



U.S. Department of Transportation
Pipeline and Hazardous Materials
Safety Administration

MAR 25 2010

1200 New Jersey Ave, S.E.
Washington, D.C. 20590

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Re: Application of the Siting Requirements in Subpart B of 49 C.F.R. Part 193 to the Mount Hope Bay Liquefied Natural Gas Transfer System

Dear Ms. Phillips:

As counsel for the City of Fall River, Massachusetts (Fall River), you have asked the Pipeline and Hazardous Materials Safety Administration (PHMSA)¹ for a written interpretation² on the application of the Siting Requirements in Subpart B of 49 C.F.R. Part 193 to the Mount Hope Bay Liquefied Natural Gas (LNG) Transfer System (MHB Transfer System). The MHB Transfer System is a proposed addition to the waterfront LNG plant that Weaver's Cove Energy, LLC (Weaver's Cove or the Company) has proposed to build in Fall River (Fall River Plant or Plant).

In particular, you have asked this agency to confirm (1) whether our Siting Requirements apply to the offshore portion of the MHB Transfer System, as we recently concluded in a letter of interpretation to the Federal Energy Regulatory Commission (FERC); (2) whether, and if so to what extent, the requirements for "transfer areas for LNG" in the NFPA 59A: Standard for the Production, Storage, and Handling of LNG, 2001 Edition (2001 NFPA 59A), the consensus industry standard that is incorporated by reference into our Siting Requirements, apply to the MHB Transfer System; (3) whether, and if so to what extent, our Siting Requirements apply to the onshore portion of the MHB Transfer System; and (4) what design-spill criteria should be used in developing an alternative model for siting the MHB Transfer System's subsea pipe-in-pipe (PIP) LNG Transfer System.

Having considered your questions, we conclude (1) that our Siting Requirements apply to the offshore portions of the MHB Transfer System; (2) that the provisions for transfer areas for LNG in the 2001 NFPA 59A apply to the MHB Transfer System, except where preempted by our regulations; and (3) that our Siting Requirements, including any provisions in the 2001 NFPA 59A not preempted by our regulations, apply to the onshore portion of the MHB Transfer System.

With regard to your last question, we affirm our previous determination that using the standard models in Subpart B of 49 C.F.R. Part 193 to calculate the thermal radiation and vapor-gas

¹ Prior to February 20, 2005, the Research and Special Programs Administration (RSPA) was the agency within the Department of Transportation (DOT) responsible for regulating pipeline safety. Norman Y. Mineta Research and Special Programs Improvement Act, Pub. L. 108-426, § 108, 118 Stat. 2423-2429 (Nov. 30, 2004); *see also* 70 Fed. Reg. 8299 (February 18, 2005). Before RSPA, the responsible agency was the Materials Transportation Bureau (MTB). Department of Transportation, Establishment of Materials Transportation Bureau, 40 Fed. Reg. 30821 (July 23, 1975). We will refer to all of these agencies as PHMSA in this letter for convenience.

² 49 C.F.R. § 190.11(b).

dispersion distances for the PIP LNG Transfer System is impracticable, and that Weaver's Cove must develop, and submit to the Administrator for approval, an alternative model for calculating those distances. We also agree that further guidance is needed on the design-spill criteria that should be used in developing that alternative model. However, as that guidance is still under technical review, we cannot provide a final response to your question at this time.

I. Background

In December 2003, Weaver's Cove filed an application with FERC to build a waterfront LNG plant in Fall River. As originally proposed, the Plant was to include an onshore storage tank and shoreline marine berth and cargo transfer system along the Taunton River. On that same date, Mill River Pipeline, LLC, an affiliate of Weaver's Cove, filed an application with FERC to build two onshore, lateral pipelines for delivering re-vaporized natural gas from the Fall River Plant to an existing interstate transmission line. In July 2005, FERC conditionally certificated both of these projects.³

In January 2009, Weaver's Cove asked FERC for permission to modify the design of the Fall River Plant—i.e., by replacing the shoreline marine berth and cargo transfer system with the MHB Transfer System, an offshore marine berth and 4.25-mile subsea PIP LNG Transfer System. Under the modified proposal, the marine berth would be located in the waters of Mount Hope Bay, Massachusetts, about 1-mile from the nearest shoreline, and contain piping, processing equipment, an impoundment system, booster pumps, and other facilities that would be used for transferring LNG from temporarily-moored vessels. The PIP LNG Transfer System would consist of two-parallel subsea LNG transfer lines—each containing a 24-inch inner carrier pipe, a layer of thermal insulation, a 30-inch outer pipe, and an exterior layer of concrete coating—located in the waters and lands beneath the Bay and Taunton River.⁴

In May 2009, FERC asked this agency for a written opinion on whether our Siting Requirements applied to the MHB LNG Transfer System and, if so, for further guidance on calculating the exclusion zones for that part of the Fall River Plant. In July 2009, we advised FERC that the MHB LNG Transfer System was a marine cargo transfer system subject to our Siting Requirements, but that our approved models could not be used to calculate the exclusion zone distances for the PIP LNG Transfer System. Accordingly, we informed FERC that Weaver's Cove should develop, and submit to our Administrator for approval, an alternative model for siting that part of the MHB LNG Transfer System.

We received your first letter shortly thereafter. Dated August 7, 2009, and apparently written without knowledge of our July 2009 letter to FERC, your letter stated that the Siting Requirements in Subpart B of 49 C.F.R. Part 193 should be applied to the MHB Transfer System, and that Weaver's Cove had not conducted an adequate exclusion-zone analysis of the onshore portion of that system—i.e., the point where the PIP LNG Transfer System connects with the conventional transfer piping for the Fall River Plant's LNG storage tank.

On September 3, 2009, Weaver's Cove provided this agency with further information on the MHB Transfer System and a written response to our July 2009 letter to FERC. In that response, the Company argued that the PIP LNG Transfer System is not part of the Fall River Plant's

³ *Weaver's Cove Energy, LLC*, 112 FERC P 61070, 61527 (July 15, 2005).

⁴ According to the documents provided by Weaver's Cove, the PIP LNG Transfer System would have a maximum instantaneous transfer rate of 12,000 cubic meters of LNG per hour, an average transfer rate of 8,500 cubic meters of LNG per hour, an operating pressure of 120-150 pounds-per-square-inch gauge, and a 50-year design life.

“marine cargo transfer system” under Part 193; therefore, an exclusion-zone analysis is not required under our Siting Requirements. The Company further argued that the PIP LNG Transfer System is not part of the Fall River LNG Plant’s “transfer area for LNG” under the 2001 NFPA 59A; consequently, an exclusion-zone analysis is not required under that standard either. Later that same month, the Company provided FERC with a letter objecting to our exercise of siting jurisdiction over the MHB Transfer System based on its “plain reading” of 49 C.F.R. 193.2001(b)(4).

We received another letter from Weaver’s Cove the following month. In that letter, dated October 5, 2009, the Company renewed its objection to our exercise of siting jurisdiction over the MHB Transfer System under 49 U.S.C. § 60101(a)(14) and 49 C.F.R. 193.2001(b)(4). In the alternative, it further argued that the PIP LNG Transfer System is “transfer piping,” a component that is not part of a “cargo transfer system” under Part 193 or subject to the exclusion-zone provisions of our Siting Requirements. Weaver’s Cove similarly argued that the PIP LNG Transfer System is “permanent plant piping,” a component that is not subject to the exclusion-zone requirements for “transfer areas for LNG” in the 2001 NFPA 59A. The Company also stated that it had already performed an adequate exclusion-zone analysis for the offshore marine berth, the only part of MHB Transfer System that, they believe, requires such an analysis. Finally, the Company dismissed your prior objection to the adequacy of its exclusion-zone analysis of the onshore portion of the MHB LNG Transfer System, citing two letters FERC and PHMSA exchanged in April 2005 and May 2005, respectively.

You responded to Weaver’s Cove’s arguments in a letter to this agency dated November 6, 2009. In that letter, you reiterated that our Siting Requirements should apply to the MHB Transfer System, and that the Company had not yet performed an adequate exclusion-zone analysis of the onshore portion of the MHB Transfer System. With regard to the latter, you argued that the letters FERC and PHMSA exchanged in 2005 do not apply to the “novel” PIP LNG Transfer System. Instead, you asserted that both agencies have an obligation to determine the appropriate design-spill criterion for that portion of the MHB Transfer System, and that such a determination must be premised on “nothing less than a full guillotine break to provide the appropriate level of conservatism for this new technology.” You further stated that your expert had analyzed a hypothetical failure of the PIP LNG Transfer System under these conditions, and that his analysis showed that Weaver’s Cove could not satisfy our exclusion-zone requirements at the Fall River site.

Several weeks later, on November 23, 2009, you asked that we treat your November 6, 2009 letter as a request for a written interpretation from this agency under 49 C.F.R. § 190.11(b). On that same date, you also submitted the four specific questions noted at the outset of this letter.

We received two more letters from Weaver’s Cove earlier this year. In the first letter, dated January 29, 2010, the Company asked that we immediately advise FERC that the MHB Transfer System complies with our Siting Requirements so that our sister agency could issue its draft Environmental Impact Statement for the modifications to the Fall River Plant. In the second letter, dated February 4, 2010, the Company stated that its prior letters to PHMSA addressed all of the matters raised in your November 2009 request for interpretation.

Finally, we received your most recent response in this matter by letter dated February 12, 2010. In that letter, you stated that Weaver’s Cove had not yet complied with our July 2009 opinion to FERC or, by implication, our Siting Requirements.

II. Jurisdiction

Before turning to your specific questions, we will address the extent of our jurisdiction in this matter. Weaver's Cove argues that two provisions in the Pipeline Safety Laws, 49 U.S.C. § 60101(a)(14) and 49 C.F.R. § 193.2001(b)(4), preclude PHMSA from regulating "any part" of the MHB Transfer System that is "located in navigable waters," including the PIP LNG Transfer System. We disagree with the Company in both respects.

A. The Pipeline Safety Laws allow PHMSA to exercise jurisdiction beyond the shoreline of a waterfront LNG plant.

As part of the 1994 re-codification of title 49 of the United States Code, Congress enacted section 60101(a)(14) of the Pipeline Safety Laws, which states:

"liquefied natural gas pipeline facility"—(A) means a gas pipeline facility used for transporting or storing liquefied natural gas, or for liquefied natural gas conversion, in interstate or foreign commerce; but (B) does not include any part of a structure or equipment located in navigable waters (as defined in section 3 of the Federal Power Act (16 U.S.C. 796)).⁵

Congress enacted the predecessor to section 60101(a)(14) in section 151 of the Pipeline Safety Act (PSA) of 1979, which stated:

'LNG facility' means any pipeline facility used for the transportation or storage of LNG, or for LNG conversion, in interstate or foreign commerce, but does not include any structure or equipment (or portion thereof) located in navigable waters (as defined in section 3(8) of the Federal Power Act (16 U.S.C. 796(8)) . . .⁶

An agency "must give effect to the unambiguously expressed intent of Congress."⁷ Therefore, if the "traditional tools of statutory construction" demonstrate "that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."⁸ If, however, "the statute is silent or ambiguous with respect to the specific issue," an agency may fill that gap with a regulation, and that regulation is "given controlling weight unless . . . arbitrary, capricious, or manifestly contrary to the statute."⁹

Accordingly, our analysis of section 60101(a)(14) of the Pipeline Safety Laws "begin[s] with the language of the statute"¹⁰ and the "presum[ption] that a legislature says in a statute what it means and means in a statute what it says . . ."¹¹ Congress drafted section 60101(a)(14) and

⁵ Pub. L. No. 103-272, § 60101(14), 108 Stat. 1302 (1994) (amending and renumbering 49 U.S.C. § 1671(12)).

⁶ Pub. L. No. 96-129, § 151, 93 Stat. 989 (1979) (originally codified at 49 U.S.C. § 1671(12)); *Consolidated Hydro, Inc. v. FERC*, 968 F.2d 1258, 1259-1260 (D.C. Cir. 1992) (discussing the navigable waters provision in the Federal Power Act).

⁷ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

⁸ *Id.* at 843, n. 9.

⁹ *Id.* at 843-844.

¹⁰ *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (stating that "in all statutory construction cases . . . [t]he first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997))).

¹¹ *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

section 151 of the PSA with two corresponding clauses, and only used terms with explicit statutory definitions in the first clause of both statutes.¹² It did not, however, use statutorily-defined terms in 60101(a)(14)(B) or the second clause of section 151 of the PSA.¹³ Moreover, a clear meaning for the two most important terms used in those clauses—structure and equipment—cannot be determined solely by examining the text of that specific provision,¹⁴ “the language and design of the statute as a whole,”¹⁵ or “the remainder of the statutory scheme.”¹⁶

We do think, however, that the “proper construction” of the phrase “structure or equipment” can be derived from the “legislative history and . . . general objectives Congress sought to achieve” in enacting section 151 of the PSA and section 60101(a)(14).¹⁷ According to the relevant authorities, one of the primary reasons for the PSA was to “[c]larify [the Department of Transportation’s] authority to regulate the safety of LNG facilities,”¹⁸ an objective accomplished in the first clause of section 151 of the PSA. In particular, Congress used terms with explicit definitions—and an accepted meaning and usage within the context of the Pipeline Safety Laws—to define an LNG facility in that part of the statute, thereby confirming that our authority “ha[d] always extended to liquefied natural gas”¹⁹ and validating the steps we had already taken to regulate those facilities.²⁰

But Congress enacted the second clause of section 151 of the PSA to serve a different purpose. By way of background, PHMSA and the United States Coast Guard (USCG) entered into a memorandum of understanding (MOU) on the regulation of waterfront LNG facilities in 1978,

¹² 49 U.S.C. § 1671(4), (11), (13), (17) (1980) (previously defining pipeline facilities, LNG, LNG conversion, and interstate or foreign commerce for purposes of the Pipeline Safety Laws); 49 U.S.C.

§ 60101(a)(3), (11), (13) (currently defining gas pipeline facility, liquefied natural gas, liquefied natural gas conversion, and interstate or foreign commerce for purpose of the Pipeline Safety Laws.

¹³ We think this demonstrates that Congress implicitly delegated PHMSA the authority to define the terms used in the second clause of section 151 of the PSA and section 60101(a)(14)(B). *Chevron*, 467 U.S. at 844.

¹⁴ Congress used the terms “pipeline facility” and “gas pipeline facility” in the first clause of section 151 of the PSA and section 60101(a)(14)(A), respectively. However, it used the terms “structure” and “equipment” in the second clauses of the PSA and the current statutory provision. For that reason, we think the term “structure” can be reasonably construed as something other than a “pipeline facility” or “gas pipeline facility.” Otherwise, Congress would not have used different terms in these two clauses of the statute. We also note that a generally-accepted definition of the term “structure” at the time of the PSA was “[t]hat which is built or constructed”—i.e., “a building or edifice of any kind.” THE OXFORD ENGLISH DICTIONARY 1165 (1970); see *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (using contemporaneous dictionary definition to determine the “ordinary or natural meaning” of statutory term); see also *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 418-420 (1992) (affirming agency’s use of dictionary definition in interpreting language of ambiguous statute). Under that definition, a “pipeline facility” could be construed as a type or component of a “structure”. On the other hand, it would also support the view that a “structure” is something that houses or contains a “pipeline facility”.

¹⁵ *Bethesda Hosp. Ass’n v. Bowen*, 485 U.S. 399, 405 (1988).

¹⁶ *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 US 365, 371 (1988). The terms “structure” and “equipment” are only used together in one other provision in the Pipeline Safety Laws. However, that provision, 49 U.S.C. § 60103(d), does not provide a clear meaning for those terms for purposes of section 60101(a)(14)(B).

¹⁷ *Wirtz v. Bottle Blower’s Ass’n*, 389 U.S. 463, 468 (1968).

¹⁸ S. REP. NO. 96-182 (May 15, 1979), reprinted in 1979 U.S.C.C.A.N. 1971, 1975.

¹⁹ *Id.* at 1978; see also H. REP. NO. 96-201, Part I, p. 22 (1979) (stating that “the [C]ommittee [on Interstate and Foreign Commerce] does not intend to express approval or disapproval of an particular siting standards” issued under the PSA, and that, “[i]n this regard, the committee views as very important the Department’s present rulemaking proceeding, pursuant to section 3(a) of the Natural Gas Pipeline Safety Act of 1968, regarding LNG safety.”).

²⁰ Office of Pipeline Safety, Liquefied Natural Gas Safety Standards, 37 Fed. Reg. 145 (January 6, 1972); Transportation of Natural and other Gas by Pipeline: Minimum Federal Safety Standards, Liquefied Natural Gas Systems, 37 Fed. Reg. 21638 (October 13, 1972).

one year before the enactment of the PSA.²¹ That MOU stated that PHMSA would be responsible for issuing regulations on facility site selection, except with respect to vessel traffic management. It also stated that this agency would regulate all other matters inward from the last manifold (or valve) located immediately before the onshore LNG storage tank. Conversely, USCG would be responsible for regulating fire prevention and facility security, site selection in relation to vessel traffic management, and all other matters between the vessel and the last manifold (or valve) located immediately before the onshore LNG storage tank.

Shortly thereafter, the Secretary of Transportation (Secretary) issued a delegation of authority on the implementation of that MOU.²² In his delegation, the Secretary provided USCG, then a modal administration within DOT, with the power to exercise PHMSA's preemptive rulemaking authority²³ when issuing regulations for waterfront LNG facilities. That action, the Secretary explained, was needed to compensate for the absence of analogous authority in the Ports and Waterways Safety Act (PWSA), USCG's primary basis for regulating such facilities.²⁴ He further explained that if USCG had to implement the MOU solely under the authority provided in the PWSA, it could create "the unacceptable situation of a nonuniform approach to Federal/State regulation"—i.e., the interior portion of the facility would be covered by PHMSA's preemptive federal standards, while the maritime portion would be subject to USCG's standards and, potentially, more stringent state standards. Thus, he issued a limited delegation of our rulemaking authority "[f]or the purpose of assuring continued regulation of an entire waterfront LNG facility."²⁵

Ten months later, Congress responded to these actions by the Secretary and enacted the second clause of section 151 of the PSA. Rather than limiting our jurisdiction, that provision was designed to retroactively void, and prospectively prohibit, a delegation of our preemptive rulemaking authority to USCG.²⁶

²¹ Notices, Department of Transportation, Memorandum of Understanding Between the United States Coast Guard and the Materials Transportation Bureau for Regulation of Waterfront Liquefied Natural Gas Facilities, 43 Fed. Reg. 30381 (July 14, 1978).

²² 49 C.F.R. § 1.46(y) (1979) (secretarial delegation of authority to USCG to exercise preemptive rulemaking authority under NGPSA in issuing regulations for waterfront LNG facilities).

²³ *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465, 470 (8th Cir. 1987) ("The NGPSA leaves nothing to the states in terms of substantive safety regulation of interstate pipelines, regardless of whether the local regulation is more restrictive, less restrictive, or identical to the federal standards.").

²⁴ Compare 44 Fed. Reg. 5436, 5437 (Jan. 26, 1979) ("For the purpose of assuring continued uniform regulation of an entire waterfront LNG facility, the delegation of authority made by this amendment will permit the USCG to carry out its regulatory responsibilities . . . with same preemptive powers available to MTB[, PHMSA's predecessor]."); with 33 U.S.C. § 1225(b) ("Nothing contained in this section, with respect to structures, prohibits a State or political subdivision thereof from prescribing higher safety equipment requirements or safety standards than those which may be prescribed by regulations [issued by USCG] hereunder.").

²⁵ 44 Fed. Reg. at 5437.

²⁶ S. REP. NO. 96-182 (1979), reprinted in 1979 U.S.C.C.A.N. 1971, 1997 ("The purpose of this exclusion is to clarify and emphasize that, in its regulation of the safety of LNG and other hazardous materials facilities, the Coast Guard was, and is, intended to operate exclusively under the authority of the Ports and Waterways Safety Act, as amended (33 U.S.C. et seq.)."); CONG. REC., U.S. Senate, 96th Congress, 1st session, 32336 (Nov. 14, 1979) ("While S. 411 provides authority to the Secretary of Transportation, it is intended that the Secretary delegate that authority to the Materials Transportation Bureau. Last year when the Congress enacted the Port and Tanker Safety Act, which amends the Port and Waterways Safety Act, we intended that the law would be the exclusive and comprehensive authority for the Coast Guard to regulate the safety of hazardous materials facilities. This is still our intent; the Coast Guard is not intended to exercise authority under this act.") (Statement of Senator Warren Magnuson).

We note that our analysis of Congress' original intent is corroborated by the text of section 151 of the PSA. Indeed, the terms "structure" and "equipment" are used throughout the PWSA, including in the State savings clause provision,²⁷ but are used sparingly and without any particular significance in the Pipeline Safety Laws.²⁸ We also note that this agency and USCG both affirmed the validity of this interpretation in contemporaneous rulemaking proceedings—i.e., in an August 1980 final rule²⁹ and May 1986 notice of proposed rulemaking.³⁰ We further note that there is no evidence that Congress intended to alter its original intent or affect any of the actions taken to implement section 151 of the PSA when it enacted section 60101(a)(14).³¹

In summary, we conclude that while a clear meaning for section 60101(a)(14)(B) cannot be determined solely by examining the text of that provision or the remaining provisions in the Pipeline Safety Laws, the legislative history shows that Congress did not intend that statute to

²⁷ 33 U.S.C. §§ 1221(c)(2)-(4), 1223(a)(3), (6), 1224(a)(4), 1225(a)(1)-(2), (b), 1226(a)(1), (b)(3), 1227(a).

²⁸ See note 16, *supra*.

²⁹ Research and Special Programs Administration, Liquefied Natural Gas Facilities; Reconsideration of Safety Standards for Siting, Design, and Construction, 45 Fed. Reg. 57402, 57417-57418 (Aug. 28, 1980).

³⁰ Department of Transportation, U.S. Coast Guard, Liquefied Natural Gas Waterfront Facilities, Notice of Proposed Rulemaking, 51 Fed. Reg. 18276, 18277-18278 (May 16, 1986). In this document, USCG offered the following analysis of the legislative history of section 151 of the PSA:

Section 4 of the [Natural Gas Pipeline Safety Act of 1968] NGPSA (49 U.S.C. 1672(a)(1)), as amended, allows state agencies to adopt additional or more stringent safety standards for intrastate pipeline transportation if such standards are compatible with the Federal minimum standards. However, this section prohibits those agencies from adopting or continuing in force any such standards applicable to interstate transmission facilities, after the Federal minimum standards become effective. No similar preemptive authority is granted by the PWSA, as amended. Without such preemption, it would be possible for an LNG facility to have to operate under the requirements of two Federal agencies and the State and local governments.

To ensure uniformity in regulating all LNG waterfront facilities, the Secretary of Transportation delegated to the Coast Guard certain functions and responsibilities vested in the Secretary by the NGPSA This delegation, which appeared in the January 26, 1979 issue of the Federal Register (44 FR 5436) as an amendment to 49 CFR 1.46, allowed the Coast Guard to carry out the Secretary's responsibilities under the NGPSA, as amended, in accordance with the MOU, and, in effect, bestowed the same preemptive authority to the Coast Guard as delegated to the [Research and Special Programs Administration] RSPA. . . .

However, subsequent legal review and legislative activity resulted in the determination that the Coast Guard does not have authority to regulate LNG waterfront facilities under the NGPSA, as amended by the [Pipeline Safety Act of 1979] PSA. The legislative history of the various statutes made it clear that Congress intended that the Coast Guard regulate LNG waterfront facilities exclusively under authority of the PWSA. This is supported by the definition of LNG facilities added by the PSA that excludes "any structure or equipment (or portion thereof) located in the navigable waters . . ." Therefore, Coast Guard regulations for LNG waterfront facilities will be issued under authority of the PWSA, which does not prohibit State or political subdivisions thereof from prescribing higher safety equipment requirements or safety standards for facilities than those which may be prescribed through this rulemaking process.

Id. (italics added).

³¹ H. REP. NO. 103-180 at 441 (1993), reprinted in 1994 U.S.C.C.A.N. 818, 1258; *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *CFTC v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.") (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)).

serve as an independent limitation on our jurisdiction. Rather, its original purpose was to preclude USCG from acquiring and using our preemptive rulemaking authority to issue regulations for waterfront LNG facilities.³² Accordingly, we reject Weaver’s Cove argument that the text of section 60101(a)(14)(B) prohibits PHMSA from exercising jurisdiction beyond the shoreline of a waterfront LNG plant and affirm the determination in our July 2009 letter to FERC—namely, that the application of our Siting Requirements to the MHB Transfer System is authorized by the Pipeline Safety Laws.

B. The Siting Requirements in Subpart B of Part 193 of the Pipeline Safety Regulations apply to an LNG facility that is located in navigable waters, if that facility is a part of or associated with a marine cargo transfer system at a waterfront LNG plant.

The full text of the provision that forms the basis of Weaver’s Cove second argument states:

§ 193.2001 Scope of part.

(a) This part prescribes safety standards for LNG facilities used in the transportation of gas by pipeline that is subject to the pipeline safety laws (49 U.S.C. 60101 et seq.) and Part 192 of this chapter.

(b) This part does not apply to:

(1) LNG facilities used by ultimate consumers of LNG or natural gas.

(2) LNG facilities used in the course of natural gas treatment or hydrocarbon extraction which do not store LNG.

(3) In the case of a marine cargo transfer system and associated facilities, any matter other than siting pertaining to the system or facilities between the marine vessel and the last manifold (or in the absence of a manifold, the last valve) located immediately before a storage tank.

(4) Any LNG facility located in navigable waters (as defined in Section 3(8) of the Federal Power Act (16 U.S.C. 796(8)).³³

The Company argues that a plain reading of section 193.2001(b)(4) prohibits PHMSA from exercising jurisdiction over “[a]ny LNG facility located in navigable waters,” including nearly all of the MHB Transfer System.³⁴ We begin by noting that this interpretation “destroy[s]” a critical part of section 193.2001(b)(3)—i.e., it renders “inoperative or superfluous, void or insignificant . . .”³⁵ the explicit reservation of our siting authority over the “marine cargo transfer system and associated facilities.”³⁶ We find that result unnecessary as a more reasonable construction exists that gives full effect to both of these provisions.

³² As noted in our July 2009 letter to FERC, the Homeland Security Act of 2002, Pub. L. No. 107-296, § 888 (2002) (codified at 6 U.S.C. § 468), undermined the original purpose of the navigable waters clause in section 60101(14) by transferring USCG from DOT to the Department of Homeland Security (DHS), which presently precludes any delegation of PHMSA’s preemptive rulemaking authority to USCG. Department of Transportation, Coast Guard, Liquefied Natural Gas Waterfront Facilities; Proposed Rule, 51 Fed. Reg. 18275, 18277 (May 16, 1986).

³³ 49 C.F.R. § 193.2001; *see also* 49 C.F.R. § 193.2007 (defining LNG facility).

³⁴ 49 C.F.R. § 193.2001(b)(4).

³⁵ *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3rd Cir. 1993) (quoting 2A Norman J. Singer, Sutherland, Statutes and Statutory Construction, § 46.06, at 119-20 (5th ed. 1992)). “Regulations, like statutes, are interpreted according to canons of construction.” *Black & Decker Corp. v. C.I.R.*, 986 F.2d 60, 65 (4th Cir. 1993). Consequently, we agree that “[w]hen construing a regulation . . . , it is appropriate first to examine the regulatory language itself to determine its plain meaning.” *Roberto v. Dep’t of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006). However, we are mindful that a regulation “‘should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.’” *Silverman*, 51 F.3d at 31.

³⁶ 49 C.F.R. § 193.2001(b)(3).

We adopted the current version of section 193.2001(b)(4) and a prior version of section 193.2001(b)(3) in a February 1980 Final Rule (FR).³⁷ With regard to the latter, the prior language in subparagraph (b)(3) was identical in every respect to the current provision, except that it omitted the phrase “other than siting”.³⁸ In the preamble to the February 1980 FR, we stated that section 151 of the PSA required both of these regulations, as “[i]t was the intent of Congress that such facilities be regulated under the Ports and Waterways Safety Act,”³⁹ and that subparagraphs (b)(3) and (b)(4) “would exempt facilities in navigable waters from the scope of Part 193,” including “facilities located offshore.”⁴⁰

However, we reversed that position and adopted the current version of section 193.2001(b)(3) six months later.⁴¹ Specifically, in an August 1980 FR on reconsideration, we stated that the prior version of section 193.2001(b)(3) had erroneously “exempt[ed] marine cargo transfer systems from any of the requirements in Part 193,” even though “[u]nder the MTB/USCG memorandum of understanding (MOU) on the regulation of waterfront LNG facilities . . . , the siting of these facilities, except with respect to vessel traffic management, is subject to the MTB regulatory authority.”⁴² Consequently, we amended subparagraph (b)(3) of the regulation to ensure that our Part 193 Siting Requirements applied to marine cargo transfer systems.⁴³

In light of the regulatory history, we think that the key to interpreting these provisions is recognizing that subparagraph (b)(3) only applies to waterfront LNG plants and that subparagraph (b)(4) applies to all other offshore LNG facilities. With respect to the former, the regulatory history confirms that we adopted subparagraph (b)(3) to codify the terms of our 1978 MOU with USCG—i.e., to make the requirements in Part 193 applicable to the siting of an entire waterfront LNG plant, including the marine cargo transfer system and associated facilities, and the design, construction, maintenance, operation, and security of the onshore portions of those plants, while (2) excluding the maritime portions of those facilities for regulation by USCG under the PWSA. That interpretation is consistent with our statutory authority, the text and history of the regulation, and the expertise of these two agencies.⁴⁴

³⁷ Department of Transportation, Research and Special Programs Administration, Liquefied Natural Gas Facilities; New Federal Safety Standards, 45 Fed. Reg. 9184, 9204 (February 11, 1980).

³⁸ 45 Fed. Reg. at 9204.

³⁹ *Id.* at 9188.

⁴⁰ *Id.*

⁴¹ Research and Special Programs Administration, Liquefied Natural Gas Facilities; Reconsideration of Safety Standards for Siting, Design, and Construction, 45 Fed. Reg. 57402 (August 28, 1980).

⁴² *Id.* at 57418.

⁴³ *Id.* We also stated in that same FR that we intended our siting requirements to apply to those parts of a marine cargo transfer system that “approach and cross an operator’s property line at the shoreline.” *Id.* at 57407.

⁴⁴ Our current MOU states that “USCG is responsible for establishing regulatory requirements for . . . [f]acility site selection as it relates to management of vessel traffic[,]” and that PHMSA “is responsible for establishing regulatory requirements for . . . [s]ite selection of facilities other than structures or equipment (or portions thereof) located in navigable waters . . .” *Id.* The MOU’s exclusion from our siting authority of “structures or equipment (or portions thereof) located in navigable waters” affirms that PHMSA will not issue siting regulations for piers or wharves and related equipment, which have been traditionally regulated by USCG (or, where appropriate, states and localities) under the PWSA. *United States v. Certain Parcel of Land Situated in the City of Valdez*, 666 F.2d 1236, 1238-1239 (9th Cir. 1982) (concluding that “a ferry terminal facility consisting of three wooden ramps used as a dock, and twelve cluster pile dolphins,” i.e., “closely driven piles used a fender for a dock or as a mooring or guide for boats,” was a structure “within navigable waters” under Title I of the PWSA). That construction is consistent with the text of 49 C.F.R. § 193.2001(b)(3), and any contrary interpretation of the MOU, including one that deprives PHMSA of siting authority over a marine cargo system and associated facilities, would amount to a repeal of that regulation, an action that can only be undertaken in a rulemaking proceeding under the Administrative Procedure Act.

Conversely, subparagraph (b)(4) was meant to render Part 193 inapplicable to all other offshore LNG facilities—i.e., those located in navigable waters and not a part of, or associated with, a waterfront LNG plant. That construction is consistent with our statutory authority, particularly the prohibition in the Pipeline Safety Laws on determining “the location or routing of pipeline facility,”⁴⁵ and Congress’ previous refusal to authorize the licensing of offshore LNG facilities in the Deepwater Port Act (DPA) of 1974,⁴⁶ a decision that eliminated the need to apply Part 193 to such facilities at the time of the February 1980 and August 1980 FRs.⁴⁷

Accordingly, we reject Weaver’s Cove argument that section 193.2001(b)(4) excludes any LNG facility located in navigable waters from the scope of Part 193. Instead, we affirm our prior determination that PHMSA’s Siting Requirements are applicable under section 193.2001(b)(3) if an LNG facility located in navigable waters is part of, or associated with, a marine cargo transfer system.

III. Questions Presented

Question 1: Is the Mount Hope LNG Transfer System Subject to Our Siting Requirements as a Marine Cargo Transfer System and Associated Facilities under 49 C.F.R. § 193.2001(b)(3)?

In our July 2009 letter to FERC, we concluded that the MHB Transfer System is a marine cargo transfer system—i.e., “a component, or system of components functioning as a unit, used exclusively for transferring hazardous fluids in bulk between a . . . marine vessel and a storage tank.”⁴⁸ Weaver’s Cove believes that we erred in reaching that conclusion, and you have asked whether we will affirm our prior position.

The Company’s argument is based on section 193.2007, which states, in relevant part:

As used in this part:

...

Cargo transfer system means a component, or system of components functioning as a unit, used exclusively for transferring hazardous fluids in bulk between a tank car, tank truck, or marine and vessel and storage tank.

Component means any part, or system of parts functioning as a unit, including, but not limited to, piping, processing equipment, containers, control devices, impounding systems, lighting, security devices, fire control equipment, and communication equipment, whose integrity or reliability is necessary to maintain safety in controlling, processing, or containing a hazardous fluid.

...

⁴⁵ 49 U.S.C. § 60104(e).

⁴⁶ Pub. L. No. 93-627, §§ 3(10), 4(A)(1), 88 Stat. 2176 (1975).

⁴⁷ *But see* Maritime Transportation Security Act of 2002, Pub. L. 107-295, Tit. I, § 106(a)(3), 116 Stat. 2086 (2002) (amending the DPA to include “natural gas”).

⁴⁸ 49 C.F.R. § 193.2007.

Transfer piping means a system of permanent and temporary piping used for transferring hazardous fluids between any of the following: Liquefaction process facilities, storage tanks, vaporizers, compressors, cargo transfer systems, and facilities other than pipeline facilities.

Transfer system includes transfer piping and cargo transfer system.⁴⁹

Weaver's Cove argues that the PIP LNG Transfer System is not part of the Fall River LNG Plant's marine cargo transfer system. Specifically, the Company argues that under our definition of "transfer system," "transfer piping" and "cargo transfer system" are independent and mutually exclusive components, and that the marine "cargo transfer system" at the Fall River LNG Plant is the processing equipment on the marine berth. Weaver's Cove further argues that the PIP LNG Transfer System is merely "transfer piping," and that, by definition, only the processing equipment on the marine berth is subject to our Siting Requirements. According to the Company, our decision to rescind the regulations that previously required impoundment systems for "transfer systems" in a March 2000 FR supports these conclusions.

We note that Weaver's Cove arguments proceed from a pair of flawed premises—namely, (1) that a "cargo transfer system" and "transfer piping" are independent and mutually exclusive components and (2) that a "cargo transfer system" and "transfer piping" are the only two "transfer systems" recognized in our regulations. With regard to the first premise, the original version of Part 193 contradicts Weaver's Cove's assertion that transfer piping cannot, by definition, be part of a cargo transfer system. Indeed, in a section of those regulations entitled "Design of Transfer Systems," it specifically stated that "[e]ach cargo transfer system must have . . . [t]ransfer piping . . . located or protected by suitable barriers so that they are safe from damage by tank car or tank truck movements[.]"⁵⁰ With regard to the second premise, the general rules of regulatory construction for Part 193 do not support the Company's interpretation of our definition of a "transfer system." Under those rules, the term "[i]ncludes means including but not limited to . . ." ⁵¹ Consequently, when our regulation says that a transfer system "includes" transfer piping and cargo transfer system, it simply means that the former and latter are examples of a transfer system, not that these two components are necessarily independent or mutually exclusive.⁵²

With that in mind, we will now reconsider whether the MHB Transfer System is a marine cargo transfer system. As currently proposed, the MHB Transfer System would include an offshore marine berth, with hoses, unloading arms, piping, and processing equipment used for transferring LNG, and the PIP LNG Transfer System, a pair of subsea LNG transfer lines that connect with the aforementioned berth facilities and terminate at the Fall River Plant's onshore storage tank.

⁴⁹ LNG is defined as a hazardous fluid for purposes of these definitions. 49 C.F.R. 193.2007 (defining hazardous fluid and hazardous liquid).

⁵⁰ 49 C.F.R. § 193.2229(a)(3) (italics added).

⁵¹ 49 C.F.R. § 193.2009(a)(1).

⁵² We further note that the inclusion of "transfer piping" within the definition of "transfer system" had other historical significance—i.e., eliminating the issuance of redundant design regulations and ensuring that all transfer piping, including that which was not a part of a "cargo transfer system[.]" fell within the scope of our Siting Requirements. 49 C.F.R. § 193.2051. The latter would include, for example, transfer piping used to transfer LNG between storage tanks. We also note that a separate regulation in that section applied to the "[c]argo transfer area." 49 C.F.R. § 193.2231. It stated that this "[t]ransfer area was part of a cargo transfer system," but did not make any references to or include any requirements for transfer piping, hoses, or arms. *Id.*

We think that these facilities are, collectively, a “system of components used exclusively for transferring hazardous fluids in bulk between a . . . marine vessel and a storage tank”⁵³ at a waterfront LNG plant.⁵⁴

Moreover, the PIP LNG Transfer System would still be subject to our Siting Requirements even if Weaver’s Cove’s premise is correct and the Fall River Plant’s marine cargo transfer system consists solely of the hoses, unloading arms, piping, and processing equipment on the offshore marine berth. In that respect, we note that Part 193 of the Pipeline Safety Regulations explicitly reserves our siting authority over a waterfront LNG plant’s “marine cargo transfer system and associated facilities.”⁵⁵ We also note that the PIP LNG Transfer System would be used exclusively for transferring LNG in bulk, that it would be connected to the components on the marine berth that perform that same function, and that it would be located between the marine vessel and storage tank. Thus, assuming that the PIP LNG Transfer System is not a part of the Fall River Plant’s marine cargo transfer system, our Siting Requirements would still apply to that “associated facility.”⁵⁶

For these reasons, we affirm our conclusion that the MHB Transfer System is a marine cargo transfer system under section 193.2001(b)(3), and that our Siting Requirements apply to all of its components and associated facilities, including the PIP LNG Transfer System.

Question 2: To what extent do the requirements for “transfer areas for LNG” in the 2001 NFPA 59A apply to the Mount Hope LNG Transfer System?

Though subject to regulatory preemption in the event of conflict, the requirements in the 2001 NFPA 59A are incorporated into our Siting Requirements by reference. Specifically, section 193.2051 states:

Each LNG facility designed, constructed, replaced, relocated or significantly altered after March 31, 2000 must be provided with siting requirements in accordance with the requirements of this part and of [the 2001] NFPA 59A (incorporated by reference, *see* § 193.2013). In the event of a conflict between this part and NFPA 59A, this part prevails.⁵⁷

⁵³ 49 C.F.R. § 193.2007 (defining cargo transfer system).

⁵⁴ The term “component” has a very broad meaning in Part 193—i.e., “any part, or system of parts functioning as a unit . . . whose integrity or reliability is necessary to maintain safety in controlling, processing, or containing a hazardous fluid.” 49 C.F.R. § 193.2007. Indeed, we used the term “component” in our regulations for two decades when imposing general requirements for LNG plants. *See e.g.*, 49 C.F.R. §§ 193.2101, 193.2103, 193.2105, 193.2107, 193.2119, 193.2121, 193.2135, 193.2137, 193.2139, 193.2143, 193.2155(a)(5)(i), 193.2159(a)-(b), 193.2161(b), 193.2165, 193.2179(a), 193.2183(a), 193.2193(a)(1), 193.2301, 193.2303, 193.2304, 193.2305, 193.2307(a)(2), 193.2311, 193.2317, 193.2323(a), 193.2329, 193.2429(a)-(b), 193.2439, 193.2443, 193.2503, 193.2505, 193.2507, 193.2515(c), 193.2517, 193.2601, 193.2605, 193.2607, 193.2609, 193.2615, 193.2617, 193.2625, 193.2627, 193.2631, 193.2633, 193.2635, 193.2639 (1981). Moreover, we considered “transfer piping,” “cargo transfer system,” and “transfer system” to be types of “components” for purposes of those requirements. 49 C.F.R. §§ 193.2193(a)(1) (“The amount and pattern of predictable movement of *components*, including *transfer piping* . . .”), 193.2319(a) (“A strength test must be performed on each *piping system* and container to determine whether the *component* is capable of performing its design function . . .”), 193.2439(a) (“Each *transfer system*, vaporizer, liquefaction system, and storage system tank must be equipped with an emergency shutdown control system. The control must automatically actuate the shutdown of the *component* . . .”) (italics added).

⁵⁵ 49 C.F.R. § 193.2001(b)(3).

⁵⁶ *Id.*

⁵⁷ 49 C.F.R. §§ 193.2013, 193.2051.

Turning to your specific question, there are several requirements in the 2001 NFPA 59A that apply to “[t]ransfer areas for LNG.”⁵⁸ A “transfer area” is defined for these purposes as:

That portion of an LNG plant containing a piping system where LNG, flammable liquids, or flammable refrigerants are introduced into or removed from the facility, such as truck loading or ship unloading areas, or where piping connections are connected or disconnected routinely. Transfer areas do not include product sampling devices or permanent plant piping.⁵⁹

Our Siting Requirements have never used the phrases “transfer area” or “transfer areas for LNG.”⁶⁰ Rather, we have always used the term “LNG transfer system,”⁶¹ and a “transfer system” has always been defined to “include[] transfer piping and cargo transfer system.”⁶² Furthermore, unlike the exclusion of “permanent plant piping” from a “transfer area” in the 2001 NFPA 59A, the definition of “transfer piping” in Part 193 has always included both “permanent and temporary piping.”⁶³ Likewise, the 2001 NFPA 59A does not require that thermal radiation and vapor gas dispersion distances be calculated for “transfer areas at the water’s edge of marine terminals,”⁶⁴ but our Siting Requirements have always required that those distances be determined for marine cargo transfer systems.⁶⁵ In other words, there is a conflict between the 2001 NFPA 59A and our Siting Requirements on the use and definition of these terms, and the requirements in Subpart B of 49 C.F.R. Part 193 must prevail in the event of such conflict.

With that principle in mind, we will now consider the extent to which the siting requirements for transfer areas for LNG in the 2001 NFPA 59A apply to the MHB Transfer System. Weaver’s Cove argues that the PIP LNG Transfer System is “permanent plant piping,” a component that is exempt from the exclusion-zone requirements for “transfer areas for LNG” in the 2001 NFPA 59A. We will assume, for purposes of this letter, that the Company is correct on these points.⁶⁶

⁵⁸ One of those provisions states, for example, that such areas “shall be graded, drained, or provided with impoundment in a manner that will minimize the possibility of accidental spills and leaks from endangering important structures, equipment, or adjoining property or from reaching waterways.” 2001 NFPA 59A, 2-1.2. Similarly, another provision states that “[i]mpounding areas, if . . . provided to serve only . . . LNG transfer areas, shall have a minimum volumetric capacity equal to the greatest volume of LNG . . . that can be discharged into the area during a 10-minute period from any single accidental leakage source or a lesser time period based upon demonstrable surveillance and shutdown provisions acceptable to the authority having jurisdiction.” 2001 NFPA 59A, 2.2.2.2. The 2001 NFPA 59A permits the waiver or alteration of some of these requirements “[i]n certain installations . . . at the discretion of the authority having jurisdiction where the change does not constitute a distinct hazard to life or property or conflict with applicable federal, state, and local (national, provincial, and local) regulations.” 2001 NFPA 59A, 2.2.1.3.

⁵⁹ 2001 NFPA 59A, 1.7.27. This definition first appeared in the 1975 NFPA 59A, ch. 1, 12(28).

⁶⁰ We have never defined a “transfer area” in Part 193 and have only used that term sparingly. For example, our original design requirements for “transfer systems” stated, in relevant part, that “[t]he transfer area of a cargo transfer system must . . . accommodate tank cars and tank trucks without excessive maneuvering . . . and . . . permit tank trucks to enter or exit the transfer area without backing.” 49 C.F.R. § 193.2231 (1981). Similarly, one of our current regulations for the onshore portion of an LNG plant states, in relevant part, that “the procedures for cargo transfer must be located at the transfer area[.]” 49 C.F.R. § 193.2513(c).

⁶¹ 49 C.F.R. §§ 193.2057, 193.2059.

⁶² 49 C.F.R. § 193.2007 (italics omitted).

⁶³ 49 C.F.R. § 193.2007.

⁶⁴ 2001 NFPA 59A, 2.2.3.1.

⁶⁵ 49 C.F.R. § 193.2001(b)(3); *In the Matter of Yukon Pacific Corp.*, PHMSA Interp. # 93-040 (Jul. 17, 1993) (stating that transient traffic, including by fishing boats and cruise ships, is not an impermissible activity within an offshore vapor-gas-dispersion exclusion zone).

⁶⁶ 2001 NFPA 59A, 1.7.19 (defining “LNG Plant” as “[a] plant whose components are used to store liquefied natural gas and may also condition, liquefy, or vaporize natural gas”), 1.7.19 (defining “[c]omponents” as “[a] part, or a system of parts, that functions as a unit in an LNG plant and could include, but is not limited to, piping . . .”).

However, if that is the case, then the requirements in the 2001 NFPA 59A are in conflict with the provisions for an “LNG transfer system” in Part 193—i.e., as previously noted, our regulations do not distinguish between permanent and temporary plant piping, and each “LNG transfer system,” including a marine cargo transfer system and associated facilities, must have a thermal radiation and vapor gas dispersion exclusion zone under our Siting Requirements. As our regulations must prevail in the event of a conflict, we conclude that PIP LNG Transfer System requires an exclusion zone analysis under Subpart B of 49 C.F.R. Part 193, and that any contrary provisions in the 2001 NFPA 59A are preempted.

In reaching this determination, we are mindful of the conservative approach that this agency has taken when applying our Siting Requirements⁶⁷ to novel facilities, like the MHB Transfer System.⁶⁸ We are also mindful that under Weaver’s Cove interpretation, the 4.25-mile-long PIP LNG Transfer System would not be subject to any meaningful federal siting requirements, a result that we do not think is in the interests of public safety.⁶⁹

In conclusion, we find that the requirements in the 2001 NFPA 59A for “transfer areas for LNG” apply to the MHB Transfer System, except where preempted by the regulations in 49 C.F.R. Part 193. We further conclude that to the extent that the provisions for “transfer areas for LNG” in the 2001 NFPA 59A would not require an exclusion-zone analysis of the PIP LNG Transfer System, those requirements are in conflict with the provisions for “LNG transfer systems” in our Siting Requirements, that our regulations must prevail, and that an exclusion-zone analysis of the PIP LNG Transfer System is required under Subpart B of 49 C.F.R. Part 193.

Question 3: To what extent, if any, do the Siting Requirements in Subpart B of 49 C.F.R. Part 193 apply to the onshore portion of the MHB Transfer System?

With regard to the application of our Siting Requirements to the onshore portion of the MHB Transfer System, we reiterate that the requirements in the 2001 NFPA 59A for “transfer areas for LNG” apply to the MHB Transfer System, except where preempted by the regulations in Part 193 of the Pipeline Safety Regulations. We also reiterate that to the extent that the provisions for “transfer areas for LNG” in the 2001 NFPA 59A would not require an exclusion-zone analysis of the PIP LNG Transfer System, those requirements are in conflict with the provisions for “LNG transfer systems” in our Siting Requirements, that our regulations must prevail, and that an

Though we need not resolve this question, we wonder whether the drafters of the 2001 NFPA 59A would consider a 4.25-mile system of subsea transfer piping to be “permanent plant piping,” or whether that standard should be suitable for use in siting an offshore LNG facility, particularly one comparable to the Mount Hope Bay LNG Transfer System.

⁶⁷ *In the Matter of Energy Terminal Services Corporation*, PHMSA Interp. 82-05-28 (May 28, 1982) (stating that we selected our original vapor-gas-dispersion model because, among other reasons, “it appeared to predict conservative distances in comparison with other available mathematical models,” that “[49 C.F.R.] § 193.2059 requires use of the model as a conservative standard of protection,” and that a “construction of th[at] standard [which] yields a conservative result . . . is supported by the preamble to the [February 1980] final rule” that contained the original Siting Requirements).

⁶⁸ *Id.* (finding that the design and functioning of the applicant’s proposed impoundment system—i.e., a 16-foot-high fence that would retain any LNG spill and produce a confined vapor volume—could not be accommodated by our approved vapor-gas-dispersion model, that a conservative application of that model required that the proposed design of the system be disregarded, and that the applicant could not demonstrate compliance with our vapor-gas-dispersion exclusion-zone requirement under those conditions).

⁶⁹ With regard to Weaver’s Cove arguments about the March 2000 FR, we note that any statements about the application of our Siting Requirements to conventional transfer piping are not applicable to the novel PIP LNG Transfer System, for which little or no operating data or historical information is available.

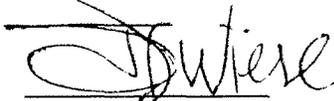
exclusion-zone analysis of the PIP LNG Transfer System is required under Subpart B of 49 C.F.R. Part 193.

IV. Conclusion

For the reasons stated in Part III of this letter, we conclude (1) that our Siting Requirements apply to the offshore portions of the MHB Transfer System; (2) that the provisions for transfer areas for LNG in the 2001 NFPA 59A apply to the MHB Transfer System, except where preempted by our regulations; and (3) that our Siting Requirements, including any provisions in the 2001 NFPA 59A not preempted by our regulations, apply to the onshore portion of the MHB Transfer System.

With regard to your last question, we affirm our prior determination that using the standard models in Subpart B of 49 C.F.R. Part 193 to calculate the thermal radiation and vapor-gas dispersion distances for the PIP LNG Transfer System is impracticable, and that Weaver's Cove must develop, and submit to the PHMSA Administrator for approval, an alternative model for calculating those distances. We also agree that further guidance is needed on the design-spill criteria that should be used in developing that alternative model. However, as that guidance is still under technical review, we cannot provide a final response to your question at this time.

Sincerely,



Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

cc: Bruce F. Kiely, Counsel for Weaver's Cove Energy, LLC
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August 7, 2009

Dianne R. Phillips
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Via Electronic Filing

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

Re: Weaver's Cove Energy, LLC, FERC Docket No. CP04-36-005

Dear Ms. Bose:

Please find enclosed for filing in the above-referenced docket a copy of correspondence sent on behalf of the City of Fall River to Jeffrey D. Wiese, Associate Administrator for Pipeline Safety concerning the above-referenced docket. Fall River is submitting this correspondence to ensure a complete record in this proceeding.

If you have any questions concerning the enclosed submission, please contact the undersigned at (617) 573-5818.

Sincerely,

HOLLAND & KNIGHT LLP



Dianne R. Phillips

DRP/jen

Enc.

Cc: All Parties to Docket No. CP04-36-005

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August 7, 2009

Via Facsimile 202-366-4566

Jeffrey D. Wiese
Associate Administrator for Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Weaver's Cove Energy, LLC,
FERC Docket No. CP04-36-005
Applicability of Federal Siting Requirements, 49 C.F.R. Part 193

Dear Mr. Wiese:

I am writing on behalf of our client, the City of Fall River, Massachusetts ("Fall River") with respect to the above-referenced matter and in connection with the May 29, 2009 letter from J. Mark Robinson to you (docketed as FERC Accession No. 20090529-3052) requesting guidance on the applicability of federal siting standards found in 49 C.F.R. Part 193 to the proposed Weaver's Cove Energy facilities.

As Mr. Robinson's letter indicates, FERC has traditionally applied the U.S. Department of Transportation regulations found in 49 C.F.R. Part 193 to the siting of marine cargo transfer systems between the marine vessel and the last valve located immediately before the storage tank. Such transfer systems have been subject to the requirements of § 193.2057 and § 193.2059 as well. As described below, the legislative and rulemaking history clearly indicates that such application is appropriate for all types of marine cargo transfer systems, including the LNG transfer system proposed in the Weaver's Cove case. To rule otherwise would allow Weaver's Cove to avoid DOT's most important LNG facility siting requirements simply because it chose a remote berth location. Stated another way, there is no logical distinction in this case from any other berth location, all of which are located in navigable waters by definition. Every on-shore LNG facility which receives shipments via marine vessel will include a berth located in navigable waters, as well as a marine cargo transfer system connecting the vessel at the berth to the landside storage tank. All of these facilities built since 1980 have been subject to DOT's

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* Representative Office

siting standards including § 193.2057 and § 193.2059. Under applicable law, Weaver's Cove's proposal should be subject to the same requirements.

Specifically, as the rulemaking history makes clear, Part 193 was designed to apply to LNG facilities which involved the supply or delivery of natural gas by pipeline (as does the Weaver's Cove project). *See, e.g.*, 45 Fed. Reg. 9184, 9185 (Feb. 11, 1980). It was not intended to cover offshore LNG facilities or facilities which did not involve the transportation of natural gas by pipeline. *Id.* at 9188; *see also* Notice of Proposed Rulemaking, 44 Fed. Reg. 8142, 8146 (Feb. 8, 1979) (because Part 193 would be adopted under the Natural Gas Pipeline Safety Act with jurisdiction limited to facilities in connection with a system for pipeline transportation of natural gas, part 193 would not apply to facilities used exclusively in the transportation of natural gas or LNG by modes other than pipeline including, for example, an LNG storage and transfer facility at a marine terminal used to transfer LNG between ships or barges and rail or motor carriers). However, where there were areas of overlapping jurisdiction with the U.S. Coast Guard, an MOU governed the delineation leaving DOT responsible for facility and transfer system siting safety and the USCG responsible for site selection as it relates to management of vessel traffic, among other things. *Id.* at 9187; *see also* 44 Fed. Reg. 8142, 8146-47 (Feb. 8, 1979) (setting forth the text of the MOU and describing its applicability); 43 Fed. Reg. 34362, 34362-63 (Aug. 3, 1978) (USCG Advance Notice of Proposed Rulemaking also setting forth the terms of the MOU, and concurring with the division of responsibility for site selection).

This delineation was confirmed upon reconsideration when § 193.2001(b)(3) was amended slightly "to be consistent with the siting provisions of the memorandum of understanding with the U.S. Coast Guard" 45 Fed. Reg. 57402, 57402 (Aug. 28, 1980). That amendment added the highlighted phrase "other than siting" as follows:

(3) In the case of a marine cargo transfer system and associated facilities, any matter ***other than siting*** pertaining to the system or facilities between the marine vessel and the last manifold (or in the absence of a manifold, the last valve) located immediately before a storage tank.

Id. at 57418 (emphasis supplied). This clarification, which has remained since 1980 without revision, confirmed that DOT siting requirements, including § 193.2057 and § 193.2059, apply to the system or facilities between the marine vessel and the last manifold or valve located immediately before the storage tank. In Weaver's Cove's case, that system is the Pipe-in-Pipe LNG transfer system.

Moreover, the U.S. Coast Guard issued its Letter of Recommendation related to management of vessel traffic, among other things, on July 30, 2009 [FERC Accession No. 20090730-4001]. The Coast Guard did ***not*** evaluate the safety siting requirements, including hazard exclusion zones, resulting from a potential LNG spill involving the Pipe-in-Pipe Transfer System where it connects with on-shore with terminal tank piping. Therefore, consistent with longstanding regulatory requirements, DOT should determine that the LNG transfer system is

August 7, 2009

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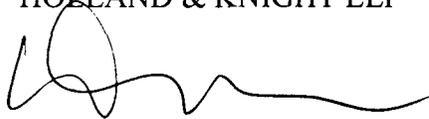
subject to Part 193 because the Coast Guard has not exercised jurisdiction over this aspect of the project.

In summary, Fall River urges DOT and FERC require Weaver's Cove to perform an exclusion zone analysis under § 193.2057 and § 193.2059 for a design spill (12,000 m³/hr) from the LNG Pipe-in-Pipe Transfer System where it connects to tank piping on-shore. DOT's regulations are clear that marine cargo transfer systems can only be sited where such exclusion zones are adequate to protect the public. To date, Weaver's Cove has not demonstrated that the proposed location of its Pipe-in-Pipe LNG cargo transfer system which will convey 12,000 m³ of LNG per hour meets the exclusion zone siting requirements.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely yours,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read 'Dianne R. Phillips', written over the printed name below.

Dianne R. Phillips

DRP/jen

Cc: Federal Energy Regulatory Commission
City of Fall River, MA

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October 5, 2009

BY E-MAIL & MESSENGER

Jeffrey D. Wiese
Associate Administrator for Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590

Bruce F. Kiely
TEL +1 202.639.7711
FAX +1 202.585.1035
bruce.kiely@bakerbotts.com

Re: *Weaver's Cove Energy, LLC*, FERC Docket No. CP04-36-005
Response to the Letter of the City of Fall River Regarding the Applicability of
Federal Siting Requirements, 49 C.F.R. Part 193

Dear Mr. Wiese:

In this letter, Weaver's Cove Energy, LLC ("Weaver's Cove") addresses the August 7, 2009 letter from the City of Fall River's counsel sent to the Pipeline and Hazardous Materials Safety Administration ("PHMSA")¹ regarding the liquefied natural gas ("LNG") facilities proposed by Weaver's Cove in the captioned proceeding ("August 7 Letter"). That August 7 Letter purports to respond to a letter from the Federal Energy Regulatory Commission ("FERC") dated May 29, 2009.² The purpose of this letter is to correct the mischaracterizations of fact and misapplication of law and regulations in the August 7 Letter to ensure that PHMSA and FERC have a full and accurate record.

To the extent that the August 7 Letter has requested that an exclusion zone analysis be conducted in accordance with the requirements of 49 C.F.R. §§ 193.2057 and 193.2059 at the onshore connection of Weaver's Cove's LNG Pipe-in-Pipe ("PiP") facility and its storage tank,³ such an analysis has already been conducted in full conformity with the Part 193 regulations and made a part of the record in the FERC proceeding. Furthermore, as explained below, both FERC and PHMSA have determined that an exclusion zone analysis for a design spill contemplating a 10-minute, full flow spill (in this case 12,000 m³/hr) is not required.

To the extent that the City of Fall River is asserting in the August 7 Letter that PHMSA's siting requirements apply to those portions of Weaver's Cove's proposed PiP facility located in navigable waters, this assertion is without merit. It is clear from the NGPSA and

¹ PHMSA has assumed the responsibility of regulating LNG pipelines facilities under the Natural Gas Pipeline Safety Act of 1968 ("NGPSA"), 49 U.S.C. § 60101 *et seq.*, as amended by Pub. L. No. 96-129, from its predecessor agency, the Research and Special Programs Administration ("RSPA").

² See Letter from J. Mark Robinson, Director, Office of Energy Projects, Federal Energy Regulatory Commission to Jeffrey D. Wiese, Associate Administrator for Pipeline Safety, Pipeline and Hazardous Materials Safety Administration (May 29, 2009) ("FERC's May 29 Letter").

³ August 7 Letter at 3.

PHMSA's implementing regulations at 49 C.F.R. Part 193 that PHMSA's Part 193 siting requirements are inapplicable to the portions of the PiP facility located in navigable waters.⁴ Nevertheless, Weaver's Cove has designed its proposed offshore berth and related facilities, including the PiP facility, to be consistent with the cited PHMSA regulations. The regulatory history of the Part 193 siting regulations and the NFPA 59A (2001) standards both indicate that impoundment and exclusion zone requirements are not appropriate for the PiP facility.

1. PHMSA Has Already Determined That An Exclusion Zone Analysis Based On A Full Flow Rate (12,000 m³/hr) Spill Is Not Required.

The August 7 Letter incorrectly states that the design spill for the exclusion zone analysis at the onshore connection of the PiP facility and the storage tank is required at the design full flow rate of the transfer piping of 12,000 m³/hr. However, both PHMSA and FERC have determined that a design spill contemplating a full pipe design flow rate (in this case 12,000 m³/hr) is *not* required. In a letter to PHMSA dated April 19, 2005 seeking comment from PHMSA, FERC determined that a review of marine transfer systems finds that the design construction, operation and historical integrity of all-welded large diameter marine transfer piping does not support a full pipe rupture as a credible accident scenario.⁵ In conclusion, FERC stated:

[O]ur determination of a single accidental leakage source for a marine transfer system is based on a facility-specific review of piping and instrumentation diagrams to identify all small diameter attachments to the transfer piping for instrumentation, pressure relief, recirculation, etc, and any flanges that may be used at valves or other equipment, in order to determine the largest spill rate.⁶

In its response, dated May 9, 2005, PHMSA agreed that FERC's method of "focus[ing] on facility-specific small diameter attachments to the transfer piping to determine the largest spill rate" was appropriate⁷ for determining design spills for marine transfer piping. PHMSA concluded:

Our regulations provide that impounding areas for marine cargo transfer systems be based on a design spill defined as flow from any accidental

⁴ See 49 U.S.C. § 60101(a)(14)(B) (stating a liquefied natural gas pipeline facility "does not include any part of a structure or equipment located in navigable waters (as defined in section 3 of the Federal Power Act (16 U.S.C. 796))" (emphasis added)); 49 C.F.R. § 193.2001(b)(4) (stating that Part 193 does not apply to "[a]ny LNG facility located in navigable waters (as defined in Section 3(8) of the Federal Power Act (16 U.S.C. 796(8)))").

⁵ Letter from Richard R. Hoffmann, Director, Division of Gas - Environment and Engineering, Federal Energy Regulatory Commission to Theodore L. Willke, Deputy Associate Administrator for Pipeline Safety, U.S. Department of Transportation, 1 (April 19, 2005). This letter is attached.

⁶ *Id.* at 2.

⁷ Letter from Stacey E. Gerard, Associate Administrator for Pipeline Safety, Pipeline and Hazardous Materials Safety Administration to Richard R. Hoffmann, Director, Division of Gas - Environment and Engineering, Federal Energy Regulatory Commission, 1 (May 6, 2005). This letter is attached.

leakage source for 10 minutes or a shorter time. . . . The OPS concurs with the two credible scenarios you propose for a potential accidental leakage source, including your justification for smaller design spill durations.

Fall River has raised similar issues regarding the size of the design spill in the related FERC proceedings for the Weaver's Cove project, which were all rejected as lacking merit.⁸

2. The PiP Facility Is Consistent with the Part 193 Siting Requirements.

Notwithstanding the fact that the Part 193 siting regulations are inapplicable to the PiP facility because it is located in navigable waters,⁹ Weaver's Cove has nevertheless designed its proposed offshore berth and related facilities, including the PiP facility, to be consistent with the PHMSA siting regulations.

Fall River's lengthy recitation of rulemaking history in paragraph 3 of the August 7 Letter simply misses the point as to Weaver's Cove's PiP facility and omits a significant piece of regulatory history. The August 7 Letter incorrectly assumes that the PiP facility is part of Weaver's Cove's cargo transfer system and that, therefore, application of PHMSA's siting regulations at 49 C.F.R. §§ 193.2057 & 2059 is appropriate. However, Weaver's Cove's PiP facility is more properly characterized as "transfer piping"—a type of facility that RSPA acknowledged does not necessitate the application of the impounding system requirements of its siting regulations.

PHMSA's regulations at 49 C.F.R. § 193.2007 distinguish between a "cargo transfer system" and "transfer piping" in the definition of the more generic term "transfer system." The term "transfer piping" is defined in part as "a system of piping used for transferring [LNG] between any of the following: . . . *storage tanks . . . cargo transfer systems*, and facilities other than pipeline facilities."¹⁰ While RSPA previously required transfer piping to adhere to its siting regulations at former 49 C.F.R. § 193.2149 (1999), the agency revised its position in 2000 and exempted such facilities from these requirements. The preamble to the 2000 final rule implementing standards adopted by the National Fire Protection Association ("NFPA") sets forth RSPA's reasoning for excluding transfer piping from its siting requirements:

In the NPRM we proposed to retain [49 C.F.R. § 2149] because it requires grading, drainage or an impounding system around transfer piping and parking areas for loaded LNG trucks. . . . [NFPA] said that *impoundment is not required for transfer piping because spills are controlled by the valves in the piping*. . . .

⁸ See *Weaver's Cove Energy, LLC*, 114 FERC ¶ 61,058, at PP 35-42 (2006).

⁹ See 49 U.S.C. § 60101(a)(14)(B); 49 C.F.R. § 193.2001(b)(4).

¹⁰ 49 C.F.R. § 193.2007 (emphasis added).

Response—After discussions with the LNG plant operators, designers and consultants we have determined that the most likely sources of leaks within LNG plant are LNG storage tanks, cargo transfer areas, and vaporizers and process equipment, which are all addressed in paragraph 2–2.1.2 of the ANSI/NFPA 59A. Therefore, we believe ANSI/NFPA 59A will satisfy this requirement, and we are removing § 193.2149.¹¹

In the same rulemaking, RSPA again articulated its express intent to *exclude* transfer piping from the siting requirements under its regulations:

In the same section of impoundment capacity for transfer systems, one operator objected to including discharge from *permanent transfer piping* in the impoundment capacity calculations, and suggested we should instead use failure of cargo transfer piping. The commenter’s justification is that impoundment along the permanent piping from liquefaction process to the LNG tanks and from the LNG tanks to loading arms, adds significantly to the plant cost without addressing a realistic release scenario. This commenter said that ANSI/NFPA 59A specifically excludes permanent plant piping from the definition of transfer area.

Response—We agree and have removed this requirement as explained above in Section 193.2149.

Application of the siting requirements to Weaver’s Cove’s proposed PiP facility would be contrary to the intent of RSPA as expressed in the 2000 Final Rule. The characteristics of the PiP facility are not consistent with those that RSPA determined merit the additional impoundment requirements. The PiP facility falls into the category of facilities that both PHMSA and NFPA have determined should be exempt from the requirements for impoundments. As discussed further in this letter, the facilities requiring impoundment areas (i.e. cargo transfer system and storage tank) have already been subject to a thorough review. The PiP facility, including the section submerged in navigable waters, is properly characterized as transfer piping, which RSPA and NFPA determined to be excluded from impoundment requirements. The nature of the PiP facilities in no way resembles the facilities the 2000 Final Rule cited as posing an LNG spill hazard and therefore, application of these same requirements to the entire span of the PiP facility is unwarranted.

¹¹ Research and Special Programs Administration, Pipeline Safety: Incorporation of Standard NFPA 59A in the Liquefied Natural Gas Regulations, 65 Fed. Reg. 10,950, 10,954 (Mar. 1, 2000) (“2000 Final Rule”); *see* NFPA 59A: Standard for the Production, Storage, and Handling of Liquefied Natural Gas (LNG) (2001) (“NFPA 59A (2001)”).

The Exclusion Zone Requirements of NFPA 59A Do Not Apply to the PiP Facility

RSPA's determination that the implementation of impoundment requirements is not appropriate for transfer piping is supported in the NFPA 59A (2001) standards, which also exclude permanent transfer piping such as Weaver's Cove's proposed PiP facility from impounding requirements. PHMSA's regulations require an LNG transfer system to have a thermal and dispersion exclusion zone *in accordance with* the NFPA 59A (2001) standards.¹² Those standards require the application of impoundment and exclusion zones only with respect to (1) process areas; (2) vaporization areas; (3) transfer areas for LNG, flammable refrigerants, and flammable liquids; and (4) areas immediately surrounding flammable refrigerant and flammable liquid storage tanks.¹³ The first, second and fourth areas listed are obviously inapplicable to Weaver's Cove's proposed PiP facility, and NFPA 59A (2001) makes clear that the PiP facility does not qualify as a "transfer area," the third type of area listed. NFPA 59A (2001) Section 1.7.27 defines a "transfer area" as "[t]hat portion of an LNG Plant containing a piping system where LNG. . . [is] introduced into or removed from the facility, such as truck loading or ship unloading areas, or where piping connections are connected or disconnected routinely. *Transfer areas do not include . . . permanent plant piping.*"¹⁴ Weaver's Cove's PiP facility does not fit the criteria for a "transfer area." The PiP facility is properly characterized as "permanent plant piping" as it will be permanently affixed in the seabed and will not be subject to routine connections and disconnections as contemplated by NFPA 59A (2001) § 1.7.27.

The Cargo Transfer System is Consistent with PHMSA's Part 193 Siting Regulations and the Exclusion Zone Requirements of NFPA 59A

In contrast to the PiP facility which will not serve as a "transfer area," the offshore berth portion of Weaver's Cove's proposed LNG terminal will be the point at which LNG is introduced into the facility. It is also this portion of the system that satisfies the definition of a "cargo transfer system" under the Part 193 regulations.¹⁵ As defined in the regulations at 49 C.F.R. § 193.2007, "[c]argo transfer system means a component, or system of components functioning as a unit, used exclusively for transferring hazardous fluids in bulk between a tank car, tank truck, or marine vessel and a storage tank." Weaver's Cove's proposed cargo transfer system includes: unloading arms, headers, piping and valves, LNG jetty booster pumps and downstream piping to the isolation valve on the jetty.¹⁶

Weaver's Cove's cargo transfer system is consistent with PHMSA's siting regulations. PHMSA's regulations at 49 C.F.R. § 193.2057 require a cargo transfer system to "have a thermal exclusion zone in accordance with section 2.2.3.2 of NFPA 59A." Similarly, 49

¹² See 49 C.F.R. §§ 193.2057 & 193.2059.

¹³ NFPA 59A (2001) § 2.2.1.2.

¹⁴ *Id.* § 1.7.27 (emphasis added).

¹⁵ As explained above, although Weaver's Cove has designed its transfer system to be consistent with PHMSA's safety regulations, the LNG pipeline facilities located in navigable waters are statutorily exempt from regulation under the NGPSA.

¹⁶ The transfer piping associated with Weaver's Cove's transfer system, as discussed above, includes piping downstream of the interface with the cargo transfer system to the last valve at the storage tank.

C.F.R. § 193.2059 requires such facilities to “have a dispersion exclusion zone in accordance with sections 2.2.3.3 and 2.2.3.4 of NFPA 59A,” except that “the design spill shall be determined in accordance with section 2.2.3.5 of NFPA 59A.” The cargo transfer system satisfies both requirements. The Vapor Dispersion and Thermal Radiation Calculations conducted in relation to the proposed cargo transfer system were calculated in accordance with 49 C.F.R. §§193.2057, 193.2059, and met the applicable standards. Additionally, in conformance with PHMSA’s regulations and the NFPA 59A (2001) standards, the spill control facilities associated with the cargo transfer system have been designed with the following features:

- The spillway and large impoundment are sized for FERC-required 10-minute full-flow spill
- The sub-impoundment is sized for NFPA 59A (2001) design spill
- Thermal radiation and vapor dispersion distances were calculated based on design spill, in accordance with Part 193 and NFPA 59A (2001)

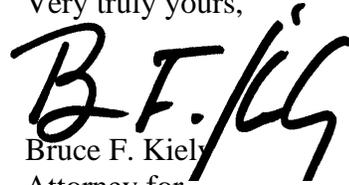
In addition, the point at which LNG will be transferred from the PiP facility to the onshore storage tank has also been subjected to an impoundment area and a thorough exclusion zone analysis. The spill control facilities located at this point have been extensively evaluated and found to be in conformity with applicable PHMSA and FERC standards. Indeed, FERC has already thoroughly reviewed the exclusion zone analysis conducted for the impoundment area at the interconnection of the transfer piping and the LNG storage tank and addressed the concerns that Fall River has raised with regard to this analysis in FERC’s orders approving the original terminal design.¹⁷

CONCLUSION

In sum, to the extent that the August 7 Letter states that the entire PiP facility, including portions located in navigable waters, should be subject to the Part 193 siting regulations, this claim is without legal support. Nevertheless, Weaver’s Cove’s LNG transfer system has been designed consistent with the Part 193 requirements. The PiP facility to which Fall River’s August 7 Letter has requested that the Part 193 siting regulations be applied constitutes permanent transfer piping. The regulatory history of the Part 193 siting regulations and the NFPA 59A (2001) standards both indicate that impoundment and exclusion zone requirements are not appropriate for such facilities. Finally, Weaver’s Cove has designed its cargo transfer system (the offshore berth portion of its proposed LNG terminal that will directly unload LNG cargoes from incoming vessels) and the onshore interconnection of the PiP facility with the LNG storage tank to be in full conformity with the Part 193 regulations.

¹⁷ See *Weaver’s Cove Energy, LLC*, 112 FERC ¶ 61,070 PP 81-82 (2005), *order on reh’g*, 114 FERC ¶ 61,058, at PP 35-42 (2006).

Very truly yours,

A handwritten signature in black ink, appearing to read "B.F. Kiely". The signature is stylized and written in a cursive-like font.

Bruce F. Kiely
Attorney for
Weaver's Cove Energy, LLC

cc: Ed LeBlanc, United States Coast Guard
Terry Turpin, Federal Energy Regulatory Commission
Dianne Phillips, Counsel for City of Fall River
Ted Gehrig, President, Weaver's Cove Energy, LLC
All Parties to FERC Docket No. CP04-36-005

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

ORIGINAL

OFFICE OF ENERGY PROJECTS

April 19, 2005

Theodore L. Willke
Deputy Associate Administrator for Pipeline Safety
U.S. Department of Transportation
400 Seventh Street, SW
Washington, DC 20590

Dear Mr. Willke:

In accordance with the February 2004 Interagency Agreement for the review of LNG import/export facilities, we are requesting your concurrence that we are following appropriate procedures on a technical issue related to evaluating exclusion zones around LNG import terminals. The technical issue is about our selection of the single accidental leakage source used to calculate spills from piping at a terminal.

The incorporation of NFPA 59A into 49 CFR Part 193 in March 2000, has resulted in some discussion within the regulatory community on how design spills should be determined for marine transfer lines. Under NFPA Section 2.2.3.5, the design spill used in thermal and flammable vapor exclusion zone calculations for vaporization, process, or LNG transfer areas must equal the greatest volume from any "single accidental leakage source." Prior to March 2000, the design spill required the rupture of a single transfer pipe with the greatest overall flow capacity, for not less than 10 minutes (old Part 193.2059(d)).

The FERC staff presently uses the greatest overall flow volume for sizing impoundments at vaporization, process and transfer areas. This approach ensures that impoundments are sized for a catastrophic failure that could result from an external event or intentional act, while recognizing that a more likely rupture of a connection to the transfer line is more appropriate as the design spill used to calculate flammable vapor exclusion zones.

Our review of marine transfer systems finds that the design construction, operation and historical integrity of all-welded large diameter marine transfer piping does not support a full pipe rupture without ignition as a credible accident scenario. Marine transfer systems are constructed of relatively thick-walled seamless pipe, fully x-ray inspected during construction, and operated at moderate pressures (50 to 80 psi). Maximum flow rates are limited to the 10- to 12-hour cargo unloading period, a time when extra staff is on hand to monitor operations and detect abnormal events and quickly

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activate emergency shutdown systems. As a result, our determination of a single accidental leakage source for a marine transfer system is based on a facility-specific review of piping and instrumentation diagrams to identify all small diameter attachments to the transfer piping for instrumentation, pressure relief, recirculation, etc, and any flanges that may be used at valves or other equipment, in order to determine the largest spill rate.

As an additional measure of conservatism in evaluating hazards from a terminal's operations, we have also decided to evaluate the marine unloading arms connected to the dock-side end of marine transfer system since the typical 16-inch diameter arms have the potential for a larger spill volume. However, we find that a shorter spill duration is appropriate since the powered emergency release coupling (PERC) valves equipped on all modern arms and the integrated ship to shore emergency shutdown systems should limit spills to less than 30 seconds.

We solicit your concurrence on this approach in determining the accidental leakage source for marine transfer systems. If you have any questions about this request, please call Chris Zerby at 202-502-6111. Thank you for your continued cooperation.

Sincerely,

Richard R. Hoffmann, Director
Division of Gas – Environment
and Engineering



U.S. Department
of Transportation

**Pipeline and
Hazardous Materials Safety
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20580

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FEDERAL ENERGY REGULATORY COMMISSION

Richard R. Hoffmann
Director
Division of Gas — Environment and Engineering
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Dear Mr. Hoffmann:

This is in response to your letter of April 19, requesting the Office of Pipeline Safety's (OPS) advice on the procedures you are following in evaluating exclusion zones for marine cargo transfer lines in LNG import terminals. We are pleased to respond in the spirit of the February 2004 Interagency Agreement on coordination of Federal safety efforts and because our regulations, 49 CFR Part 193, are used to assess the safety and hazard impacts from proposed siting of LNG facilities, including marine transfer lines.

Our regulations provide that impounding areas for marine cargo transfer systems be based on a design spill defined as flow from any single accidental leakage source for 10 minutes or for a shorter time. The shorter time is based upon demonstrable surveillance and shutdown provisions acceptable to the authority having jurisdiction. Therefore, these spills are the basis upon which hazard exclusion modeling could be performed.

The OPS agrees that the design and construction of marine cargo transfer systems is very robust and that failure is unlikely under operational constraints. Moreover, the extensive security and safety oversight provided by the USCG before, during, and after transfer operations further reduces the risk that a spill could threaten life and property. There is no documented evidence of a catastrophic failure ever having occurred in either LNG operational experience or research. The OPS intends to explore a more comprehensive approach that accounts for risk and probability instead of a spill based only on a worst case scenario. This may include incentives that encourage operators to utilize more mitigating measures in controlling potential spills to reduce the impact on people and property close to LNG facilities.

The OPS concurs with the two credible scenarios you propose for potential single accidental leakage sources, including your justification for smaller spill durations. The first scenario focuses on facility-specific small diameter attachments to the transfer piping to determine the largest spill rate. The OPS agrees with using this scenario for the design spill.

The second and more conservative scenario requires the review of the marine unloading arms based on the fact that these components are reconnected to the ship each time a ship docks. We agree that the integrated ship to shore shutdown systems make large spills here very unlikely. Therefore, spill duration of 30 seconds or less from leaking flanges instead of guillotine breaks may be used for the spill rate criteria.

We appreciate the opportunity to provide the above input on your approach in determining the accidental leakage source for marine transfer systems. If you have any questions or require any additional information on our position, please feel free to contact me or Theodore Willke, Deputy Associate Administrator for Pipeline Safety, at (202)366-4595.

Sincerely yours,



Stacey E. Gerard
Associate Administrator for Pipeline Safety

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Dianne R. Phillips
617.573.5818
dianne.phillips@hklaw.com

November 6, 2009

Via Facsimile 202-366-4566

Jeffrey D. Wiese
Associate Administrator for Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Weaver's Cove Energy, LLC ("WCE")
FERC Docket No. CP04-36-005
Applicability of Federal Siting Requirements, 49 C.F.R. Part 193

Dear Mr. Wiese:

I am writing on behalf of our client, the City of Fall River, Massachusetts ("Fall River") with respect to the above-referenced matter and in connection with your July 31, 2009 letter to the Federal Energy Regulatory Commission ("FERC") [Accession No. 20090731-4028] and WCE's responses also filed with FERC on September 15, 2009 [Accession No. 20090915-5093], September 21, 2009 [Accession No. 20090921-5096] and October 6, 2009 [Accession No. 20091006-5024].

As an initial matter, as described in my letter dated August 7, 2009 [Accession No. 20090807-5046], Fall River agrees with your determination that WCE's proposed Mount Hope Bay LNG transfer system is a marine cargo transfer system in accordance with the plain meaning of the regulations, 49 C.F.R. § 193.2007 (defining "cargo transfer system"). Fall River also agrees that the U.S. Department of Transportation ("DOT") regulations found in 49 C.F.R. Part 193 apply to the siting of marine cargo transfer systems between the marine vessel and the last valve located immediately before the storage tank, including the WCE proposal.

Fall River disagrees with WCE's response that the Part 193 siting rules do not apply "to the parts of Weaver's Cove's transfer system that are located in navigable waters."¹ As described

¹ Response of Weaver's Cove Energy, LLC to August 26, 2009 Environmental and Engineering Information Request for the Bay Berth Project, Response No. 4 (Sept. 15, 2009) [Accession No. 20090915-5093]; *see also* WCE response dated October 6, 2009 [Accession No. 20091006-5024] (continuing to argue that because the PiP facility is

in Fall River's earlier submittal regarding the regulatory history, and in your letter, "the application of the siting requirements turns on whether something is a marine cargo transfer system, not whether it is an LNG facility located in navigable waters."² Indeed, "[e]very on-shore LNG facility which receives shipments via marine vessel will include a berth located in navigable waters, as well as a marine cargo transfer system connecting the vessel at the berth to the landside storage tank."³

Moreover, Fall River disagrees with WCE's assertions that its facilities "are in full compliance with both the letter and spirit of applicable sections of 49 CFR Part 193."⁴ First, WCE's analysis ignores the "spirit" of the regulation embodied in the rulemaking history. From the earliest regulation, DOT was responsible for facility and transfer system siting safety between the marine vessel and the last manifold (or in the absence of a manifold, the last valve) located immediately before a storage tank irrespective of the description of the facilities. *See, e.g.*, 45 Fed. Reg. 9184, 9187 (Feb. 11, 1980); *see also* 44 Fed. Reg. 8142, 8146-47 (Feb. 8, 1979) (setting forth the text of the MOU between DOT and the USCG and describing its applicability); 43 Fed. Reg. 34362, 34362-63 (Aug. 3, 1978) (USCG Advance Notice of Proposed Rulemaking also setting forth the terms of the MOU, and concurring with the division of responsibility for site selection). This responsibility was confirmed upon reconsideration when § 193.2001(b)(3) was amended slightly "to be consistent with the siting provisions of the memorandum of understanding with the U.S. Coast Guard" 45 Fed. Reg. 57402, 57402 (Aug. 28, 1980). That amendment added the highlighted phrase "other than siting" as follows:

(3) In the case of a marine cargo transfer system and associated facilities, any matter ***other than siting*** pertaining to the system or facilities between the marine vessel and the last manifold (or in the absence of a manifold, the last valve) located immediately before a storage tank.

Id. at 57418 (emphasis supplied). This clarification, which has remained since 1980 without revision, confirmed that DOT siting requirements, including § 193.2057 and § 193.2059, apply to the system or facilities between the marine vessel and the last manifold or valve located immediately before the storage tank. In Weaver's Cove's case, that system is the berthing station and Pipe-in-Pipe ("PiP") LNG transfer system from the point where it connects to the ship unloading arms until the last valve at the storage tank. Moreover, as described in detail below, subsequent DOT rulemaking events confirms this "spirit" of the regulations which require DOT

located in navigable waters it is exempt from DOT regulation, an argument which was rejected in your July 31, 2009 letter to FERC [Accession No. 20090731-4028]).

² July 31, 2009 letter to Mr. Jeff C. Wright, Director, Office of Energy Projects, FERC, at n.15. Moreover, the United States Coast Guard has explicitly disclaimed any responsibility or jurisdiction for "the design and siting criteria for the subsea pipeline." *See* Letter dated October 27, 2009 from Capt. Raymond J. Perry, Captain of the Port, to Clement Brown, counsel for the Town of Somerset, p. 1.

³ August 7, 2009 letter to Jeffrey D. Wiese, Associate Administrator for Pipeline Safety, at p. 1 [Accession No. 20090807-5046].

⁴ Response of Weaver's Cove Energy, LLC to August 26, 2009 Environmental and Engineering Information Request for the Bay Berth Project, Response No. 4 (Sept. 15, 2009) [Accession No. 20090915-5093].

to evaluate marine cargo transfer system siting, and to conduct those evaluations by application of the DOT exclusion zones found in § 193.2057 and § 193.2059.

Specifically, WCE's attempts to parse the definitional sections found in § 193.2007 misses the point.⁵ "Cargo transfer system" includes the entire system of components functioning as a unit used for transferring fluids "between a . . . marine vessel and a storage tank." 49 CFR § 193.2007. When read in conjunction with the siting jurisdictional delineation above, this clearly means the system up to the last manifold or valve located immediately before a storage tank. WCE's attempts to divide the "cargo transfer system" into segments such that it is limited to components located on the jetty and does not include the novel PiP transfer system should be rejected.⁶

Nor do the definitions contained in NFPA 59A (2001) support WCE's argument. As noted by WCE, "Transfer Area" is defined as "[t]hat portion of an LNG plant containing *a piping system* where LNG, flammable liquids, or flammable refrigerants are *introduced into* or removed from *the facility*, such as truck loading *or ship unloading areas*, or where piping connections are connected or disconnected routinely" (emphasis supplied). WCE implies that there is only a single Transfer Area in connection with the novel berthing station and PiP facility where the ship's berth is located over 4 miles away from the storage tank. However, the Part 193 definition of "cargo transfer system" clearly indicates that the entire system comprises the NFPA 59A definition of "Transfer Area." The berth headers, piping, valves, and jetty booster pumps and the PiP operating together comprise "a piping system" where LNG is introduced into the shore-side facility. WCE should not be able to avoid the DOT siting requirements simply by using a novel approach and an extensive distance between ship and storage tank.

Next, WCE claims that the "PiP facility is properly characterized as 'permanent plant piping' as it will be permanently affixed in the seabed and will not be subject to routine connections and disconnections as contemplated by NFPA 59A (2001) § 1.7.27."⁷ However, as the 2000 rulemaking adopting NFPA 59A makes clear, "marine cargo transfer systems and associated facilities" (the items subject to DOT siting jurisdiction under § 193.2001(b)(3)) are distinct from "permanent plant piping" which is an undefined term in NFPA 59A and in Part 193. Nothing in the 2000 Final Rule negates this analysis.⁸

By way of background, in 1996, NFPA petitioned DOT requesting that DOT change its 20 year history and adopt the substantive provisions from NFPA 59A by incorporation by reference.⁹ This followed a policy shift by DOT towards incorporating by reference voluntary

⁵ See PowerPoint presentation filed to supplement WCE's responses to Data Requests 4 and 5, pp. 62-68 (Sept. 21, 2009) [Accession No. 20090921-5096].

⁶ See *id.* at p. 68.

⁷ WCE response dated October 6, 2009, p. 5 [Accession No. 20091006-5024].

⁸ The 2000 Final Rule, 65 Fed. Reg. 10950 (Mar. 1, 2000) adopted and incorporated the 1996 version of NFPA 59A. For purposes of this discussion, there is no material difference except as noted herein between the 1996 version of NFPA 59A and the 2001 version of NFPA 59A, which was subsequently adopted by DOT and is cited by WCE.

⁹ See Notice of proposed rulemaking, 63 Fed. Reg. 70735, 70736 (Dec. 22, 1998) (reciting rulemaking history).

consensus standards into its regulations and DOT's participation on the 59A technical committee.¹⁰ Only 11 comments were received on the proposed paradigm shift, and these were received from two trade associations, two standards organizations, six operators, and one State agency.¹¹ Where DOT believed that NFPA 59A did not adequately address requirements from the existing Part 193 requirements, it proposed to retain the DOT regulation. The applicability of siting requirements for marine cargo transfer systems and associated facilities was not changed, and, as indicated above, has not been changed since the regulations were finally adopted in 1980. In addition, the exclusion zone requirements applicable to such transfer systems also did not change.¹²

The 2000 Final Rule did, however, make a change with regard to the treatment of "permanent plant piping" a term that was used but not defined in NFPA 59A.¹³ Specifically, DOT originally planned to retain regulations requiring impoundments around certain piping and defining the volume of the design spill used to size the impoundments.¹⁴ However, "one operator objected to including discharge from permanent transfer piping in the impoundment capacity calculations, and suggested [DOT] should instead use failure of cargo transfer piping." *Id.* at 10955.¹⁵ The request to eliminate permanent plant piping from the impoundment requirement was based upon a cost-benefit argument and the fact that NFPA 59A "excludes permanent plant piping from the definition of transfer area." *Id.* In response, DOT consulted with LNG plant operators, designers and consultants and determined "that the most likely sources of leaks within [the] LNG plant are LNG storage tanks, **cargo transfer areas**, and process equipment, which are all addressed in [NFPA 59A]." *Id.* at 10954 (emphasis supplied). Accordingly, permanent plant piping (which was never defined throughout this process), as contrasted with cargo transfer systems (which did have a Part 193 definition), did not require impoundment or to be included in the design spill calculations. However, the requirements for cargo transfer systems, including marine cargo transfer systems, remained the same. These systems were and remained subject to exclusion zone siting. It does not matter that the transfer

¹⁰ *Id.* at 70737.

¹¹ See Final Rule, 65 Fed. Reg. 10950, 10951 (Mar. 1, 2000)

¹² See Section 193.2057 (each LNG transfer system, including marine cargo transfer systems, must have a thermal exclusion zone); section 193.2059 (each LNG transfer system, including marine cargo transfer systems, must have a vapor dispersion exclusion zone).

¹³ The term "LNG Plant" is defined in the 2001 version of NFPA 59A as "A plant whose components are used to store liquefied natural gas and may also condition, liquefy, or vaporize natural gas." The 1996 version of NFPA 59A, adopted in 2000 when the change in treatment of "permanent plant piping" emerged, did not define "LNG Plant." Rather, it used the definition of "Process Plant" which included "[a]ll systems needed to condition, liquefy, or vaporize natural gas" Both definitions, when read in context, imply that "the plant" is the shore-side terminal facilities. See, e.g., NFPA 59A, § 2.1 (Plant Site Provisions); § 2.1.1 ("Provision for minimum clearances ... with respect to plant property lines ...") (2001 version). Accordingly, "permanent plant piping" is logically that plant piping contained within the shore-side terminal, a context which is confirmed by the one commentator who mentioned it.

¹⁴ See Final Rule, 65 Fed. Reg. 10950, 10954 (Mar. 1, 2000).

¹⁵ This commenter was especially concerned about including "the permanent piping from liquefaction process to the LNG tanks and from the LNG tanks to loading arms." *Id.*

system is comprised of components which may be welded together, or that certain portions of the transfer system are permanently resting on the sea floor or on pipe supports.

For WCE's original shore-side berth proposal, the marine cargo transfer system was subject to its own exclusion zone siting (even though a portion of the system was welded and permanently affixed). However, WCE's claim that "the point at which LNG will be transferred from the PiP facility to the onshore storage tank has also been subjected to an impoundment area and a thorough exclusion zone analysis" is simply false.¹⁶ Where the PiP facility comes on-shore and connects to the storage tank piping has never been subject to an exclusion zone analysis by DOT or FERC and does not appear, according to plans filed with the Fall River Conservation Commission, to have an associated trough or impoundment system proposed.

Moreover, WCE's claim that "PHMSA Has Already Determined That An Exclusion Zone Analysis Based On A Full Flow Rate (12,000 m³/hr) Spill Is Not Required" is likewise false.¹⁷ The correspondence exchanged between FERC and DOT in 2005, relied upon by WCE, did not address the novel PiP facility which was subsequently proposed. Rather, it addressed traditional marine transfer systems for which there had been historical operational experience and which systems were "constructed of relatively thick-walled seamless pipe, fully x-ray inspected during construction, and operated at moderate pressures (50 to 80 psi)." Unlike the system described in FERC's 2005 inquiry, the PiP transfer system has never before been used for this application and thus has no operational history on which to rely. In addition, according to WCE's proposal, the PiP connections will be X-ray inspected during manufacturing before the pipe is installed in the field and not during construction once the pipe is in place as with other systems. Lastly, the normal operating pressure of the PiP according to WCE is three times that which was identified by FERC in its inquiry to DOT.¹⁸ Reliance on the 2005 determination, which concerned an entirely different type of LNG transfer system, is unwarranted and unjustified.

Accordingly, neither FERC nor DOT has yet determined the proper design spill for the PiP cargo transfer system. The applicable NFPA 59A requirement, incorporated by reference into Part 193, is that the design spill for LNG transfer systems must measure "the flow from any single accidental leakage source" for 10 minutes (absent a waiver from DOT). In this case, DOT and FERC must determine the appropriate "single accidental leakage source" for the PiP transfer system. Fall River contends the appropriate design spill for the PiP transfer system should be nothing less than a guillotine break to provide the appropriate measure of conservatism for this novel technology.

If such a design spill were used, Fall River contends that the inappropriateness of this particular site would be self-evident. Indeed, Fall River's expert, Dr. Jerry Havens, has performed an illustrative analysis based upon a hypothetical design spill representing a rupture of

¹⁶ WCE response dated October 6, 2009, p. 6 [Accession No. 20091006-5024].

¹⁷ WCE response dated October 6, 2009, p. 2 [Accession No. 20091006-5024].

¹⁸ See WCE Waterway Suitability Assessment at p. 3-7 (January 30, 2009) ("The PiP transfer system will comprise twin transfer lines that will transfer the LNG at normal operating pressure of up to approximately 150 psig ...").

November 6, 2009

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the PiP facility on-shore for 10 minutes. When the flammable vapor dispersion zone is calculated for such an illustrative design spill, it clearly exceeds the property boundaries as shown on the attached figure.

In summary, Fall River supports the DOT's determination that it has exclusive siting jurisdiction over the berth and PiP facilities as they comprise a marine cargo transfer system subject to DOT's exclusive jurisdiction. Fall River renews its request that DOT apply the proper exclusion zone siting criteria, including determining the applicable design spill size, for this novel technology.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely yours,

HOLLAND & KNIGHT LLP



Dianne R. Phillips

DRP/jen

Cc: Federal Energy Regulatory Commission
City of Fall River, MA

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From: dianne.phillips@hklaw.com
Sent: Monday, November 23, 2009 10:12 AM
To: Coyle, Keith (PHMSA)
Cc: Mayberry, Alan (PHMSA); Gale, John (PHMSA); Satterthwaite, Cameron (PHMSA); Fred, Benjamin (PHMSA)
Subject: RE: November 6, 2009 Letter to Jeffrey D. Wiese

Attachments: Final Response Ltr as Signed Somerset 27Oct09.pdf
[Keith,](#)

Thank you. To clarify our request, and to follow-up on our conversation, we are specifically seeking answers/interpretations related to the following topics:

- Confirmation that the Department's position as stated in its July 31, 2009 letter to FERC remains unchanged. Specifically, confirmation that the Weaver's Cove Mt. Hope Bay LNG transfer system is a "marine cargo transfer system" subject to the Department's Siting Requirements, Subpart B of Part 193, 49 C.F.R.
- Whether and how NFPA 59A's (2001) definition of "Transfer Area" applies to Weaver's Cove's Mt. Hope Bay LNG transfer system, including the pipe-in-pipe where it comes onshore at the terminal.
- Whether and how the Part 193 exclusion zones, s. 193.2057 and s. 193.2059, apply to the on-shore portion of the pipe-in-pipe transfer system.
- If the above are answered in the affirmative, determination of any "single accidental leakage source" with respect to the pipe-in-pipe transfer system.

In addition, attached for your information and convenience, is a copy of the October 27, 2009 letter from Capt. Raymond Perry referred to in footnote 2 of my November 6, 2009 letter.

I look forward to the Department's response.

Best regards. Please do not hesitate to contact me if you have any questions or need additional information.

Dianne

Dianne R. Phillips | Holland & Knight

Partner

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February 12, 2010

Via Facsimile 202-366-4566

Jeffrey D. Wiese
Associate Administrator for Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Weaver's Cove Energy, LLC ("WCE")
FERC Docket No. CP04-36-005
Applicability of Federal Siting Requirements, 49 C.F.R. Part 193

Dear Mr. Wiese:

I am writing on behalf of our client, the City of Fall River, Massachusetts ("Fall River") with respect to the above-referenced matter to correct certain errors, omissions and misstatements in the letter from Baker Botts, counsel to WCE, to you dated January 29, 2010 [also filed in the FERC Docket as Accession No. 20100202-5045].

The Baker Botts letter purports to summarize the history relating to the application of the federal siting standards, 49 C.F.R. Part 193, to the WCE proposed amended project, including specifically the marine cargo transfer system comprised of the Mt. Hope Bay berthing station and the Pipe-in-Pipe LNG transfer system. The letter fails to mention key details, including the fact that Fall River raised concerns to you back in early August 2009 concerning WCE's failure to comply with applicable DOT regulations.¹ In addition, Fall River sought and received permission from your office to respond to WCE's September 2009 presentation to PHMSA and subsequent correspondence.² Fall River's written argument and analysis was sent to you in my letter dated November 6, 2009 [also docketed with FERC as Accession No. 20091106-5024]. It is simply disingenuous for Baker Botts to credibly claim that "Weaver's Cove has not been made aware of any open issues PHMSA may now have."

¹ See August 7, 2009 letter from me to you [also docketed with FERC as Accession No. 20090807-5046].

² Specifically, Fall River responded to WCE's written filings with you which were also filed with FERC on September 15, 2009 [Accession No. 20090915-5093], September 21, 2009 [Accession No. 20090921-5096] and October 6, 2009 [Accession No. 20091006-5024].

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Abu Dhabi | Beijing | Caracas* | Mexico City | Tel Aviv*

* Representative Office

As an initial matter, WCE has never even tried to comply with your July 31, 2009 letter which determined that "the applicant must develop, and submit the PHMSA Administrator for approval, an alternative model for calculating those distances consistent with the specific requirements in Subpart B and the general principles stated in this opinion." Rather, WCE has consistently argued you were wrong in your interpretation of the regulations you enforce. Specifically, WCE has argued that the Part 193 siting rules do not apply "to the parts of Weaver's Cove's transfer system that are located in navigable waters"³ and, alternatively, that it has already complied with the regulations, as it does again in this latest letter.⁴ Both of those arguments ignore the determination you have already made at FERC's request in your July 31, 2009 letter. Although WCE might not like it, you have already determined that the Part 193, Subpart B siting standards, including application of thermal-radiation and vapor-gas-dispersion exclusion zones, apply to the 4.25-mile PIP transfer system. None of the voluminous submittals by WCE demonstrates application of any exclusion zone whatsoever to the 4.25-mile pipe-in-pipe transfer system.

Because of WCE's attempts to thwart or ignore your prior interpretation rendered to FERC, Fall River itself sought a formal interpretation under PHMSA's regulations, 49 C.F.R. § 190.11(b), in November 2009, requesting confirmation of your July 31, 2009 determination that that the Weaver's Cove Mt. Hope Bay LNG transfer system is a "marine cargo transfer system" subject to the DOT's Siting Requirements, Subpart B of Part 193, 49 C.F.R., among other issues related to interpretation of DOT's regulations which are disputed between Fall River and WCE. That formal interpretation request is currently pending, a fact Baker Botts was well aware of when it requested in its January 29th letter that "you, as author of the PHMSA Letter, advise FERC that Weaver's Cove's Pipe-in-Pipe proposal is in compliance with DOT regulations, and that the issues raised in the PHMSA Letter have been resolved."

I will not repeat the detailed argument, including a review of the regulatory rulemaking history, Fall River presented in my November 6, 2009 letter, which is the subject of the formal interpretation request. However, that interpretation request necessarily must be resolved before any determination can be made concerning whether WCE's proposal complies with applicable DOT siting standards. Based on the current record, FERC may not proceed with processing the WCE amendment application because, among other things, WCE has not yet complied with your prior interpretation dated July 31, 2009 which FERC itself requested.

Fall River appreciates the thoughtfulness with which you and your office are approaching this matter, and we look forward to receipt of your decision and interpretation at the appropriate time when all questions have been answered and all positions carefully considered. Fall River

³ Response of Weaver's Cove Energy, LLC to August 26, 2009 Environmental and Engineering Information Request for the Bay Berth Project, Response No. 4 (Sept. 15, 2009) [Accession No. 20090915-5093]; *see also* WCE response dated October 6, 2009 [Accession No. 20091006-5024] (continuing to argue that because the PiP facility is located in navigable waters it is exempt from DOT regulation, an argument which was rejected in your July 31, 2009 letter to FERC [Accession No. 20090731-4028]).

⁴ *See* Exhibit 7, September 3, 2009 PowerPoint Presentation [also filed with FERC on September 21, 2009 as Accession No. 20090921-5096].

February 12, 2010

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supports your determination that DOT has exclusive siting jurisdiction over the berth and PiP facilities as they comprise a marine cargo transfer system subject to DOT's exclusive regulation. Fall River renews its request that DOT apply the exclusion zone siting criteria, including determining the applicable design spill size, for this novel technology.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely yours,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read 'Dianne R. Phillips', with a long horizontal flourish extending to the right.

Dianne R. Phillips

DRP/jen

Cc: Federal Energy Regulatory Commission
City of Fall River, MA

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