

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

2100 Second Street, S.W. Stop 7126
Washington, DC 20593-7126
Staff Symbol: CG-5222
Phone: (202) 372-1444
Fax: (202) 372-1926
Email: Curtis.E.Borland@uscg.mil

16601

SEP 1 2010

Mr. Bruce F. Kiely
Baker Botts LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004-2400

Mr. Gordon Shearer
President and Chief Executive Officer
Weaver's Cove Energy, LLC
1185 Avenue of the Americas
New York, NY 10036

Dear Mr. Kiely and Mr. Shearer:

I am in receipt of your administrative appeal dated June 20, 2008 from the ruling of Rear Admiral (RADM) T.S. Sullivan, Commander, First Coast Guard District dated May 21, 2008. This appeal regards the Captain of the Port, Coast Guard Sector Southeastern New England's recommendation that the waterway from near Sandy Point, Prudence Island, Rhode Island, at approximate position 41°36'21" N, 071°18'13" W to the proposed facility in Fall River, Massachusetts passing under the old and new Brightman Street bridges, is unsuitable from a navigation safety perspective for the type, size, and frequency of liquefied natural gas (LNG) marine traffic associated with your proposal.

I also received your correspondence of October 3, 2008 whereby you submitted additional matters for my consideration in this appeal, specifically: 1) Weaver's Cove's Motion to Lodge in the Record Certain Documents and Correspondences and 2) five separate exhibits marked "Exhibits 30 - 34" respectively. In accordance with 33 CFR § 127.015, I have appended these matters to the administrative record, have considered their content, and have given them the weight which I deem to be appropriate.

In light of the long procedural history associated with this matter, the robust administrative record which the Captain of the Port (COTP) developed prior to issuing his Letter of Recommendation, your petition for reconsideration to the COTP and subsequent appeal to RADM Sullivan, and the lengthy response from RADM Sullivan denying your appeal, I have applied a deferential standard of review to your current appeal. Under this standard of review, my inquiry is limited to determining whether, based on the administrative record, the COTP's issuance of the LOR, and the subsequent denials of your request for reconsideration/appeal by both the COTP and the District Commander, was arbitrary, capricious or an abuse of discretion.

As a predicate matter, I feel it is important to clarify the Coast Guard's role in the processing of an application to site, construct and operate a waterfront LNG facility. Pursuant to the Natural Gas Act, as amended, the Federal Energy Regulatory Commission (FERC) possesses the exclusive authority to approve or deny an application for the siting, construction, expansion, and operation of a waterfront LNG facility. FERC, as the LNG licensing authority, is also the lead federal agency for ensuring that proposed LNG projects comply with the requirements of the National Environmental Policy Act (NEPA). The Coast Guard, as an agency with subject matter expertise in matters affecting the safety and security of the waterway, serves as a cooperating agency. In this role as a cooperating agency, and in accordance with 33 Code of Federal Regulations (C.F.R.) Part 127, the Coast Guard makes recommendations to FERC, the owner/operator of the facility, and to state and local government agencies as to the suitability of the waterway. The Coast Guard communicates its recommendations to FERC, as the siting authority, via the Letter of Recommendation (LOR) to assist with FERC's decision to approve or disapprove the proposed facility's construction or expansion.

Because the Coast Guard's LOR is not a binding and immediately enforceable rule, license, or dispositive order against the Waterfront LNG facility applicant or operator, it is not a decision on the siting of the waterfront LNG facility. The Coast Guard has no authority to adjudicate the siting of waterfront LNG facilities. As described above, the Coast Guard, in response to a Letter of Intent submitted by an applicant, recommends only as to the suitability of the waterway for LNG vessels. FERC is not bound by the Coast Guard's LOR, nor is FERC even required to condition its Order on receipt of a recommendation of suitability issued by the Coast Guard. This is borne out by FERC's Order of July 15, 2005 (the Order),¹ which was issued prior to the Coast Guard's completion of its LOR. The Order finds that Weaver's Cove's proposed facility can be constructed and operated safely so long as certain conditions attached to the Order are met. Nowhere in the Order does FERC condition its approval on the Coast Guard making a recommendation on the suitability of the waterway to support LNG marine traffic. In this case, FERC has approved Weaver's Cove's application.

A LOR is not an enforceable rule, order or license to operate and is therefore not an "agency action" as that term is contemplated by the Administrative Procedure Act (APA). FERC possesses exclusive authority to approve siting, construction and operation of waterfront LNG facilities; the Coast Guard has no authority to license the operator to construct and operate a waterfront LNG facility. Because the Coast Guard cannot directly enforce its LOR, there is no reviewable final agency action. Lacking enabling authority to site waterfront LNG facilities, the LOR is exactly what its name says it is: a recommendation. In its discretion, the Coast Guard provides for administrative appeal and review of a LOR. However, those administrative appeals and reviews do not change the advisory nature of the LOR. Even after the administrative appeals and reviews are exhausted, the LOR remains an advisory opinion and not an agency action.

¹ FERC Order Granting Authority Under Section 3 of the Natural Gas Act and Issuing Certificate (112 FERC ¶ 61,070).

The above is not to say that the Coast Guard has no regulatory oversight over LNG facilities and the associated LNG vessel traffic. The Coast Guard is responsible for matters related to navigation safety, vessel engineering and construction safety standards, and matters pertaining to the safety and security of facilities and/or equipment located in or adjacent to navigable waters. See e.g., the Ports and Waterways Safety Act of 1972, as amended (33 U.S.C. § 1221 et seq.), and 33 Code of Federal Regulations (C.F.R.) Subchapter H (Parts 101-105). The Coast Guard could take agency action subject to the APA on the actual operation of a waterfront LNG facility. For example, a Captain of the Port (COTP) may issue an order to the operator of a LNG facility to suspend LNG transfer operations if the COTP finds any condition requiring immediate action to protect the navigable waters of the United States and infrastructure located on, in or adjacent to those waters (see 33 C.F.R. § 127.013). The COTP also has the authority to promulgate a safety zone and/or a security zone to help ensure the safe and secure transit of LNG vessels. These are enforceable actions that are widely understood to be reviewable under the APA's arbitrary and capricious standard of review.

In the matter of your appeal before me, I have conducted a review of the administrative record that was before Captain (CAPT) Nash when he made his recommendation to you that the waterway from Sandy Point, Prudence Island, Rhode Island to the proposed facility in Fall River, Massachusetts is unsuitable from a navigation safety perspective for the type, size, and frequency of LNG marine traffic associated with your proposal. I also considered the separate matters you submitted with your Request for Reconsideration to CAPT Nash, your subsequent appeal to the Commander, First Coast Guard District, RADM Sullivan, and exhibits 30 – 34 which you have included in your appeal that is before me.

After completing my review of the administrative record, I find that both CAPT Nash and RADM Sullivan have complied with and followed the applicable regulation and policy guidance for preparing the LOR. It is my opinion that the administrative record provides reasonable and adequate documentation to support CAPT Nash's recommendation that the waterway, as it currently exists, is unsuitable for the type, size, and frequency of LNG marine traffic associated with Weaver's Cove's original proposal. I also concur with, and hereby adopt, the District Commander's analysis regarding your allegations of procedural and substantive errors which RADM Sullivan comprehensively set forth in his response to your appeal. Weaver's Cove's arguments provide no new factual information regarding the condition of the waterway which warrants a reversal of the COTP's LOR and/or remand to the District Commander for reconsideration. In sum, I find your arguments insufficiently persuasive to cause me to order a different action, or to return the LOR for further review.

The administrative record in this matter also leads me to conclude that Weaver's Cove has been afforded, and taken advantage of, substantial opportunities to participate in the LOR process. As RADM Sullivan observed in his conclusion to your prior appeal, should the status of the Brightman Street bridges change, you may request the COTP to re-evaluate the suitability of the federal channel leading thereto. This re-evaluation

should include a recommendation on both the navigation safety and maritime security aspects of the proposed LNG vessel transits.

This letter constitutes final agency review of the issues raised in your appeal. As the issuance of the Letter of Recommendation is not an "agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 552 et seq., my review of your appeal does not constitute "final agency action" within the meaning of that Act, and is not subject to judicial review. I consider this matter closed for the Coast Guard.

Sincerely,



Brian M. Salerno
Rear Admiral, U.S. Coast Guard
Deputy Commandant for Operations