gale, Director, Office of Regulations, Pipeline and Hazardous Materials and Safety Administration, U.S. Department of Transportation to George H. Williams, Jr., Attorney for Calais LNG Project Company, LLC in Docket No. PF08-24-000.

²⁴ See January 2006 Order, 114 FERC ¶ 61,058 at P 127-128.