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

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

Dear Mr. Kiely and Mr. Shearer:

This letter constitutes my ruling, issued pursuant to 33 C.F.R. § 127.015(c), on Weaver's Cove Energy, LLC's (Weaver's Cove) appeal of (1) the Captain of the Port (COTP), Southeastern New England's October 24, 2007 Letter of Recommendation (LOR), which characterized the waterway from near Sandy Point, Prudence Island, Rhode Island to the site of its Liquefied Natural Gas (LNG) facility in Fall River, Massachusetts, as unsuitable for the type, size, and frequency of LNG marine traffic proposed by Weaver's Cove,[1] and of (2) the COTP's December 7, 2007 response to Weaver's Cove's request for reconsideration thereof. On January 8, 2008 I received the pending 70-page appeal along with 25 supporting exhibits. I have carefully reviewed that submission, the prior correspondence between Weaver's Cove and the COTP, and the COTP's "Administrative Record," as listed in enclosure (2) to the Letter of Recommendation. Having considered the foregoing, I adopt the COTP's unsuitability recommendation and underlying analyses as modified herein, and partially deny the pending appeal.

Background

The procedural posture of this matter in relation to the conditional authority to construct and operate an LNG terminal, as granted to Weaver's Cove on July 15, 2005 by the Federal Energy Regulatory Commission (FERC),[2] is somewhat unique. As a matter of more recent practice, and as envisioned in Coast Guard Navigation and Vessel Inspection Circular (NVIC) 05-05,[3] a Captain of the Port's Letter of Recommendation is generally released shortly after release of FERC's Final Environmental Impact Statement (FEIS), and in close temporal proximity to the

[1] As detailed in Weaver's Cove's May 12, 2004 Letter of Intent, amended by its February 2, 2006 letter proposing smaller LNG tankers, and again amended by its February 21, 2007 submission entitled "Additional Smaller LNG Ship Design."

[2] 112 FERC 61,070 (2005).

[3] NVIC 05-05 is discussed in full in Analysis § I.B., below.

announcement of FERC's ultimate siting decision. By all accounts, this case did not follow that timeline. Accordingly, it is useful to recount the series of filings, correspondence, and events that led to the COTP's issuance of his Letter of Recommendation, and, ultimately, the present appeal, prior to addressing the specific issues raised therein.

On May 12, 2004, Weaver's Cove submitted a Letter of Intent (LOI) pursuant to 33 C.F.R. § 127.007 to the Captain of the Port (COTP) of Providence, Rhode Island, then-Captain Mary E. Landry,[4] in which it proposed to use LNG tankers to transport LNG to a marine transfer facility it intends to build in Fall River, Massachusetts, on the banks of the Taunton River. Weaver's Cove originally envisioned building 950 foot LNG tankers, with a 145 foot beam, and a 37.5 foot draft, that would be equipped with four containment tanks with a total storage capacity of 145,000 cubic meters. Under this initial proposal, such ships were to arrive in port every 5-7 days, for an anticipated total of approximately 60 deliveries (round trips in and out of port) per year.

On September 7, 2004, the Coast Guard's Marine Safety Office in Providence[5] hosted a Ports and Waterways Safety Assessment (PAWSA) of Narragansett Bay. As explained in the resulting report:

> The PAWSA process is a structured approach for obtaining expert judgments on the level of waterway risk. The process also addresses the effectiveness of possible intervention actions for reducing risk in the waterway. A select group of waterway users / stakeholders evaluate risk factors and the effectiveness of various intervention actions. Thus the process is a joint effort involving waterway experts and the agencies / entities responsible for implementing selected risk mitigation measures.[6]

Critically, the PAWSA considered the potential impacts and risk mitigation strategies for the marine transport of LNG as proposed by Weaver's Cove[7] at that time.

On May 20, 2005, the Federal Environmental Regulatory Commission (FERC) released its Final Environmental Impact Statement (FEIS) regarding Weaver's Cove's proposal.

After publication of FERC's FEIS, on June 14, 2005, the Assistant Commandant for Marine Safety, Security, and Environmental Protection[8] issued Navigation and Vessel Inspection

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[4] Captain Landry has since been promoted to the rank of Rear Admiral (Lower Half).

[5] The Coast Guard undertook internal organizational changes whereby Marine Safety Office Providence was subsequently combined with Coast Guard Group Woods Hole to form a new, unified command called "Sector Southeastern New England." *See* 71 Fed Reg 14535 (March 22, 2006). In alignment with this change, the current Captain of the Port is appropriately referred to as the Captain of the Port, Southeastern New England, vice Captain of the Port, Providence.

[6] Ports and Waterways Safety Assessment Workshop Report for Narragansett Bay (LOR enclosure (2), document 5) at 1.

[7] The PAWSA also considered the potential impacts, risks, and mitigation strategies associated with an additional proposal submitted by Key Span LNG, LP, which was ultimately not approved by FERC.

[8] This position and associated Headquarters directorate has since been changed to Assistant Commandant for Marine Safety, Security, and Stewardship.

Circular (NVIC) 05-05, entitled "Guidance on Assessing the Suitability of a Waterway for Liquefied Natural Gas (LNG) Marine Traffic." This document was developed, in large part, from the process developed and followed by CAPT Landry up to that point for working as a cooperating agency with FERC, and in processing Weaver's Cove's Letter of Intent per 33 C.F.R. Part 127. As the NVIC itself explains, it was created: "to provide guidance to an applicant seeking a permit to build and operate a shore-side LNG terminal on the timing and scope of the process that is necessary to ensure that full consideration is given to safety and security of the port, the facility and the vessels transporting LNG;" to "assist the Coast Guard to obtain all information needed to assess the proposed LNG marine operations and fulfill its commitment to [FERC] to provide input to their Environmental Impact Statement (EIS);" and to provide "guidance on the Coast Guard's regulatory role in issuing a Letter of Recommendation (LOR)."[9]

The day after NVIC 05-05's issuance, FERC issued an order under Section 3 of the National Gas Act[10] allowing Weaver's Cove to site, construct, and operate its proposed LNG facility, subject to, among other things, 77 different environmental conditions.[11] Under one such condition, Weaver's Cove is required to:

> Annually review its waterway suitability assessment for the project; update the assessment to reflect changing conditions; provide the updated assessment to the cognizant [Coast Guard] Captain of the Port/Federal Maritime Security Coordinator for review and validation; and provide a copy to the FERC staff.[12]

On August 10, 2005, the President signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).[13] Section 1948 of that Act states: "Notwithstanding any Federal law, regulation, or policy to the contrary, no Federal funds shall be obligated or expended for the demolition of the existing Brightman Street Bridge connecting Fall River and Somerset, Massachusetts, and the existing Brightman Street Bridge shall be maintained for pedestrian and bicycle access, and as an emergency service route." The existing (or "old") Brightman Street Bridge as referenced in this legislation crosses the transit route just to the south of the site of Weaver's Cove's proposed facility. The bridge has only a 98-foot wide horizontal opening for vessel traffic.[14] It is located approximately 1,100 feet from a new bridge, currently under construction, which has a 200-foot horizontal opening, and which is better aligned with the federally maintained navigable channel.[15]

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[9] NVIC 05-05 at § 1.a, .p2.

[10] *See* 15 U.S.C. § 717f.

[11] 112 FERC 61,070 (2005).

[12] 112 FERC 61,070, Appendix B. Condition 75 (2005).

[13] Pub.L. 109-59 (2005).

[14] *See* NOAA Chart No. 13227 " Fall River; State Pier"

[15] *See* Eighth Coast Guard District letter, "Navigation Review: Brightman Street Bridge Across the Taunton River, Mile 1.8 Between Fall River and Somerset, Massachusetts, of May 8, 2007 (LOR, enclosure (2), document 42) at §

Presumably in developing alterative transit plans to confront the new reality of the old Brightman Street bridge, Weaver's Cove commissioned Marine Safety International (MSI) to produce a computer-based simulation modeling report of vessel transits along the intended transit route from sea to the Weaver's Cove proposed facility, including between the old and new Brightman Street bridges. This initial report was completed on October 26, 2005.

On February 2, 2006, Weaver's Cove amended its Letter of Intent by submitting a "Change of Information" letter which modified the specifications of the vessels it intended to have call on its facility to: 725 feet long, with a 82 foot beam, a 36 foot draft, and three or four containment tanks with an approximate capacity of 55,000 cubic meters. Given the reduced volume of this "smaller tanker" proposal, Weaver's Cove estimated ships would make roughly 120 deliveries (round trips in and out of port) per year, at a rate of approximately two to three vessels per week.[16] The aforementioned MSI modeling report was provided to the COTP as Attachment 3 to this change of information letter.

On March 7, 2006, the Army Corps of Engineers (New England District) sent a letter to the Attorney General of Rhode Island regarding Weaver's Cove's proposal to dredge portions of the Taunton River to facilitate its planned vessel operations.[17] In that letter, the Army Corps explained its plan to defer its adjudication of Weaver's Cove's dredging permit application pending FERC's and the USCG's review of the smaller, more frequent tankers. In a related piece of correspondence, on March 17, 2006, the Army Corps of Engineers (New England District) sent a letter to Mark Robinson of FERC, requesting that FERC comment on the sufficiency of its previously issued Final Environmental Impact Statement in light of the changed circumstances and amended vessel characteristics.

On March 13, 2006, the COTP sent a letter addressed to Mr. Gordon Shearer, Chief Executive Officer of Weaver's Cove, which replied to the February 2, 2006 change of information and outlined concerns about the amended proposal. Specifically, the COTP noted:

> extraordinary maneuvers are required to navigate the waterway segment between the old and new Brightman Street Bridge openings. While such a transit may be feasible, the necessary favorable ambient conditions for safe passage through this waterway segment, as currently configured, present a practical challenge to your proposal. This waterway segment, including the opening through the existing Brightman Street Bridge, affords no margin for navigational error, and appears unsuitable in its current state, when considering the intended vessel size, cargo and number of transits in your proposal. Given this navigational situation, a revised waterway suitability assessment and

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VI.3, p. 6; *see also* NEMP, "Report on the Feasibility Study of the Proposed Weaver's Cove LNG Ship to Transit from Sea to the Proposed Terminal in Fall River," (LOR, enclosure (1), document 41) at § 5.b).

[16] Weaver's Cove Letter "Change of Information in Letter of Intent to Operate a Newly Constructed Waterfront Facility Handling LNG," of February 2, 2006 at 1.

[17] Generally, only correspondence between Weaver's Cove or FERC and the COTP is recounted in this initial summary of correspondence. As two letters from the Army Corps of Engineers are discussed in Weaver's Cove's appeal, they are discussed here briefly to provide context and background for future treatment.

environmental impact review may be required, prior to issuance of a Letter of Recommendation.[18]

Thereafter, on March 27, 2006, Weaver's Cove, through Mr. Shearer, responded to the concerns outlined in the COTP letter of March 13, 2006 and acknowledged the difficulty of navigating through the two bridges and the need to demonstrate that the maneuver could be performed safely on a repeatable basis. The letter also noted that the modeling conducted in preparation for the February 2, 2006 letter was done with ships that did not have accurate handling characteristics and, among other factors, "used only the tugs presently available on the Bay, rather than the new high power tractor tugs [Weaver's Cove] would be utilizing in support of LNG vessel movements."[19]

On April 3, 2006, the COTP replied to Mr. Shearer, thanked Weaver's Cove for its March 27, 2006 submission, and noted that it would "provide...a much better foundation from which to base a decision regarding a Letter of Recommendation."[20] The COTP went on to note that he intended to engage in a "thorough analysis" of the 'items you identified in your letter."

On that same day, the Supervisory Bridge Management Specialist for the First Coast Guard District sent a letter to the Coast Guard's Office of Bridge Administration requesting that it initiate an obstructive bridge analysis per the provisions of 33 C.F.R. Part 116 for the old Brightman Street Bridge. On April 6, 2006, the Office of Bridge Administration issued a reply letter, "Preliminary Investigation of the Brightman Street Bridge Across The Taunton River, Mile 1.2, Between Somerset and Fall River," noting that "subject bridge may constitute an unreasonable obstruction to navigation," and authorizing a preliminary investigation to determine, among other things, whether the navigational benefits (in dollars) for existing marine traffic will exceed the cost of any alteration.[21]

Following Weaver's Cove's amended LOI submission to the Coast Guard, several parties, including the City of Fall River, Massachusetts, the Conservation Law Foundation, and Save the Bay, moved FERC to re-open its record to consider the affects of smaller LNG tankers making more frequent deliveries. On April 17, 2006, FERC denied these motions.[22]

In response, on June 28, 2006, the COTP SENE sent a letter to Mr. Richard Hoffman, of FERC, in which he provided FERC with an update on the Coast Guard's progress toward

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[18] COTP letter to Weaver's Cove of March 13, 2006, at 2.

[19] *See* Weaver's Cove letter to COTP of March 27, 2006 at ¶ 2.

[20] *See* COTP's letter to Weaver's Cove of April 3, 2006 at ¶ 2.

[21] The Eighth Coast Guard District subsequently conducted a "Navigation Review" of the Brightman Street bridges, which noted that retaining the old Brightman Street Bridge not only nullified the navigation improvements intended with the new bridge, but actually makes navigation more difficult. This confirmed the validity and rationale of a condition within the Coast Guard permit that granted permission to construct the new bridge, which requires removal of the old bridge. As indicated in separate correspondence from Coast Guard Headquarters to Weaver's Cove on October 4, 2007: "should P. L. 109-59 be rescinded, the Coast Guard would move immediately to enforce the permit condition requiring the Commonwealth of Massachusetts to remove the old Brightman Street Bridge."

[22] 115 FERC 61,058 (2006).

issuance of its Letter of Recommendation per 33 C.F.R. § 127.009. Specifically, the COTP explained that after receiving anticipated "supplemental information from Weaver's Cove regarding ship and tug design, results of modeling simulation, contingency plans, and data on other issues," he would "validate the data and evaluate the feasibility of the LNG proposal solely from a navigation safety perspective." The COTP further clarified that "If the Weaver's Cove proposal is not feasible in terms of navigation safety, further analysis of maritime security and/or environmental impacts is not required."

On November 22, 2006, Mr. Ted Gehrig submitted, on behalf of Weaver's Cove, two additional documents to the COTP. The first was titled "Weaver's Cove Energy, LLC, Waterway Suitability Assessment," and provided 16 pages of updated information regarding the smaller vessels proposed in its amended LOI and the anticipated effect, thereof, from a risk management perspective, on the proposed transit area. The second document, entitled "Weaver's Cove Energy, LLC, Amended Letter of Intent, Environmental Analysis," was comprised of a two-page cover letter, a 22 page report, and three substantive appendices addressing various anticipated environmental impacts as updated to include the recently proposed smaller tankers and more frequent deliveries.

Then, on February 21, 2007, Mr. Gehrig sent a further submission to the COTP titled "Additional Smaller LNG Ship Design, Navigational and Operational Data." This documentation included, among other things, detailed design specifications of the proposed smaller LNG tankers; additional mathematical and MSI "Full Mission Simulation Modeling," proposed weather and current operating parameters, proposed training of marine pilots, the design specifications for tractor tugs Weaver's Cove intended to use, the proposed selection and training requirements for tractor tug crews, an analysis of the Brightman Street Bridge Fendering systems, and several contingency plans Weaver's Cove proposed to follow in the event of mechanical or electrical casualties with any tanker or tugs during the proposed transit.

On March 20, 2007, Weaver's Cove, through Mr. Gehrig, submitted a memo to the COTP, which addressed risk management for intentional spills of LNG.

On May 8, 2007, the Eighth Coast Guard District released its "Navigational Review of the Brightman Street Bridge Across the Taunton River, Mile 1.8 Between Fall River and Somerset, Massachusetts." Not surprisingly, that review concluded that "Retaining the old Brightman Street Bridge not only nullifies the navigation improvement intended by the new bridge but makes navigation more difficult. Maximum intended waterway improvement will only be possible with removal of the old Brightman Street Bridge."[23]

On May 9, 2007, the COTP sent a letter to Mr. Gordon Shearer, acknowledging receipt of the aforementioned submissions from Weaver's Cove regarding its smaller tanker proposal. In that letter, the COTP stated he had reviewed all the documentation sent to him to that point in time, reiterated his previously stated concern that the transit between the Brightman Street bridges was

[23] *See* Eighth Coast Guard District, "Navigation Review: Brightman Street Bridge Across the Taunton River, Mile 1.8 Between Fall River and Somerset, Massachusetts, of May 8, 2007 (LOR, enclosure (1), document 42) at § VII. ¶ 6, p.7.

"an extraordinary navigational maneuver" that left "no margin for error," and reiterated his preliminary determination that, notwithstanding the supplemental information submitted by Weaver's Cove, the waterway was likely unsuitable for LNG traffic of the size and frequency proposed by Weaver's Cove. This letter included, as enclosure (1), a 14-page preliminary analysis of the proposed operation based on the submissions provided to the COTP to date.

The same day, Weaver's Cove (Mr. Shearer) responded to the COTP's May 9, 2007 letter, indicating that "[Weaver's Cove] intend[ed] to proceed with the project and … very quickly begin the process of responding to all issues … raised in [the COTP's] correspondence."

On May 23, 2007, the COTP sent a one and a half page letter to FERC updating that agency on the ongoing Letter of Recommendation process. Specifically, the COTP explained that he was following the previously stated plan of analyzing navigation safety first, followed by analysis of maritime security and environmental impacts. The COTP recounted that, on May 9, 2007, he issued a preliminary assessment of the smaller tanker proposal that identified numerous navigation safety issues and provided an initial review of maritime security issues. The COTP also commented that issuance of the Letter of Recommendation, per 33 C.F.R. § 127.009 remained contingent upon further review.

On May 24, 2007, the Northeast Marine Pilots, Inc. (NEMP) released its "Report on the Feasibility Study of the Proposed Weaver's Cove LNG Ship to transit from Sea to the Proposed LNG terminal in Fall River." This report provided the Pilots' opinion as to the feasibility, difficulty, and recommended conditions to be placed on LNG tankers transiting from sea to the facility proposed by Weaver's Cove. The ultimate conclusion as provided therein was that "the [MSI] simulation project suggests that it would be safe for this proposed LNG vessel to transit from sea to the proposed terminal and back to sea again with the noted recommendations being adhered to."[24] Mr. Bruce Kiley, of Baker Botts, LLP, forwarded the NEMP report, on behalf of Weaver's Cove, on May 25, 2007, noting that "as further information regarding your May 9 letter is available," it would be provided.

Then, on June 6, 2007, Mr. Bruce Kiley sent a letter to the COTP, which forwarded a letter addressed to Weaver's Cove from the Commonwealth of Massachusetts Executive Office of Energy and Environmental Affairs, indicating that the COTP had communicated to the Commonwealth that he would be issuing the Letter of Recommendation in the summer at some point. In this letter, Weaver's Cove, through counsel, sought to confirm the COTP's timeline for issuing his Letter of Recommendation, and, if further workshops or meetings were anticipated, when they might be.

On June 8, 2007, Mr. Bruce Kiley submitted another partial response to the COTP letter of May 9, 2007. This letter addressed the shore-side security concerns raised in the May 9, 2007 letter, and requested a meeting with the COTP to discuss the results of a study it commissioned that tested the resilience of the double hulled LNG ship design.

[24] The specific provisions of the NEMP's report are discussed more fully in Analysis Section II of this letter.

Shortly thereafter, on June 12, 2007, Mr. Bruce Kiley submitted another partial response to the COTP's May 9, 2007 letter. This letter forwarded an additional MSI modeling report, "Brightman Street Bridge Simulation Report," for the COTP's consideration.

On July 18, 2007, Mr. Gordon Shearer of Weaver's Cove Energy, wrote the COTP to stress that Weaver's Cove felt it had addressed all of the concerns raised in his May 9, 2007 letter with its recent submissions. In this letter, Weaver's Cove provided a detailed 14-page "full response to each issue listed in the May 9 letter."

On July 27, 2007, Mr. Kiley sent a letter to the COTP regarding the COTP's May 23, 2007 letter to FERC. Mr. Kiley confirmed obtaining a copy of the May 23, 2007 letter, and expressed concerns that its contents could be read as undermining the prior communications between the Coast Guard and Weaver's Cove. Specifically, Weaver's Cove questioned whether the COTP was deviating from his sequential process of addressing navigation safety, then maritime security, then environmental impacts, as relayed in the COTP's June 28, 2006, letter to it. Weaver's Cove, citing various news articles quoting timelines for issuance of the Letter of Recommendation attributed to the Coast Guard, questioned whether the COTP was going forward with security or environmental review, or not.

On August 8, 2007, Mr. Ted Gehrig, of Weaver's Cove, sent a letter to the COTP urging him to disregard a June 20, 2007 letter submitted by Thomas F. McGuire, Corporation Counsel, on behalf of the City of Fall River, which outlined the city's concerns on navigational safety, maritime security, and possible environmental impacts.

On August 9, 2007, the COTP sent a letter to Mr. Kiley which acknowledged receipt of eight separate submissions from Weaver's Cove in response to his letter of May 9, 2007. This letter noted that Weaver's Cove's submissions were received and being carefully reviewed. The letter also indicated that there was no specific timeline for issuance of the Letter of Recommendation and that "the sequential methodology described in [the] June 28, 2006 letter to [FERC] remain[ed] valid, i.e., we are focusing first on navigation safety." The COTP explained: "Any additional steps, and the process and formal thereof, will be established only after waterway suitability is settled in terms of navigation safety."

On September 4, 2007, the COTP met with representatives from Weaver's Cove. A review of subsequent correspondence from Weaver's Cove, dated October 9, 2007, suggests that the COTP raised several additional navigation issues at this meeting. Thereafter, Weaver's Cove submitted additional information in a nine page letter with 12 supporting attachments. This submission was broken into the following sections: Possible Restrictions from tidal windows during daylight hours; Wind Speed and Direction; Fog and Reduced Visibility; Ice Conditions; Summary of Potential No-Go Days; Under Keel Clearance (UKC); and Security Considerations.

On October 24, 2007, the COTP issued his Letter of Recommendation which characterized the waterway from near Sandy Point, Prudence Island, Rhode Island to the site of its Liquefied Natural Gas (LNG) facility in Fall River, Massachusetts, as unsuitable for the type, size, and frequency of LNG marine traffic proposed by Weaver's Cove.

On November 20, 2007, Weaver's Cove Energy submitted a "Request for Reconsideration" of the Letter of Recommendation pursuant to 33 C.F.R. 127.015 (a), which was subsequently denied by the COTP in his reply of December 7, 2007.

On January 7, 2008, Weaver's Cove submitted the pending appeal pursuant to 33 C.F.R. § 127 (b)(1), to which I now turn.

Standard of Review

The legal standard for review of final agency action[25] on Weaver's Cove's Letter of Intent, as amended, is whether the findings and conclusions of the COTP's ultimate waterway suitability recommendation are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[26] As an administrative, intermediate, appellate authority, however, I am not limited to the APA standards of review. Moreover, the guiding regulation at 33 C.F.R. § 127.015 does not prescribe a specific legal standard for me to utilize. Accordingly, in the interest of providing the fullest vetting of Weaver's Cove's concerns with the COTP's actions, I undertook a *de novo* review of the COTP's record and recommendation when considering this matter. That record included the list of documents cited by the COTP as his "Administrative Record," the prior correspondence between the COTP and Weaver's Cove, as well as the additional materials submitted with both Weaver's Cove's request for reconsideration and the pending appeal. My analysis of the arguments made after careful consideration of those materials follows.

Analysis

Weaver's Cove advances "arguments in support of [its] appeal" under six separate headings.[27] While this letter is intended to address every point, it follows a different structure. Each appeal point involves allegations of either procedural or substantive error. I will address all points along those two lines, in turn. Policy arguments (Section III of the Appeal) are addressed as they relate to procedural and substantive aspects as well.

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[25] Per 33 C.F.R. § 127.015(d), a ruling of the Assistant Commandant for Marine Safety, Security, and Stewardship on any appeal taken from my determination would be final agency action.

[26] A court would also determine if final agency action and related findings or conclusions are "contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law." 5 U.S.C. § 706(2)(B)-(D). As a Letter of Recommendation issued pursuant to 33 C.F.R. § 127.009 is not the result of a formal hearing or adjudication, it is not subject to "substantial evidence" review. 5 U.S.C. § 706(2)(E) (providing for action to be set aside if "unsupported by substantial evidence *in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute*" (emphasis added)); *see also Bogner v. United States Forest Service*, 851 F.Supp. 1437, 1439 (D.S.D. 1994) ("The substantial evidence standard applies only to agency decisions made under formal rule-making procedures or formal adjudications.").

[27] The initial argument in Section II.A of the pending appeal deals primarily with Weaver's Cove's assertion of the governing legal standard for judicial review of agency action under the APA. While informative for present purposes, as detailed under "Standard of Review," above, this standard is not binding on my review.

I. The COTP's Letter of Recommendation *Process* concerning Weaver's Cove

Weaver's Cove attributes a wide array of procedural errors to the COTP's development of his ultimate Letter of Recommendation. In general terms, these arguments are based on (1) Weaver's Cove's reading of NVIC 05-05 and the process contemplated therein, (2) perceived "due process" violations raised in the context of an alleged lack of "fair notice and opportunity to comment" on facts and materials considered by the COTP, and, conversely, through the COTP's alleged failure to fully consider certain documents, and (3) a separate but related assertion of fundamental unfairness grounded on the notion that the COTP prejudged the matter or was unduly influenced by local politicians and members of Congress who are publicly opposed to Weaver's Cove's proposed operations. While, as discussed below, some specific assertions may have merit, none have prejudiced Weaver's Cove's right to a full and fair consideration of the relevant facts and circumstances surrounding its proposed operations, particularly with regard to the COTP's ultimate recommendation, based solely on navigational safety perspectives.

A. The COTP's Reply to Weaver's Cove's Request for Reconsideration

Part B of Section II – comprising pages 9 through 17 of the appeal itself asserts various defects in the COTP's response to Weaver's Cove's request for reconsideration.[28] Weaver's Cove asserts, among other things, that the COTP's reconsideration response is deficient for lack of substance, and for failing to address each of the issues raised in the request.[29] While requesting reconsideration from the COTP is a pre-requisite to filing the present appeal,[30] the applicable appeal regulations do not appear to provide an affirmative obligation for the COTP to address specific concerns point-for-point in any reply.[31] I note that in his reply, the COTP stated that he reviewed Weaver's Cove's reconsideration request, including its exhibits and other documents referenced therein, and "reconsidered [his] determinations, analysis, and ultimate recommendation" in the process.[32] This is all the applicable regulations require. Moreover, this letter provides a specific reply for each point raised in the request for reconsideration, which is incorporated in its entirety in the pending appeal.[33] Thus, I find no procedural error in the way in which the COTP handled the request for reconsideration. Accordingly, I now turn to the Appeal's other procedural error discussions.

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[28] As distinguished from the unsuitability recommendation itself, as set forth in the COTP's LOR.

[29] Appeal at § II.B.1., pp. 9-10.

[30] *See* 33 C.F.R. § 127.015(b).

[31] The sole discernible requirement placed on the COTP is some form of "ruling" on the reconsideration request. *See* 33 U.S.C. § 127.015(b) (noting that a party aggrieved by a "ruling" on a request for reconsideration may appeal to the District Commander).

[32] CAPT Roy Nash letter to Weaver's Cove of December 7, 2007 ("Reconsideration Reply") at 1.

[33] For simplicity, I will address the substantive concerns with the reconsideration reply simultaneously with any related substantive concerns about the LOR itself.

B. Navigation and Vessel Inspection Circular 05-05

Weaver's Cove asserts various procedural errors based on the provisions of NVIC 05-05. Specifically, Weaver's Cove alleges it suffered procedural harm because the COTP "failed to adhere to the Coast Guard's NVIC 05-05 Guidelines for LNG projects,"[34] inconsistently applied NVIC 05-05 (to the extent it was followed) when compared to how LNG projects have been evaluated in other ports,[35] and, in general, failed to provide a more iterative, cooperative, process through which Weaver's Cove could address and mitigate the COTP's specific concerns about its proposed LNG marine traffic.[36] Coast Guard Navigation and Vessel Inspection Circulars, such as NVIC 05-05, provide detailed guidance to the Coast Guard about enforcement and compliance programs for Federal marine safety regulations and Coast Guard marine safety programs. NVICs, however, are non-directive. They do not have the force of law. Clearly, a COTP must consider such guidance when processing a Letter of Intent received under 33 C.F.R. § 127.007 to produce a Letter of Recommendation in accordance with 33 C.F.R. § 127.009. By its own terms, however, the specific process and timeline contemplated in NVIC 05-05 does not apply to Weaver's Cove's proposal – including its amendments.[37] Even assuming that it did, the relevant portions of the process described therein were substantially followed in this case. The COTP's departure from certain aspects of the process, as detailed below, are both in keeping with its terms, and are justified on the unique facts presented.

1. NVIC 05-05's Principal Process and Timelines are Not Applicable Here

In its original request for reconsideration, and again on appeal, Weaver's Cove states that "the well-established Coast Guard standards that governed the COTP's action are Navigation and Vessel Inspection Circular No. 05-05, dated June 14, 2005 ("NVIC 05-05")."[38] Weaver's Cove further asserts that "[a]n LOR related to an LNG project must adhere to Coast Guard guidance and policy in NVIC 05-05.[39] These assertions overstate the applicability of NVIC 05-05. Section 6 of NVIC 05-05 details how the circular's guidance is to be implemented for LNG projects in various stages of review at the time of the NVIC's promulgation. Paragraph "b" of that section explains that for "Applicants with applications under FERC review . . . prior to publication of this Circular: FERC, on a case-by-case basis, and in consultation with the Coast

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[34] Appeal at § I.D.2., p. 5; *see also* p. 1(i); §§ I.D.3.(a), p. 6; I.D.6, p. 6; II.A.2, p. 8; II.B. ¶2, p. 9; II.B.2, p. 10; II.E, p. 21; II.F.1.A. ¶13, p. 25; II.F.3.a. ¶3, p. 47; II.F.3.d. ¶3, p. 51; and III.A., p. 56.

[35] Appeal at §§ I.D.6, p. 6; II.B. ¶2 (iii), p. 9.

[36] *See, e.g.*, Appeal at §§ I.D.3.(d), p. 6; II.E, p. 21; and II.F.1.b.(3) ¶2, p. 31.

[37] As discussed further herein, NVIC 05-05 does not limit COTP discretion. *See* NVIC 05-05 § 7 ("Nothing in this Circular is meant to override or subvert the discretion of the COTP/FMSC when addressing the unique safety and security concerns for an LNG operation.") To the extent there are differences between the procedures set forth in NVIC 05-05 and those followed in this case, such differences are justified, in keeping with terms of the NVIC itself, and without prejudice to Weaver's Cove.

[38] Appeal at § II.A.2., p. 8.

[39] *Id.* and Appeal at § IV., p. 70.

Guard, will review the need for the applicant to complete a [Waterway Suitability Assessment], including the schedule for submission."[40]

Clearly, paragraph 6.b. applies to Weaver's Cove. At the time NVIC 05-05 was signed, Weaver's Cove's project was already "under review" by FERC. Indeed, FERC's final EIS was issued on May 20, 2006; nearly a month before NVIC 05-05 was released.

Moreover, all parties agree that NVIC 05-05 was developed, in large part, based on the procedures the Coast Guard followed to provide input to FERC's Environmental Impact Statements and siting decision for Weaver's Cove itself.[41] In light of these facts, NVIC 05-05 should not be viewed as "well-established," or as controlling the Coast Guard's review of Weaver's Cove's original submissions.

More to the point, Weaver's Cove implies that because the amendments to its LOI came after the promulgation of NVIC 05-05, the COTP should have followed its provisions more closely going forward.[42] In light of the NVIC's own implementation provisions, I view the process followed by the COTP as appropriate under the circumstances. Section 6.b. of NVIC 05-05 contemplates that for LNG projects, such as Weaver's Cove, that were already under FERC review at the time NVIC 05-05 was released, FERC and the Coast Guard would determine an appropriate course of action based on the facts of each case.

The NVIC 05-05 process is designed to be temporally intertwined with the FERC's decision making process. Thus, the implementation guidance of Section 6 speaks, in practical terms, to the applicability of the NVIC as a whole. Where, as here, FERC has issued its final EIS and ultimate decision on the Applicant's proposal, many, if not most, of NVIC 05-05's provisions and contemplated timelines are inapplicable. For example, as envisioned in NVIC 05-05, the processes for "validating" an applicant's initial or follow-on Waterway Suitability Assessment (WSA), and for providing a report to FERC thereon (the Waterway Suitability Report or WSR), are designed in large part to ensure FERC receives relevant, timely information necessary for incorporation into it's EIS[43] and "so that it can make an informed decision as to whether the project is in the public interest."[44] In this case, both of those ships had already sailed.

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[40] NVIC 05-05 at § 6.b.

[41] *See* Appeal at § III.A. ¶2 ("…the NVIC was developed in 2005 based on the processes employed by the then COTP Providence in analyzing the LOI applications of Weaver's Cover and KeySpan"); 112 FERC 61,070 at ¶ 68 ("the procedures used by the Coast Guard in developing the Vessel Transit Security Plan for this proceeding are the basis for NVIC, and the Weaver's Cove Vessel Transit Plan complies with NVIC in all material respects.")

[42] Appeal at § III ¶2, p. 56 ("…Weaver's Cove's amended LOI was filed on February 2, 2006, after NVIC 05-05 was issued. Why the COTP would not want to follow the spirit of NVIC 05-05, if not the letter, is odd.").

[43] *See* NVIC 05-05 at § 5.b.(21) ("Submission of this report in accordance with the timeline contained in enclosure (1) will ensure FERC receives the information prior to their publication deadline for their Draft EIS.")

[44] NVIC 05-05 at § 5.c. ("This information is necessary so that FERC can make an informed decision as to whether the project is in the public interest.")

The NVIC does contemplate annual review of the WSA.[45] The sole paragraph addressing that concept, however, does not specify what to do beyond "reporting to FERC" when the changed conditions occur before the COTP has issued a Letter of Recommendation in the first place, or when, as is the case here, FERC has declined to re-open its proceedings despite the changed circumstances.[46] Most importantly, nothing in the NVIC precludes the COTP from using his ultimate Letter of Recommendation, issued pursuant to 33 C.F.R. § 127.009, as the means of reporting his waterway suitability concerns to FERC.

Through a series of motions, orders, and correspondence, FERC and the COTP agreed upon that very course of action in this case. First, in its order granting conditional authority to Weaver's Cove to site, construct, and operate its LNG facility, FERC made clear that it viewed the review processes preceding its July 15, 2005 decision as being in substantial compliance with NVIC 05-05. Paragraph 68 of FERC's order reads, in pertinent part:

> although the NVIC was issued after the Weaver's Cove Vessel Transit Security Plan, the procedures used by the Coast Guard in developing the Vessel Transit Security Plan for this proceeding are the basis for NVIC, and the Weaver's Cove Vessel Transit Security Plan complies with NVIC in all material respects. Further, Environmental Condition 75 requires annual updates of Weaver's Cove's waterway suitability assessment for the project.[47]

Then, on April 17, 2006, FERC clarified that the COTP's still-pending Letter of Recommendation would sufficiently resolve any environmental or safety concerns raised by the Congressionally mandated retention of the old Brightman Street Bridge, and Weaver's Cove's amended, smaller tanker proposal in response thereto. Following Weaver's Cove's amended LOI submission to the Coast Guard of February 2, 2006, several parties, including the City of Fall River, Massachusetts, the Conservation Law Foundation, and Save the Bay, moved FERC to re-open its record to consider the affects of smaller LNG tankers making more frequent deliveries.[48] In denying the motions, FERC explained:

> …The Coast Guard had not yet issued a Letter of Recommendation for the project, and no ship operations may take place until it does so.
>
> …Weaver's Cove has informed the Coast Guard of the changes it is planning for its vessel operations. Pursuant to our July 15, 2005 Order, Weaver Cove's first annual update of its WSA also must reflect these changes for the Coast Guard's review. The Coast Guard will evaluate this material and determine in accordance with its responsibilities whether the proposal to use smaller vessels with a larger number deliveries meets its navigation and safety requirements. This is a matter for the Coast Guard, not the Commission.

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[45] NVIC 05-05 at § 5.b.(21).

[46] 115 FERC 61,058 (2006)

[47] 112 FERC 61,070 at ¶ 68 (2005).

[48] 115 FERC 61,058 at ¶14-16 (2005).

> …We note, however, that if the Coast's Guard's review of this matter results in changes to the project that require a change to our authorization, we would determine at that time what additional review we might be required to undertake in connection with such changes.[49]

This ruling confirmed for the Coast Guard that FERC was awaiting Coast Guard input on the suitability of the waterway in light of the change in proposed vessel type, size, and frequency.

In response, the COTP explained his intended process for providing that information– namely, by issuing the pending Letter of Recommendation – in a letter to FERC dated June 28, 2006.[50] The process for developing this particular Letter of Recommendation, in light of the changed circumstance and amended LOI, was also explained. Specifically, the COTP noted that after receiving "supplemental information from Weaver's Cove regarding ship and tug design, results of modeling simulation, contingency plans, and data on other issues," he would "validate the data and evaluate the feasibility of the LNG proposal solely from a navigation safety perspective."[51] The COTP further explained that, "If the Weaver's Cove proposal is not feasible in terms of navigation safety, further analysis of maritime security and/or environmental impacts is not required."[52]

Weaver's Cove contends that it was not provided notice of this intended process and has repeatedly questioned what process the COTP followed.[53] In the COTP's letter to Weaver's Cove's law firm on August 9, 2007, however, the COTP explained that "the sequential methodology described in [the] June 28, 2006 letter to [FERC] remains valid, i.e., we are focusing first on navigation safety. … [such that a]ny additional steps, and the process and format thereof, will be established only after waterway suitability is settled in terms of navigation safety."[54] Thus, as contemplated by Section 6.b. of NVIC 05-05, the COTP, in communication with FERC, developed and implemented a procedure based on the facts of the present case, which superseded the generic start to finish process envisioned by NVIC 05-05 for projects proposed after its promulgation.

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[49] *Id.* at ¶14-16.

[50] COTP letter to Mr. Richard Hoffman of June 28, 2006 at 2 (noting "once these steps are complete, and assuming there are no additional substantive chances to the marine component of the Weaver's Cove proposal, the Coast Guard would be in a position to issue a Letter of Recommendation, with a determination as to the suitability of the waterway for marine transportation of LNG.")

[51] COTP letter to Mr. Bruce Kiley of August 9, 2007 at ¶2.

[52] The COTP's June 28, 2006 letter was addressed to FERC, not to Weaver's Cove. Weaver's Cove, through counsel, acknowledged having reviewed the letter in correspondence from Mr. Bruce Kiley to the COTP dated July 27, 2007.

[53] *See, e.g.*, Appeal at § II.A.2. ¶4, p. 8 ("…if NVIC 05-05 procedures do not apply, what procedures did the COTP follow?).

[54] CAPT Roy Nash letter to Mr. Bruce Kiley of August 9, 2007, ¶2. As the COTP ultimately recommended that a portion of the waterway at issue was unsuitable from a navigation safety perspective, no further discussion on procedures for assessing security or environmental concerns were necessary.

2. Whether the COTP followed the relevant principles of NVIC 05-05

The COTP, in his Reconsideration Reply, noted that even though much of the guidance in NVIC 05-05 was not binding or applicable to Weaver's Cove's project, *per se*, his process substantially followed its relevant provisions. Weaver's Cove disagrees. In Section III.A. of its appeal,[55] Weaver's Cove highlights various sections of NVIC 05-05 and alleges procedural error for failure to follow the certain provisions and example documents. Elsewhere in its appeal, Weaver's Cove more generally claims procedural error for the COTP's failure to engage in a more iterative, cooperative process with Weaver's Cove,[56] and for the alleged failure to apply the NVIC "consistently."[57] After reviewing these points, I find that many of the cited provisions are inapplicable in this case and that the COTP substantially followed the spirit of the NVIC and its underlying process.

(i) Appeal Section III.A.'s alleged deviations from NVIC 05-05

Weaver's Cove first asserts that the COTP "failed to adhere to NVIC 05-05," because he did not adopt applicable portions of FERC's EIS to satisfy the Coast Guard's NEPA compliance responsibilities.[58] This assertion is not supported by the record. The fourth paragraph of the COTP's Record of Decision (ROD), issued concurrently with the Letter of Recommendation on October, 24, 2007, states:

> As I view the safety of navigation as paramount, my recommendation that the waterway is unsuitable generated no additional environmental documentation requirements. I, therefore, (pursuant to 40 C.F.R § 1506.3) adopt those portion of the FERC EIS that address the environmental impacts associated with the proposed use of the waterway and those portions addressing any environmental impacts of the no action alternative.[59]

Accordingly, the COTP substantially complied with the NEPA process envisioned by the NVIC.

Second, Weaver's Cove quotes a portion of NVIC 05-05 noting that FERC and the Coast Guard have agreed that maritime safety and security information will be addressed by FERC in its EIS process.[60] Weaver's Cove alleges the COTP erred, in his Letter of Recommendation, by raising a "host of purported risks to navigation safety" that were not addressed in the PAWSA process, which helped generate the Coast Guard's input to FERC's environmental review. For his part, the COTP explained in his ROD that his ultimate unsuitability recommendation is the functional equivalent of the "no action alternative," as discussed in FERC's EIS.[61] I agree. In

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[55] The most detailed listing of alleged "substantive failures to follow NVIC guidelines" appears in Section III.A. of the appeal. The same litany was contained in Section IV.A. of Weaver's Cove's Request for Reconsideration.

[56] *See* Appeal at §§ I.D.3.d, p. 6; II.E, p. 21; II.E. ¶¶ 2,4, p. 21; and II.F.1.b.(3) ¶ 2, p. 31.

[57] Appeal at §§ II.B.¶2, p. 10; III.A., p. 56.

[58] Appeal at § III.A., p. 56.

[59] ROD at ¶ 4.

[60] Appeal at § III.A, p. 57 (quoting NVIC 05-05 at 3).

[61] ROD at ¶ 3; *see also*, FERC Final EIS at pp. ES10-12, and § 3.1.

this case, the COTP's recommendation – the no-action alternative – effectively eliminates the environmental impacts discussed in the May 20, 2005 FERC final EIS.[62] Thus, the COTP correctly decided that no further environmental documentation was necessary.

Third, Weaver's Cove claims the COTP erred by not following the NVIC 05-05 prescriptions for a follow-on WSA.[63] As previously discussed, the NVIC processes for "validating" an applicant's follow-on WSA and providing a report (the Waterway Suitability Report or WSR) to FERC thereon, are designed in large part to ensure FERC receives relevant information necessary for incorporation into its EIS and "so that it can make an informed decision as to whether the project is in the public interest."[64] Thus, the cited provision is largely inapplicable to the extent FERC's Final EIS and public interest determination had already been filed. This is not to say the COTP had no obligation to verify (or "validate") the submissions provided by Weaver's Cove for the Coast Guard's use. In this case, the record indicates that the COTP, with assistance from his staff, reviewed and "validated" the information submitted by Weaver's Cove, and then issued his Letter of Recommendation instead of a WSA or WSR.[65] I find no harm in this approach.

Similarly, despite Weaver's Cove's NVIC 05-05-based assertions to the contrary,[66] it was not necessary for the COTP to provide a list of risk management measures, and resources to implement them, to ensure waterway suitability in this case. The unsuitability recommendation, and the COTP's stated intent to use his authorities to prevent vessels of the size, type, and frequency proposed by Weaver's Cove from transiting through the old and new Brightman Street bridges if necessary,[67] renders other risk management measures (such as escort vessels and security regimes) moot. The COTP's opinion appears to be based, largely, on the presence of the two bridges and the navigational challenges they present.[68] Accordingly, the NVIC's recommendation to address security measures and the resources needed to implement them is inapplicable in this case, at least unless and until the old Brightman Street Bridge is removed.

Fourth, Weaver's Cove contends that the COTP failed to provide FERC with a report on the suitability of the waterway for marine traffic.[69] In this case, the COTP's report to FERC was his

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[62] FERC Final EIS at p. ES-10 ("the no action or postponed action alternative would eliminate the environmental impacts identified in this EIS…").

[63] Appeal at § III.A, p.57.

[64] *See* NVIC 05-05 at §5.b.(14).

[65] Weaver's Cove's claim of error for failing to involve other workgroups or committees in the validation process is addressed, below, at p. 18.

[66] Appeal at § III.A, p.57 ("…there was a failure to identify either the risk management measures or the resources that will be needed to carry out the risk management measures identified in the WSA.")

[67] LOR, enclosure (2) at §D.5. ("Based on my thorough review of the facts before me, even without the Letter or Recommendation process of Part 127, to fulfill my responsibilities to ensure the safety of the waterway, I would feel compelled to use my discretionary authorities to control vessel movements to prohibit the recurrent transit of LNG tankers from northeast of the line between Mt. Hope Point and Common Fence Point, under the Braga Bridge and through the Brightman Street Bridges and to the north of those bridges in the Taunton River.").

[68] The COTP's non-bridge based findings, and Weaver's Cove's challenges thereto, are also addressed in Section II of this ruling, below.

[69] Appeal at § III.A., p. 57.

Letter of Recommendation. Nothing – including NVIC 05-05, to the extent it is found instructive – precludes this approach; especially where FERC's EIS and ultimate siting decision have already been made.[70]

Fifth, Weaver's Cove asserts that the COTP failed to adhere to NVIC 05-05 by failing to notify FERC of the need for additional NEPA review[71] and, similarly, by failing to work with FERC to address any changes with regard to FERC's EIS arising from differences between the findings in the Letter of Recommendation, and those previously provided in the WSR.[72] The COTP indicated in his Record of Decision that, because he viewed the waterway as unsuitable from a navigation safety perspective, no further environmental documentation was necessary.[73] There being nothing further to request of FERC, I find no procedural error for failing to contact them on this aspect.

Sixth, Weaver's Cove contends that, assuming its recent submissions of the past year constituted a follow-on or annual WSA, as required in FERC's July 15, 2005 order, the COTP "failed to follow the [NVIC] process, which call[s] for validation of the WSA, not issuance of an LOR."[74] As previously discussed,[75] the processes and timeline envisioned in NVIC 05-05 for "validating" an applicant's initial or follow-on Waterway Suitability Assessment (WSA), and for providing a report to FERC thereon, are largely designed to assist FERC in developing its EIS and in making its public interest determination, which has already occurred in this case."[76] The NVIC's guidance on the concept of an annual, post-FEIS, WSA update does not specify what to do (beyond reporting to FERC) where changes occur before the COTP has issued a Letter of Recommendation, and FERC has declined to re-open its proceedings. The NVIC does not preclude the use of the Letter of Recommendation as means of communicating – to FERC or any other agency with jurisdiction in the matter – the suitability of the waterway for marine LNG traffic at issue.[77] I find no error in the COTP's decision to use the issuance of the Letter of Recommendation to do so here.[78]

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[70] Discussed, above, at pp. 13-14.

[71] Appeal at § III.A., p. 58.

[72] *Id.*

[73] ROD at ¶4.

[74] Appeal at § III.A., p. 58.

[75] *See* above at pp. 12-13.

[76] NVIC 05-05 at § 5.c. ("This information is necessary so that FERC can make an informed decision as to whether the project is in the public interest.")

[77] This is the purpose of the LOR. 33 C.F.R. § 127.009 ("…the COTP issues the letter of recommendation to the owner or operator of the facility and to the state and local government agencies having jurisdiction, as to the suitability of the waterway for the LHG or LNG marine traffic…")

[78] Weaver's Cove also contends the COTP failed to create and forward a Supplemental Security Report, containing Sensitive Security Information, to FERC. Appeal at § III.A., p. 60. As Weaver's Cove itself notes, however, "since the COTP based his decision solely on the issue of navigation safety and issued the LOR without any SSI protection, there should be no need to classify the Record as SSI." It is for this same reason that there was no need for the COTP to issue a Supplemental Security Report.

Implicit in its "no validation" discussion is Weaver's Cove's suggestion that the COTP did not adequately socialize the supplemental navigation safety data it submitted to the Coast Guard by re-convening a PAWSA or otherwise consulting the Area Maritime Security Committee (AMSC) and other port stakeholders.[79] While the NVIC "suggests" that the COTP "consider" verifying that appropriate port stakeholders have been "consulted" (by the applicant), and notes that AMSC/[Harbor Safety Committee] members "may also assist the COTP/FMSC in the review and validation of the WSA,"[80] nothing in the NVIC or any other Coast Guard guidance requires the COTP to solicit the input of any specific non-federal entity.[81] Accordingly, there is no error in failing to do so in this case.

All parties agree that a Ports and Waterways Safety Assessment (PAWSA) and numerous security workshops[82] involving various non-federal entities[83] were initially facilitated by a prior COTP for the purpose of assessing the safety and security risks to the port associated with the originally anticipated LNG vessels transits. These workshops facilitated development of a vessel transit plan that was submitted to FERC, for its consideration, when completing its NEPA analysis and siting decision.[84] These workshops all proceeded under the assumption that the old Brightman Street Bridge would be removed prior to vessels calling on Weaver's Cove's proposed facility. To the extent the COTP based his ultimate waterway suitability recommendation on navigation safety[85] – and the risks posed by retention of the old Brightman

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[79] Appeal at § III.A., p. 60 ("Weaver's Cove is not aware, and the LOR makes no reference to, the COTP[] ever consulting with the relevant Area Maritime Security Committee prior to issuing the LOR."). *See also*, Appeal at § II.E., p. 22 ("The deficiencies in the LOR's compliance with NVIC 05-05 include… [that] the COTP deliberately cut the waterway suitability review process short by relying only on his personal opinions without seeking input of others via workshops…").

[80] NVIC 05-05 at § V.b.(11)-(12).

[81] The NVIC "encourages" Area Maritime Security Committees, Harbor Safety Committees, and similar groups to "assist the applicant in developing the WSA, and assist the COTP/FMSC with review and validation of the WSA." NVIC 05-05 at § 5.e. The NVIC also encourages these groups to use the WSA to update the various port plans each maintains. *Id*. It does not, however, require the COTP to create an *ad hoc* committee, or otherwise mandate the involvement of any specific group in a certain capacity.

[82] Workshops involving Weaver's Cove were hosted by the COTP on December 16, 2004, January 11, 2005, February 1, 2005, February 15, 2005, March 1, 2005, and March 16, 2005.

[83] In addition to the participation of the four participating federal agencies (USCG, FERC, FBI, and TSA), the workshops were attended by representatives from 5 local governments, 13 state organizations (from both Massachusetts and Rhode Island) and 15 private entities other than Weaver's Cove.

[84] Via CAPT Landry's letter to Mr. Richard Hoffman of April 15, 2005. *See also* 112 FERC 61,070 at ¶85 (mentioning the "initial Vessel Transit Security Plan, which will become the basis for appropriate security measures for each Maritime Security threat level."). This submission to FERC was not final agency action, but rather, an indication of what would likely be implemented, through the rulemaking process, if and when LNG operations were permitted by FERC to proceed as proposed.

[85] Weaver's Cove's assertion that the COTP's recommendation also included non-safety issues is addressed, below, at pp. 35-37. As further discussed there, to the extent the LOR mentioned security issues that were not fully vetted, I have not considered them in my decision in a security context.

Street Bridge, in particular – it was not unreasonable for him to find it unnecessary to reconvene such "security workshops."[86]

The final allegations of error in Section III.A. of Weaver's Cove's appeal concern deviations from the checklists and example documents provided as enclosures to NVIC 05-05.[87] To the extent these documents are provided solely to guide and assist the COTP in the NVIC process,[88] any deviations from such boilerplate or recommended steps is harmless for the reasons previously discussed, above.

(ii) The Cooperative and Iterative Process

Weaver's Cove alleges procedural error for failure to follow provisions of NVIC 05-05[89] that it suggests require the COTP to engage in a more "cooperative and iterative process."[90] According to Weaver's Cove, under NVIC 05-05:

1. The COTP is to make every effort to cooperate with the applicant to ensure a smooth review process and to address and mitigate any concerns that may arise about marine safety and security,

2. The COTP is to establish a dialogue with the applicant and other responsive agencies as soon as possible upon initiation of the review process,

3. The COTP is to convene several working committees to assist the applicant in the application process and suggests that the Coast Guard staff work with the applicant to ensure the information and analysis submitted to the agency by the applicant is realistic and reasonably addresses the potential public safety and security issues that may arise from the construction and operation of the facility; AND

4. "in all cases where the COTP has determined that the waterway is unsuitable it is important to document the reasons why, so that, if practicable, steps can be taken to make the waterway suitable."[91]

In sum, Weaver's Cove contends that the COTP should have worked more closely with it to better identify specific port safety hazards and security risks, and have helped it to devise acceptable strategies to mitigate or remove such impediments to its project.[92]

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[86] Similarly, I find no requirement for the COTP to have held another formal PAWSA workshop given the abundant amplifying information provided by Weaver's Cove directly to the COTP.

[87] Appeal at § III.A., pp. 59-61.

[88] A process, as discussed above, that does not fit the procedural posture and facts of this case.

[89] Assuming it applies in the first place. *See,* above, pp. 11-14.

[90] Appeal at § II.E., p. 21; *see also* Appeal at §§ I.D.3.d., p. 6, and II.F.1.b.(3) ¶2, p. 31.

[91] Appeal at § II.E, p. 21 (quoting NVIC 05-05 at p. 12.)

The NVIC contemplates and recommends that the COTP work with the applicant, maritime industry, and other port stake holders, to define workable parameters and procedures for LNG marine operations when the waterway will support them. This is sound guidance. On the other hand, the COTP is neither required nor expected to determine the specific ship dimensions, performance characteristics, or transit frequencies that would meet the suitability threshold for a given waterway configuration.

In this case, the COTP repeatedly made clear his concerns with the navigation safety hazards presented by, among other things, the retention of the old Brightman Street bridge. That specific concern was communicated to Weaver's Cove on at least three separate occasions.[93] Weaver's Cove was afforded the opportunity to respond, which it did through eight separate substantive submissions back to the COTP.[94] In my view, the NVIC – to the extent it may be found instructive – envisions nothing more. Accordingly, I find that Weaver's Cove was provided ample opportunity to communicate and coordinate with the COTP.

(iii) Consistent Application

At several points elsewhere in its Appeal, Weaver's Cove alleges that the COTP did not "consistently" apply NVIC 05-05's guidelines. The foregoing discussion amply explains the reasons the NVIC should not be construed as binding, or, in many instances, applicable in this particular matter. Weaver's Cove's separate "inconsistency" point bears further comment. The inconsistency allegations can be grouped in two general themes: (1) that the conclusions and recommendations of CAPT Roy Nash, the COTP who issued the Letter of Recommendation on appeal, are inconsistent with the preliminary determinations of his predecessor;[95] and (2) that CAPT Nash's actions are inconsistent with the "decision in LORs or PAWSAs for every other LNG project" in other ports across country.[96]

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[92] Appeal at § II.E., p. 21 (commenting that "the promulgation and issuance of an LOR should be a cooperative and iterative process between the COTP and the applicant, rather than a means to obstruct marine commerce.")

[93] (1) On March 13, 2006, the COTP wrote Weaver's Cove to outline his concerns about the "extraordinary maneuvers" that would be "required to navigate the waterway segment between the old and new Brightman Street bridge opening." (2) After receiving additional environmental and waterway suitability assessments, and additional smaller LNG ship design, navigational, and operational data from Weaver's Cove, on May 9, 2007, the COTP again wrote Weaver's Cove, noting that nothing submitted supported the notion that the smaller LNG tanker could be safety navigated through the waterway on a consistent, repeatable basis. Thus, he noted in that letter, "it appears the waterway may not be suitable for the type and frequency of LNG marine traffic contained in your smaller tanker proposal." (3) At the specific request of Weaver's Cove, the COTP met with its executives at its facility in Fall River, Massachusetts on September 4, 2007 to further discuss his navigation safety concerns.

[94] Through letters of March 27, 2006; November 22, 2006, February 21, 2007; March 20, 2007; May 25, 2007, June 8, 2007, June 12, 2007; and October 9, 2007.

[95] Appeal at §§ I.B. n.3, p. 3 and II.F.1.b.(4) ¶¶ 4-5, p. 33.

[96] Appeal at §§(iv), p. 1; I.D.3., pp 5-6; II.E., p. 20; II.F.3.b.(1)(2), pp.48-49;II.F.3.d. ¶3, p. 51; III.¶1, p. 55; III.B, p. 61; III.D.1, pp. 64-65; III.D.2, p. 65; III.D.3, pp. 66-70.

With respect to the local, temporal inconsistency claims,[97] it is important to note that all work done during the tenure of then-CAPT Landry was done under the then-valid assumption that the old Brightman Street Bridge would be removed prior to LNG vessels calling on Weaver's Cove's proposed facility. As the Letter of Recommendation at issue is based, at its core, on a change to this critical fact (and the corresponding changes to the proposed size and frequency of vessels involved), it would be inappropriate to rely on preliminary suitability opinions derived from workshops and studies that proceeded on a now-false premise.

With respect to geographic inconsistency, it is true that vessels routinely undertake challenging navigation evolutions around the country and the world. Each waterway, however, is unique. It is therefore appropriate to evaluate each evolution on its merits in the context of the waterway where it will occur. Weaver's Cove specifically notes navigation challenges associated with LNG operations in Everett, Massachusetts; Corpus Christi, Texas; Lake Charles, Louisiana; and Houston, Texas.[98] None of these areas, however, involve a waterway through which a ship would be required to proceed with the assistance of multiple tugs through a bridge with extremely limited horizontal clearance, then come to a complete stop between that bridge and a second while it is moved transversely to align itself with the second bridge opening only 1100 feet away, all during necessarily limited environmental conditions, up to 260 times per year, in the very same segment of waterway where the population concentration is closest to the intended transit route. The proximity and arrangement of the old and new Brightman Street bridges make Weaver's Cove's proposal truly unique. While other ports may have navigational hurdles, to my knowledge, none (mentioned by Weaver's Cove or otherwise) appear to have the unique confluence of risks presented here.

3. Departures from NVIC 05-05's Guidance

Ultimately, by design, the COTP has substantial discretion in ensuring the safety and security of the port areas over which he is charged to serve.[99] NVIC 05-05 does not degrade that discretion. On the contrary, paragraph 7 of the circular affirms this point:

> Each COTP/FMSC has discretionary authority on how best to address specific safety and security concerns within their area of responsibility. Nothing in this Circular is meant to override or subvert the discretion of the COTP/FMSC when addressing the unique safety and security concerns for an LNG operation. While the guidance contained in this document may assist industry, the general public, the Coast Guard as well as other federal and state regulators in applying statutory and regulatory requirements, the guidance is not a substitute for applicable legal requirements, nor is it a regulation itself. Thus it is not intended to nor does it impose legally binding requirements on any party, including the Coast Guard...[100]

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[97] *See* Appeal at §§ I.B., I.D.3., II.B.4.c. ¶4, II.F.1.b.(4) ¶4, and II.F.3.a.

[98] Appeal at §§ II.F.1.a., p. 23 and III.D.1. ¶2-3, p. 64.

[99] *See, e.g.*, 33 CFR §§ 6.04-8, 160-111.

[100] NVIC 05-05 at § 7.

In light of this language, it is unclear how Weaver's Cove has been legally harmed for deviations from this guidance document. While a COTP should not, as Weaver's Cove suggests, use the Letter of Recommendation as "a means to obstruct marine commerce,"[101] neither can a COTP abdicate his ultimate responsibility to ensure the safety and security of the port he is charged to keep.

In his Letter of Recommendation, the COTP made clear that:

> even without the Letter of Recommendation process of Part 127, to fulfill my responsibilities to ensure the safety of the waterway, I would feel compelled to use my discretionary authorities to control vessel movements to prohibit the recurrent transit of LNG tankers from northeast of the line between Mt. Hope Point and Common Fence Point, under the Braga Bridge and through the Brightman Street Bridges and to the north of those bridges in the Taunton River.[102]

Accordingly, the Letter of Recommendation at issue can be viewed largely as a ministerial act – one which the COTP genuinely felt he had no choice but to take by issuing an unsuitability recommendation given the unique circumstances before him. Accordingly, any deviation from the NVIC is squarely within the rationale of Section 7 and, by that section's provisions, permissible.

For the foregoing reasons, I find no procedural error based on alleged failures to follow any specific provisions of NVIC 05-05.

C. Due Process

Separate and apart from its NVIC 05-05 – based procedural error claims, Weaver's Cove asserts that the "COTP committed several violations of Due Process in developing the LOR."[103] These claims are based on (1) a perceived lack of "fair notice and opportunity to comment" on documents considered by the COTP, (2) the lack of notice on certain issues Weaver's Cove asserts it was not aware of, which caused the COTP concern with its proposed operations, and (3) the COTP's alleged failure to fully consider certain documents.[104] A close review of these claims indicates error in the COTP's failure to fully consider one particular submission from Weaver's Cove prior to issuing his Letter of Recommendation. Ultimately, as set forth below, that error is harmless. Moreover, none of the other alleged due process violations have harmed Weaver's Cove in any material respect, given the further opportunities for review and consideration provided in the administrative appeals process in which it is now engaged.

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[101] Appeal at § II.E., p. 21.

[102] LOR, enclosure (2) at § D.5.

[103] Appeal at § II.D, p. 19; *see also*, Appeal at §§ I.D.5, p. 6; II.A.3, p. 8; II.B ¶3, p. 9; II.B.5, p. 14; II.C, p. 17; II.C.7 ¶4, p.19; and II.F.4.c., p. 54.

[104] *Id.* Weaver's Cove's due process claim arising from the COTP's treatment of its Request for Reconsideration, Appeal at § II. B ¶3, is addressed, above, at § I.A, p. 16. It is not addressed again here.

1. Claims of Improper Notice for *Documents* Considered by the COTP.

As a threshold matter, I note that the Letter of Recommendation process of 33 C.F.R. § 127 is neither formal notice and comment rulemaking, nor a formal adjudication under the Administrative Procedures Act.[105] As such, there is no hearing "on the record," or right to call, examine, or cross-examine witnesses or evidence before the COTP or a Coast Guard Administrative Law Judge.[106] Accordingly, the process can best be described as "informal" agency action.[107] This does not mean that the APA does not apply, or that fundamental tenants of fairness and due process should not be observed.[108] On the other hand, I have found no specific procedural rules – including in guidance set forth in NVIC 05-05, to the limited extent it may be found relevant[109] – that requires the COTP to publish any specific fact or evidence under consideration, in advance of his suitability recommendation.[110] Further, nothing in 33 C.F.R. Part 127, its underlying statutory authority,[111] NVIC 05-05, or elsewhere, provides a specific procedure for parties to preview and examine all relevant facts known to the COTP on which he may base his suitability recommendation.

Weaver's Cove asserts that the COTP, in "violation of due process, admittedly relied on at least seven (7) documents heretofore not identified by the COTP in any communication as being documents considered or sources to be relied on in preparation of the LOR."[112] Specifically, it takes issue with inclusion of the following documents in the COTP's "Administrative Record" as attached to his Letter of Recommendation:

(1) Dr. A.M. Rothblum's paper, "Human Error and Marine Safety," a product of the Coast Guard Research and Development Center; as presented at the Maritime Human Factor's Conference 2000 in Linthicum, MD, on March 13-14, 2000.

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[105] *See, e.g., City of West Chicago, Ill. v. U.S. Nuclear Regulatory Com'n*, 701 F.2d 632, 642 (11th Cir. 1983) (explaining that the APA's formal adjudication provisions are only triggered for proceedings where an underlying statute specifically required a hearing "on the record," or where Congress otherwise clearly intends to trigger the formal, on-the-record provisions.)

[106] *See, id.*, and cases cited therein.

[107] The Administrative Procedure Act does not use the term "informal adjudication." It is a residual category "including all agency actions that are not rulemaking and that need not be conducted through 'on the record' hearings." *United States v. An Article of Device . . . Diapulse*; 768 F.2d 826, 829 n.4 (7th Cir. 1985).

[108] The APA's arbitrary and capricious standard of review applies to "informal" agency adjudications. *See, e.g., United States Postal Service v. University Pub. Corp.*, 835 F.Supp. 489 (S.D.Ind.1993).

[109] *See* above at § I.A.

[110] The only *binding* procedures in this case are those contained in 33 C.F.R §§ 127.007, 127.009, which require the submission of a Letter of Intent (containing certain prescribed information), and which require the COTP to consider that submission along with certain other characteristics of the port presumably known to, or easily verified by, him. *See also* the discussion, above, at § II.B.2.(ii), pp. 19-20 (The Cooperative and Iterative Process).

[111] 33 C.F.R. Part 127 is promulgated solely under the authority of 33 U.S.C. § 1221, et seq. (the Ports and Waterways Safety Act, as amended). *See* 51 Fed. Reg. 18276, 18278 (1986).

[112] Appeal at §§ II.B.5.a-e, pp. 14-15; II.C.3, p. 18; II.C.7 ¶ 2, p. 19; II.D. ¶ 4 a-g, p. 20; and II.F.1.b.(5) ¶ 5, p. 35.

(2) A First District memo of April 3, 2006, regarding the old Brightman Street Bridge.

(3) A letter from the Deputy District Commander for the Army Corps of Engineers, New England District to the Attorney General for the State of Rhode Island, of March 7, 2006, noting that the Army Corps intended to await FERC's and the Coast Guard's respective assessments of Weaver's Cove's plan to use smaller tankers before concluding its dredging permit decision.

(4) A letter from the District Commander for the Army Corps of Engineers, New England District to the Director of FERC's Office of Energy Projects, of March 17, 2006, requesting that FERC "review the revised operational plan for ship transit, evaluate the effects of the proposal, clarify them for public review, and determine whether the EIS addresses the effects of these changes to the application or if any additional analysis must occur."

(5) Sector Southeastern New England's October 2, 2007, Waterways Analysis and Management System (WAMS) review of Narragansett and Mount Hope Bays.

(6) The "Vessel Critical Profile" for the M/V WINTERSET as extracted from the Coast Guard Marine Information for Safety and Law Enforcement (MISLE) database.

(7) The "Vessel Critical Profile' for the M/V CLIPPER RANGER, from MISLE.

Weaver's Cove asserts that notice is the essence of due process.[113] Having reviewed each document in question, however, I find nothing that should have come as a "surprise" to Weaver's Cove. Accordingly, I find no harm or prejudice in their inclusion. I will address each document in turn.

Weaver's Cove's first improper notice allegation centers on the COTP's inclusion of the Rothblum paper. The COTP, in response to the concerns voiced in Weaver's Cove's Request for Reconsideration, explained that the "paper was relied on for the general proposition that human error can contribute to marine accidents."[114] Weaver's Cove does not dispute that proposition,[115] but argues that specific references to generalized statistical facts and theories, taken from the paper, suggest the COTP actually relied on the document to support a more detailed, statistical analysis of Weaver's Cove's specific proposal,[116] an analysis Weaver's Cove contests.[117]

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[113] Appeal at § II.B.5, p 14.

[114] Reconsideration Reply at §2.B.i., p. 4.

[115] Appeal at § II.B.5.a., p. 14 ("Weaver's Cove and the COTP can agree that human error can contribute to accidents…")

[116] Appeal at § II.B.5.a, p. 14.

[117] *See* Appeal at §§ I.B.5.a, p. 14; II.D.4.a, p. 20; II.F.I.b, pp. 27-30; III.A., p. 56.

As discussed further in my analysis of substantive arguments,[118] I view the COTP's inclusion of general casualty statistics as illustrative only. Thus, in my review of this matter, I have viewed the Rothblum paper solely in those terms. That is, on appeal, I have considered it only for the general proposition on which both Weaver's Cove and the COTP agree. As I ultimately reach the same unsuitability recommendation with respect to the proposed transit between the old and new Brightman Street bridges, I find no error or harm in the paper's inclusion in the record.

Second, Weaver's Cove questions the inclusion of an April 3, 2006 letter, from my Supervisory Bridge Management Specialist, requesting that the Coast Guard Office of Bridge Administration[119] initiate an obstructive bridge analysis for the old Brightman Street bridge. As part of the request, this letter explains the recently enacted legislation that requires the preservation of the bridge, and provides a brief history of reported allisions involving the bridge. Importantly, it also notes that Weaver's Cove was among the parties that lobbied the Coast Guard to undertake this analysis.

To the extent an investigation into the obstructive nature of the bridge was something Weaver's Cove asked of Coast Guard, I find no harm created by including the request itself in this record.[120] To the extent the letter also recounts a history of accidents (allisions) involving the bridge, there is ample evidence in the record showing Weaver's Cove's knowledge of these historic facts.[121] Accordingly, I can find no harm in the inclusion of this letter in the record.

Third, Weaver's Cove challenges the COTP's inclusion of certain correspondence from the Army Corps of Engineers in the COTP's "Administrative Record." The first letter in question, sent to the Rhode Island Attorney General, relays the Army Corps of Engineers' plan to defer its adjudication of Weaver's Cove dredging permit application pending FERC's and the USCG's review of Weaver's Cove's change to its proposed marine operations. The relevance of this

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[118] Below, at pp. 48-50.

[119] The Office of Bridge Administration's former Office Staff Symbol, as used on the letter in question, was G-PWB. The current designator is CG-5411.

[120] I note, however, that any potential action considered under 33 C.F.R. Part 116 is completely separate and apart from the Letter of Recommendation process at issue here, as it is beyond the authority of the COTP. The Navigational Review provided in response to the April 3, 2006 request, however, is included in the COTP's Administrative Records as document 42. Weaver's Cove does not object to the inclusion of this reply to the request it challenges.

[121] Weaver's Cove addressed the issue of bridge allisions in their February 21, 2007 submission to the COTP on pages 18-20 and in footnote 3, which make reference to a Draft Feasibility Report: "Reuse Alternatives for the Brightman Street Drawbridge" prepared for the Massachusetts Highway Department by Fay, Spofford, and Thorndike, LLC (May 2006); as well as in footnote 4, which refers to an Engineering Study, "Replacement of the Brightman Street Bridge Route 6/138 Over the Taunton River Fall River/ Somerset, Massachusetts" prepared by the U.S. Department of Transportation, Federal Highway Administration, and the Commonwealth of Massachusetts Department of Public Works, Table 11, page 39 (1988). In the COTP's May 9, 2007 letter to Weaver's Cove, he noted that "the proximity of the old and new Brightman Street Bridges to each other presents a high risk of a vessel striking either or both bridges. Specifically, not only is the old 98-foot wide bridge narrow relative to the 85-foot wide tankers proposed, but a transiting vessel must stop forward momentum to avoid striking the new bridge in a very short distance." COTP letter to Weaver's Cove of May 9, 2007 at enclosure (1), p. 9. Additionally, page 12, item 5,of the Executive Summary to Weaver's Cove's letter to the COTP of July 18, 2007 addressed: "Assumption: An allision between the small LNG tanker and the New Brightman Street Bridge could damage the bascule spans."

document seems to be that it raises the possibility that Weaver's Cove might be denied permission to dredge portions of the intended LNG vessel transit route. Weaver's Cove does not refute that the Corps deferred its dredging decision pending action from other federal agencies, including the Coast Guard. To the extent the COTP's analysis takes, as a given, that this dredging will ultimately occur,[122] inclusion of this document is harmless.

The second letter from the Army Corps with which Weaver's Cove takes issue was sent by the Corps to FERC to request a determination on the sufficiency of FERC's Environmental Impact Statement, in light of the changed circumstances and amended vessel characteristics. While the COTP's use of this document is unclear from the record, it could be viewed as supporting the COTP's subsequent assertions that if the waterway were deemed suitable from a navigation safety perspective, further environmental review might be necessary.[123] In any event, I see no substantive issue in this letter and, consequently, do not find harm to Weaver's Cove from its inclusion – even if not previously provided.

Fourth, Weaver's Cove challenges the inclusion of Sector Southeastern New England's October 2, 2007 Waterway Analysis and Management Systems review of Narragansett and Mount Hope Bay. In his Reconsideration Reply, the COTP asserts that this review was cited "primarily for the proposition that the aids-to-navigation system in the waterway at issue is adequate for current users."[124] Weaver's Cove does not contest that assertion. Accordingly, I find its inclusion appropriate, and harmless.

Fifth, Weaver's Cove questions the COTP's inclusion of documentary extracts from the Coast Guard's Marine Information for Safety and Law Enforcement (MISLE) database for two of the coal carrying vessels that routinely transit through the Brightman Street bridges. In his Reconsideration Reply, the COTP explained that this information was sought and considered to evaluate Weaver's Cove's claim that its proposed LNG vessels were essentially similar to coal ships already transiting the area.[125] I see no harm in the COTP attaching evidentiary support concerning the actual size of these vessel's for a comparison between the proposed LNG vessel and vessels currently using the waterway.[126]

At points in the appeal, Weaver's Cove seems to concede that it was aware of some, if not all, of the documents or underlying facts at issue.[127] Thus, its argument seems to be, at least in part, that it was owed advance, pre-decisional notice if the COTP was considering relying on anything in the challenged seven documents in his ultimate determination.[128] In the Coast

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[122] LOR, enclosure (2) at § B.2.c, p. 4.

[123] The COTP's March 13, 2006 letter to Weaver' Cove noted that non-navigation "impacts associated with the increased waterway transits and bridge closures pend a separate analysis."

[124] Reconsideration Reply at § 2.B iv., p. 4

[125] Reconsideration Reply at §2.B.i., p. 4.

[126] *See* LOR, enclosure (1) at Table 3, p. 23.

[127] See Appeal at § II.B.5.b, p. 15 ("having the document is different than knowing prior to the issuance of the LOR the COTP is going to rely on it.").

[128] *Id.*

Guard's informal Letter of Recommendation process, there is no requirement for the COTP to foretell the specific documents, issues, or evidence on which he intends to base his ultimate decision. Such internal insight is the essence of the deliberative process. Indeed, the government's assimilation and selection of certain documents, facts, or materials from a larger pool of knowledge, at the pre-decisional stage, is generally protected from release.[129]

At least at this stage, Weaver's Cove is aware of the contents of the documents at issue, and the propositions for which they have been cited by the COTP. It has presented its position on their inclusion in the record, and on the substantive matters, if any, they contain.[130] Further, it may request further consideration by appealing my ruling to the Assistant Commandant for Marine Safety, Security, and Stewardship.[131] I have considered Weaver's Cove's substantive comments on these documents, but reserve my analysis thereof for elsewhere in this ruling. For present purposes, in light of the foregoing analysis, I find nothing in Weaver's Cove's remarks concerning the seven documents in question that cause me to remand the Letter of Recommendation back to the COTP on procedural due process grounds.

2. Claims of Improper Notice on Fendering Issues Considered by the COTP

In addition to the aforementioned documents, Weaver's Cove asserts a "no notice" due process violation for the COTP's alleged failure to notify it of concerns regarding the fendering system around the Brightman Street bridges, prior to issuance of his Letter of Recommendation. Specifically, it notes that:

> the insertion of this issue in the LOR as a basis for a conclusion is a violation of due process, as the COTP failed to give Weaver's Cove any notice that this was an issue or an item relevant to the LOR or one on which he intended to base the LOR. This lack of notice and denial of an opportunity to respond to the undisclosed issues is a fundamental denial of due process.[132]

The record, however, shows that the fendering issue was raised as a concern in the COTP's letter to Weaver's Cove of March 13, 2006.[133] The fendering comments in that letter appear to have been in direct response to the concern raised by the Northeast Marine Pilots in its "Report on the Feasibility study of the Proposed Weaver's Cove LNG Ship to transit from Sea to the Proposed

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[129] *See, e.g.*, *Williams v. U.S. Dep't of Justice*, 556 F. Supp. 63, 65 (D.D.C. 1982).

[130] With the possible exception of the Army Corps March 7, 2006 letter to the Rhode Island Attorney General, which Weaver's Cove notes it has been unable to identify. To the extent Weaver's Cove desires to challenge any aspect of the March 7 letter, it is free to do so in a further appeal of this ruling.

[131] 33 C.F.R. § 127.015(d).

[132] Appeal at § II.F.1.b.(5) ¶5, p. 35.

[133] COTP letter to Weaver's Cove (via Mr. Bruce Kiley) of March 13, 2006, at p.2 ¶3 ("The current fendering system on the old Brightman Street bridge is damaged and appears to be unsatisfactory for vessels such as those proposed by Weaver's Cove on the southeastern side. An improved fendering system, capable of withstanding the typical (incidental) impacts from a vessel of the size and type you propose, needs to be addressed. Any reduction in the navigational width that may be caused by enhancements to the existing fendering system must also be considered.")

LNG terminal in Fall River,"[134] which was produced and provided to the COTP at the request of Weaver's Cove. By Weaver's Cove's own admission, the issue was discussed during a meeting with the COTP on September 4, 2007.[135] Moreover, bridges are among the few required considerations enumerated in the guiding regulation at 33 C.F.R. § 127.009.[136] Weaver's Cove's substantive complaints with the COTP's treatment and weighing of this issue are addressed elsewhere in this letter.[137] I do not agree that Weaver's Cove had inadequate prior notice of this issue.

3. The Four Documents Allegedly Overlooked by the COTP

Weaver's Cove's other due process argument is its assertion that the COTP failed to include certain "key" documents in his administrative record; and therefore, must have erroneously failed to consider them. Likely foreseeing the certainty of an appeal and the high potential for litigation over his Letter of Recommendation from one party or another, the COTP created an "Administrative Record" – an enclosure to his Letter of Recommendation listing the documents he considered in making his decision. Arguably, there was no legal obligation for him to create this list of documents, as such, until the matter was actually under appeal.[138] Weaver's Cove's previously discussed "notice" arguments notwithstanding, the fact that the COTP felt it prudent to include and cite documentary support for every substantive fact, down to the lengths of ships known to transit the waterway in question, should not harm Weaver's Cove. Weaver's Cove, however, asserts it has been prejudiced by the omissions from this list. Specifically, it claims that the COTP failed to appropriately consider and list in his "Administrative Record":

(1) An October 9, 2007, submission from Weaver's Cove to the COTP regarding issues raised at a meeting of September 4, 2007;

(2) The COTP's letter of May 23, 2007 to FERC;

(3) The COTP's input to FERC preceding issuance of FERC's DEIS; and

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[134] Northeast Marine Pilots, "Report on the Feasibility study of the Proposed Weaver's Cove LNG Ship to transit from Sea to the proposed LNG terminal in Fall River," at ¶ 5.b. ("NEMP has been reluctant to transit the Brightman Street Bridge with vessels having a beam of 90'. The reluctance is multi-faceted, but the primary factor is that the fendering in the older bridge is in major disrepair and has been for many years.")

[135] Appeal at II.F.1.b.(5) ¶5, p. 34 ("No allision impact assessment on the old bridge was developed because, unlike the new bridge, the old bridge's fendering system is not of the dynamic impact absorbing type, and this was discussed with the COTP during the meeting of September 4, 2007."); see also Appeal at II.F.1.b.(5) ¶5, p. 35 ("A small narrow beam LNG tanker would not have a highly flared bow and the narrow bridge opening would not allow the ship to be misaligned during transit. Therefore, the small tanker's bow would not be able to overhand the fender line and an analysis is not warranted. Weaver's Cove addressed this topic directly to the COTP during the September 4, 2007 meeting.")

[136] 33 C.F.R. § 127.009(c).

[137] *See* below at p. 43.

[138] As such a record would be "certified" to a court of competent jurisdiction during the course of any such litigation.

(4) The COTP's input to FERC preceding issuance of FERC's FEIS.[139]

Again, I address each document in order.

With respect to Weaver's Cove's October 9, 2007 submission, by his own admission, the COTP failed to fully consider this ten page letter and its twelve attachments prior to issuing his Letter of Recommendation on October 24, 2007.[140] For this, there is no excuse. There is also, however, no prejudice to the extent Weaver's Cove pointed this error out in its Request for Reconsideration, and caused the COTP to fully review its submission.[141] The COTP's decision to provide only minimal commentary on the substance of these documents in his Reconsideration Reply is, based upon my own review, defensible.[142] As before, I reserve for later my own comments on the substance of this submission. From a purely procedural standpoint, it is sufficient that they have been reviewed, and considered. As it is clear that Weaver's Cove's October 9, 2007 submission has been reviewed, and considered, I agree with Weaver's Cove that it should be listed as part of the administrative record of this matter going forward. Accordingly, it is enclosed with this letter ruling.[143]

The second omitted document concerns the COTP's letter to Weaver's Cove of May 23, 2007. This piece of correspondence was also not listed in the COTP's Administrative Record. I agree that it should have been. I also agree with the COTP's initial Reconsideration Reply where he stated that his May 23, 2007 letter was procedural, not substantive, in nature, and, in any event, was inevitably "considered" by him.[144] To the extent much of the pending appeal challenges aspects of who was provided or knew what information, and when, all formal correspondence between the COTP (and his predecessor) and Weaver's Cove (and its attorneys) should be part of the administrative record as that concept is envisioned by the APA.[145] Accordingly, I have appended all such formal correspondence to this ruling for consideration going forward.

As for harm from the omission of the May 23, 2007 letter from enclosure (2) of the Letter of Recommendation (the "Administrative Record"), I find none. If notice is the hallmark of due

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[139] *See* Appeal at § II.B.4., pp. 11-14; II.D, p. 20.

[140] Reconsideration Reply at § 2.a i, p. 2 ("This submission was received just as my analysis was finalized. I have, however, since reviewed the letter, along with its accompanying documentation, in its entirety. I find nothing therein that prompts me to alter my ultimate recommendation of unsuitability.")

[141] *Id.*

[142] *See* above, at § I.A (discussing the lack of any requirement for a point-for-point reply to a request for reconsideration)

[143] Enclosure (4), Document 25.

[144] Reconsideration Reply at § 2.A.ii.

[145] Any judicial review of this decision would ultimately be based on the full administrative record that was before the agency at the time the decision, including my review, was made. This would include matter directly or indirectly considered, regardless of whether specifically enumerated in the COTP's list. *See, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Lloyd v. Illinois Regional Transp. Authority*, 548 F.Supp. 575 (N.D.Ill. 1982)

process,[146] Weaver's Cove has suffered little harm with respect to this piece of correspondence. Weaver's Cove received the letter. Thus, its real concern seems to be with the COTP's failure to mention the letter as being part of the record. Any harm from its omission is rectified by my inclusion of the May 23 correspondence with this letter.

Finally, Weaver's Cove questions the lack of documents cited, or provided to it,[147] showing the Coast Guard's input to FERC for development of its Draft and Final Environmental Impact Statements.[148] The Final EIS itself is listed as document six in the COTP's "Administrative Record" of documents on which he relied in developing his Letter of Recommendation. Also included, as Document 5, is the Ports and Waterways Safety Assessment (PAWSA) Report for Narragansett Bay. As Weaver's Cove notes, however, the Draft EIS is not listed.[149] In response to these assertions, the COTP explained that the Coast Guard's input to FERC's environmental documentation came in the form of the Port and Waterway Safety (PAWSA) workshop and report, and separate security workshops. The COTP's Reconsideration Reply also explained that "the results of [these] workshops were communicated to FERC during the course of the Coast Guard's "dialogue" with that agency during its environmental review process. This input was adopted by FERC and is reflected in the DEIS and FEIS documents themselves."[150] This explanation is consistent with my review of the COTP's "Administrative Record," FERC's docket for the Weaver's Cove's project, and Coast Guard documents reviewed in conjunction with two requests for documents from Weaver's Cove under the Freedom of Information Act (FOIA), discussed further below.

While processing two FOIA requests, I reviewed and released to Weaver's Cove a letter that I considered part of the "dialogue" mentioned by the COTP. The letter in question, from the COTP's predecessor to FERC, dated April 15, 2005, was entitled "Security Resources for Proposed Weaver's Cove Liquefied Natural Gas (LNG) Marine Terminal." I agree with the COTP's assessment that the substance of this letter is reflected, in generic form, in FERC's Final EIS, such that including the April 15, 2005, letter separately in the record is arguably redundant.[151] In the interest of completeness, however, I will append it to this appeal ruling to effectively add it to overall record of this matter.[152]

The only other formal correspondence between the COTP and FERC on this point located in a reasonable search of agency records consisted of comments from Coast Guard personnel on a

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[146] Appeal at § II.B.5, p 14.

[147] All documents concerning the Coast Guard's input to FERC that were found in a reasonable search of agency records were provided to its attorneys, via, and subject to certain withholdings under, the Freedom of Information Act as further detailed, below, at § I.D, pp. 33-34

[148] Appeal at §§ II.B.4.c., p. 13 and II.D., pp. 19-20.

[149] *Id.*

[150] Reconsideration Reply at § 2.a.iii., ¶2, p.3.

[151] To the extent the letter speaks primarily to security issues, and not the navigation safety concerns on which the COTP's final LOR was based, it has arguably little relevance for present purposes.

[152] The April 15, 2005 Security Resources letter contained Sensitive Security Information (SSI). As such, its release and further dissemination remain subject to the provisions of 5 U.S.C. § 552, and 49 C.F.R. Parts 15 and 1520.

draft of FERC's Final EIS itself that were provided via embedded comment blocks and proposed edits using Microsoft Word's "track changes" feature.[153] This input is consistent with the COTP's explanation that the Coast Guard's "input [on safety and security measures] was adopted by FERC and is reflected in the DEIS and FEIS documents themselves."[154] The annotated draft of FERC's final EIS constitutes pre-decisional, inter-agency, deliberative process material that is protected from release under 5 U.S.C. § 552(b)(5). My review of that draft when compared to the Final EIS, confirms that the substance of the Coast Guard's edits were incorporated by FERC in its final document. Accordingly, the COTP's reliance on the Final EIS alone is appropriate. Indeed, reliance on the Draft EIS after the Final EIS has been issued presents other procedural problems that the COTP wisely chose to avoid.

Regarding the omission of the Draft EIS from the COTP's "Administrative Record," I have not found any substantive aspect of that document, not otherwise reflected in the Final EIS, to support the notion that the COTP's assumed failure to consider the draft work, as opposed to the final product, was harmful to Weaver's Cove in some way. Similarly, with respect to the allegedly missing written input to FERC's Draft EIS, a reasonable search of agency records has found none. Based on the record before me, the DEIS appears to have been written based on the substantive discussions of the PAWSA and security workshops themselves, at which FERC personnel were present and participated.

The implication in Weaver's Cove's comments on the Coast Guard submissions to FERC's environmental review is that such documents would further show that the COTP's predecessor found the waterway suitable for the proposed transits.[155] Thus, its concern for the claimed omission of materials is tied to an underlying argument that the COTP failed to consider that his predecessor viewed the waterway as suitable for Weaver's Cove's plans. The COTP addressed this point squarely:

> [Y]our reconsideration request claims that "the previous COTP" made findings favorable to Weaver's Cove that have now been arbitrarily overturned. This misrepresents the record. The previous COTP neither made findings, nor issued a Letter of Recommendation. At the time – a time before federal law effectively barred removal of the old Brightman Street Bridge – the previous COTP cooperated with FERC in developing a DEIS and FEIS, under the hypothesis of what could be possible if it were (later) determined (through the LOR process) that the waterway was suitable for LNG transits, which is one of about 75 conditions attached to FERC's approval.[156]

The COTP further explained that the findings of the PAWSA workshop, while considered by him, were "tempered by the fact that the 2004 PAWSA assumed (1) that the old Brightman Street

[153] The draft input appears to be the "non-sensitive description of the security plan and its cost" that was mentioned as in the last two sentences of the April 15, 2005 letter as being "submitted for publication in the final EIS."

[154] Reconsideration Reply at § 2.a.iii., ¶2, p.3.

[155] *See* Appeal at §§ I.B. n.3, p. 3.

[156] Reconsideration Reply at § 2.a.iii n.4, p. 3.

Bridge would be removed before LNG tanker transits would take place, and (2) that LNG tanker deliveries to Fall River would occur at a rate of about one per week."[157]

Given that FERC's draft and final environmental impact statement both predate P.L. 105-59 (the law that essentially preserves the Old Brightman Street Bridge in its present state), any Coast Guard input[158] provided to FERC's environmental review is, in my mind, tempered for the same reasons. Moreover, I find nothing substantive in the April 15, 2005 Security Resource letter to FERC, or in the comments on draft language for the FEIS, that changes my decision to affirm the COTP's ultimate unsuitability recommendation, as discussed and amended in Section II of this letter.

Ultimately, Weaver's Cove's due process claims are, themselves, tempered by the present appeal process. I have carefully considered each of the aforementioned documents and allegations of improper surprise or omission based thereon. I find no prejudice to Weaver's Cove in the COTP's treatment of these documents, and, in any event, find nothing substantive therein that alters my decision to affirm the COTP's unsuitability recommendation.

D. Claims of Fundamental Unfairness and Collusion

As one last procedural error claim, Weaver's Cove implies that the COTP essentially pre-judged this matter and colluded with local elected officials and members of Congress to stop its proposed operations altogether.[159] In response to this allegation, and to explain his interaction with such officials, the COTP replied:

> I personally provided three briefings on the Weaver's Cove proposal to various elected officials, at their specific request. Importantly, in all such instances, I limited my interaction to providing factual background and details from the public record, information regarding my duties and responsibilities with respect to assessing the suitability of the waterway for LNG marine traffic, and updates on the procedural posture and anticipated timeline for issuing my Letter of Recommendation. Those officials wishing to comment on the project were asked to do so in writing to ensure that all comments could be reflected in the public docket. If any elected official provided me with unsolicited opinions outside the docket or public meeting process, I did not consider those comments in arriving at my ultimate recommendation, I only considered those written comments contained in the record, including notes from public meetings where verbal comments were received.[160]

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[157] *Id.* at § 2.a.iii, p. 3

[158] Whether in the form of verbal communication, participation in the PAWSA and security workshops, or comments on draft wording of the EIS.

[159] Appeal at § I.C. ¶5-6, p. 4; II.B.6, p. 15; *see also* Appeal at §§ I.E., p. 21, II.B.3-4, p. 11; II.C.4 ¶1-2, p. 18; II.C.6, p. 19; II.F.1.b.(3) ¶4, p. 32; II.F.1.b.(6) ¶2, pp. 35-36; II.F.1.b.(8) ¶¶2,5, pp. 36-37; II.F.1.b.(10), p. 40; II.F.4.b. ¶2, p. 54; II.F.4.d ¶3, p. 55; II.F.4.e, p 55; III.A ¶2, p. 56; and III.C., p. 63.

[160] Reconsideration Reply at 5.

Weaver's Cove rejects this explanation. On appeal, it takes issue with the Reconsideration Reply's failure to provide "evidence to support the statement made by the COTP."[161] It further questions the lack of production of any materials related to such Congressional interaction, including notes of public meetings, in response to its two requests under the Freedom of Information Act (FOIA) for such materials,[162] and the lack of reference to such documents in the COTP's "Administrative Record."[163]

I take the COTP at his word. I offer the following additional information in the nature of evidence. In accordance with applicable regulations, policy, and procedure,[164] after a reasonable search of agency records was completed by Sector Southeastern New England and First Coast Guard District personnel, I authorized the release of 1,654 pages, comprised of 246 separate documents, photos, and correspondence, including email strings, in response to Weaver's Cove's May 16, 2006 FOIA request. I also authorized the release of 141 pages of documents related to the security workshops that were the subject of its separate June 26, 2006 request.[165] Having reviewed those documents. Nothing in either production suggests fundamental unfairness, collusion, or pre-judgment on the part of the COTP.

Additionally, as the first person in the COTP's chain of command with authority to deny any part of a FOIA request,[166] I authorized the withholding of certain otherwise responsive documents from both replies.[167] Collectively, I authorized the withholding of 143 e-mail strings to and from Coast Guard attorneys seeking or providing legal advice, constituting 319 pages, as privileged attorney-client communications, which are exempt from release per 5 U.S.C. § 552(b)(5).[168] I also authorized the withholding of 241 e-mail strings and correspondence by, among, and between numerous federal employees, totaling 544 pages, from release under 5 U.S.C. § 552(b)(5) as intra-agency, pre-decisional, deliberative process materials.[169] Similarly,

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[161] Appeal at § II.B.6., p. 15.

[162] Weaver's Cove requested, via letter of May 16, 2007, materials from the time period between February 3, 2006 to May 16, 2007 (the date of the request), related to its Letter of Intent, as amended, regarding the transit of LNG by ship to its proposed LNG receiving terminal in Fall River, Massachusetts. This request specifically sought letters, correspondence, electronic communications, telephone notes, reports, and studies, and any other communications between and among officers, officials, and employees of the Coast Guard, and any member of the United States Congress or the staff of such member and any third Party, and such materials to or from any other Federal or state or local elected officials. A second request, dated June 26, 2007, sought any and all materials related to meetings and or workshops conducted by the Coast Guard regarding security for Liquefied Natural Gas (LNG) Carrier vessel transits proposed by Weaver's Cove Energy, LLC, along with similar workshops conducted with respect to KeySpan LNG, L.P.'s proposed LNG facility in Providence, Rhode Island.

[163] *Id.*

[164] *See, generally*, 6 C.F.R. Part 5, 49 C.F.R. Part 7, and The Coast Guard Freedom of Information (FOIA) and Privacy Acts Manual, COMDTINST M5260.3 (series).

[165] Via my letters to Mr. Bruce Kiley of January 18, 2008, and March 10, 2008.

[166] *See* COMDTINST 5260.3 at Ch. 4.

[167] *Id.* My decision to withhold certain documents is the subject of ongoing litigation brought by Weaver's Cove in the United States District Court for the District of Columbia. Civil Action No. 08-00125 (RWR).

[168] As explained in my letters to Mr. Bruce Kiley of January 18, 2008, and March 10, 2008.

[169] *Id.*

54 drafts of various documents, constituting 434 pages of pre-decisional, deliberative process material, were withheld under 5 U.S.C. § 552(b)(5) as well.[170] These documents and communications were preliminary to, and involved deliberation of, the Letter of Recommendation at issue. My review of these withholdings while processing the two FOIA replies – documents which, admittedly, Weaver's Cove does not have – also revealed nothing suggesting political collusion or pre-judgment.

In its motion for reconsideration, and again on appeal, Weaver's Cove suggests that the COTP's failure to provide the documents requested under FOIA suggests that he had something to hide.[171] To be clear, while the COTP's staff initially handled Weaver's Cove's FOIA requests, the potentially responsive materials, by policy, were forwarded to me and my staff for further processing. The delay in release was due, in part, to the review process. The decision to withhold documents, ultimately, was mine. Weaver's Cove's pending lawsuit on my decision to withhold certain documents suggests that it is not satisfied the withholding was proper. Still, I am not aware of any evidence to suggest the COTP compromised his position, or did anything other than impartially evaluate the facts before him in making his waterway suitability recommendation. Based on my review of all internal and public documents available to me, I find nothing to support Weaver's Cove's claims of undue political influence or pre-decision on the part of the COTP.

Having found no harmful procedural error in the way the COTP processed and produced his Letter of Recommendation, I turn now to Weaver's Cover's substantive complaints on the COTP's findings, opinions, and ultimate recommendations.

II. Substantive Issues Raised on Appeal

In addition to its allegations of procedural error, Weaver's Cove questions many of the COTP's substantive findings, opinions, and recommendations; and their utilization – individually and collectively – in the ultimate waterway suitability recommendation. Specifically, it asserts that "the COTP reached several 'conclusions' in the 'determination' section [of the Letter of Recommendation] that do not withstand scrutiny and provide no credible support for the LOR."[172] Many of these substantive allegations appear in multiple areas of the appeal under different headings. Ultimately, the substantive error arguments are grounded in concerns with the COTP's consideration and treatment of the following 14 items: (1) *security* concerns in an unsuitability recommendation that purports to be based solely on navigation *safety*;[173] (2) the limitations posed by a 400 foot-wide federal channel north of a line between Mount Hope Point and Common Fence Point;[174] (3) waterway closures potentially resulting from Weaver's Cove's operations;[175] (4) the PAWSA workshop and report;[176] (5) under keel clearance;[177] (6) the turn in

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[170] *Id.*

[171] *See* Appeal at §§ I.B.n. 4, p. 3; I C. ¶7 n.14, p. 5; II.B.4.c ¶4 n. 17, p. 13; II.B.6., p. 15; II.D., p. 20; II.F.3.a, p. 47.

[172] Appeal at § II.F., p. 22.

[173] Appeal at §§ II.F.2.d-e, pp. 46-47; II.F.1.b(1) ¶3, p. 26.

[174] Appeal at § II.F.1.a. ¶6, p. 23.

[175] Appeal at §§ II.F.1.a, p. 22; II.F.1.a ¶¶11-12, p. 25.

the channel north of the Braga Bridge;[178] (7) nighttime transits;[179] (8) the fendering systems around the Brightman Street bridges[180] (9) air draft;[181] (10) the use of tugs and their configuration;[182] (11) computer simulation modeling and the weight given the professional opinions of the Northeast Marine Pilots and Marine Safety International thereon;[183] (12) the COTP's own professional qualifications;[184] (13) personal observations from transits aboard coal ships;[185] and (14) human error and risk analyses.[186] I will address each topic in turn.

A. Security Concerns

In several portions of its appeal[187] Weaver's Cove questions the COTP's invocation of what it views as security concerns in light of the fact that COTP based his ultimate waterway suitability recommendation solely on his analysis of navigation safety issues. It is clear that the COTP did not fully develop his analysis of the security aspects and mitigations that might be associated with Weaver's Cove's amended proposal. Indeed, the COTP's reply to Weaver's Cove's request for reconsideration states: "because my ultimate recommendation was based on my analysis of navigation safety issues, other relevant factors, such as maritime security, were not further analyzed."[188] It is also clear that the COTP's substantive analysis includes references to security boats,[189] security escorts,[190] as well as the proximity of the intended transit route to population centers, and the USS MASSACHUSETTS museum complex.[191] Weaver's Cove questions the connection between the assumed presence of security vessels, and the proximity of the transit route to population centers with the issue of navigation safety. While admitting that

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[176] Appeal at §§ I.B., p. 3; I.D.3, pp. 5-6; II.B.4.c ¶ 4, p. 13; II.F.1.b.(4) ¶ 4, p. 33; II.F.3.a, p. 47.

[177] Appeal at §§ II.F.1.a ¶ 6, p. 23; II.F.1.b.(9) ¶ 2, p. 39.

[178] Appeal at §§ II.F.4.a ¶¶ 4-6, pp. 52-53; III.A.¶ 2, p. 57.

[179] Appeal at § II.F.1.b.(6), pp. 35-36.

[180] Appeal at §§ II.F.1.b.(5), p. 34; II.F.1.b.(8) ¶ 2 (iii), p. 36.

[181] Appeal at § II.F.3.c, p. 49-50.

[182] Appeal at §§ II.F.1.b (1)¶¶ 3-4, p. 26; II.F.1.b (7), p. 36; II.F.1.b.(8) ¶ 2 (ii), p. 36; II.F.2.a-d, pp. 45-46.

[183] See Appeal at §§ II.F.1.b.(8) ¶¶ 2-3, pp 36-37; II.F.1.b.(8) ¶ 6, p. 38; II.F.1.b.(12) ¶¶ 3-8, pp 43-45; II.F.3.b-d, pp 48-51 (noting concerns with COTP's treatment of simulations, in general); §§ I.C.¶4, p. 4; I.D.3.b, p. 6; II.B.7, pp. 16-17; II.C.4, p. 18; II.F.1.b.(8) ¶¶ 3-6, pp. 37-39 (questioning the COTP's treatment of MSI's professional opinions); §§ I.C. ¶ 4, p. 4;I.D.3.b, p. 6; I.D.3.d, p. 6; II.B.7, pp. 16-17; II.C.4, p. 18; II.F.1.b.(8) ¶ 2, pp. 36-37; II.F.1.b.(8)¶ 3, p. 37; II.F.1.b.(8) ¶ 6, pp. 38-39 (challenging the COTP's treatment of the opinions of NEMP).

[184] See Appeal at §§ II.B.7 ¶¶ 7-8, p. 17; II.F.1.b.(8) ¶ 4, pp. 37-38; II.F.1.b.(8) ¶ 6, pp. 38-39.

[185] Appeal at §§ II.C.4, p. 18; II.F.1.b.(3)¶ 2, p. 31; II.F.1.b.(8) ¶6, p. 38.

[186] Appeal at §§ II.B.5.a, p. 14; II.D.a, p. 20; II.F.1.b (1), pp. 27-30; II.F.1.b (2), pp. 30-31; II.F.1.b.(9), pp. 39-40; II.F.1.b.(10) ¶¶ 3-6, pp. 40-42; II.F.1.b.(11), pp. 42-43; III.A. ¶2, p. 57; III.C., p. 63; III.D.2., p. 65.

[187] *See* Appeal at §§ II.F.1.b.(4), pp. 32-33; II.F.2.c-e, pp. 46-47; II.F.4.a. pp. 52-53; and III.A. ¶2, p. 56.

[188] Reconsideration Reply at § 2.a.iii. ¶2.

[189] LOR enclosure (2) § C.1.k.

[190] *Id.* at § C.1.j.

[191] *See, e.g., id.* at § C.1.c.

such facts are valid considerations for "the consequences of a deliberate attack and the necessary mitigations against such an action,"[192] it asserts that "since the COTP has disclaimed any interest in security for purposes of this Letter of Recommendation, there is no clear nexus"[193] between the aforementioned facts and the COTP's navigation safety-based suitability recommendation.

As an initial matter, I note that because the security aspects of the pending amended proposal have not been fully vetted by the COTP in consultation with the port community, I decline to analyze these issues further in a *security* context. Thus, my ultimate decision to affirm and adopt, as amended, the COTP's unsuitability recommendation is based solely on the navigation safety aspects of Weaver's Cove's amended proposal.

That said, it is important to note that safety and security issues are often inextricably linked, especially when viewed from a consequence management perspective. Thus, while the COTP's discussion of population density and the proximity of certain moored vessels, infrastructure, museums, etc., to the LNG tankers' transit route would surely be factors in any security analysis, they remain valid considerations with respect to any navigation safety analysis as well.

Regarding the presence of security vessels, it is safe to assume that some security escort regime would be utilized for any of the LNG deliveries contemplated by Weaver's Cove. The impacts of that regime on navigation safety, while minimal, exist.[194] The presence of any flotilla of vessels increases the traffic and congestion in the waterway and increases the interaction among and between waterway users.

More importantly, the presence and proximity of people and things to a potential hazard is a necessary element in evaluating the consequences of an *accident* (such as that resulting from a navigationally *unsafe* operation); as well as from an attack. Weaver's Cove suggests that any accident (stemming from the navigation safety aspects of the waterway or otherwise) could not lead to a release or ignition of LNG. Admittedly, the probability that an accident suffered while an LNG tanker is undertaking a slow, controlled evolution, such as transiting through bridges, would result in an actual hull or tank breach is minimal. Nonetheless, the consequence of such an event, even if relatively unlikely, is high enough that it cannot be entirely discounted. In broad terms, an accident (be it a collision, allision, or grounding) resulting in the release and ignition of LNG *could* ultimately have similar impacts on the surrounding environs to those of an intentional attack on the vessel.

Moreover, while an accident stemming from close quarters maneuvering might not result in the rupture of an LNG carrier's cargo tanks, it could lead to a hull breach or other casualty – such as recently occurred when the COSCO BUSAN struck the Golden Gate Bridge[195] – resulting in the release of fuel oil or petroleum. The fact that the area encompassing the COTP's greatest

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[192] Appeal at § III.A, p. 59 (discussing the issue of population density).

[193] *Id.*

[194] The COTP's treatment of these regimes is discussed further in the context of waterway closures below at § II.B, pp. 37-38

[195] *See, e.g.*, Carl Nolte & Michael Taylor, "*Ship crashes into Bay Bridge tower, spills fuel oil*" San Francisco Chronicle, Nov. 8, 2007 at A1.

concerns with navigation safety – in and around the Brightman Street bridges – is also characterized in the 2004 PAWSA report as an area of "very high absolute risk" in terms of consequences from a hazardous materials release,[196] highlights the importance and validity of this consideration. Viewed in this light, I find no error in the COTP's inclusion and consideration of security escorts, population centers, infrastructure, and area attractions such as the USS MASSACHUSETTS.[197]

B. The 400 foot channel north of Mount Hope Point.& Common Fence Point

Weaver's Cove contends that the COTP's unsuitability determination for that portion of the waterway north of Mount Hope Point to Borden Flats lacks support in the record. The COTP's stated reason for this finding is the notion that "once a northbound tanker enters the 400-foot wide Federal channel… there are very limited options in terms of responding to a disabling incident or accident…."[198] The COTP further observed that were a tanker to become disabled, it would either need to be towed backwards (to the south) down the channel, or to the north, through both Brightman Street bridges to Weaver's Cove's facility. In reply, Weaver's Cove notes, among other things, that no LNG tanker has reported such a debilitating casualty while in port, that no published PAWSA or WSA has cited the issue of a disabled ship as a particular concern, and that, in any event, LNG tankers routinely transit similarly confined waterways without incident.[199]

Regarding disabled tankers, I am mindful of a recent casualty involving the LNG tanker CATALUNYA SPIRIT, which left that vessel without power and propulsion to maneuver.[200] The vessel was *en route*, but not yet within, the Port of Boston at the time of casualty. It remained unable to move under its own power for several days. While this incident occurred well outside of port, and was quickly brought under control by tug boats and attending Coast Guard vessels, it confirms the fact that debilitating casualties can and do happen, even to LNG tankers.[201]

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[196] Ports and Waterway Safety Assessment Workshop Report at 5.

[197] Weaver's Cove questions the COTP's reference to ships berthed 95 feet outside the channel as posing an "allision risk." Appeal at § II.F.4.a (citing LOR, enclosure (2) at §§ B.2.c.(2)-(3); B.2.c.(9); and C.1.c.(1)(f)). While I agree that proximity to such vessels is fairly common in confined port areas, this proximity remains a valid consideration when evaluation the totality of circumstances that contribute to waterway suitability. *See generally* 33 C.F.R. § 127.009(d)(6) (citing distance of berthed LNG vessel from channel as a required consideration).

[198] The COTP's subsequent statement in this section that such vessels "are committed to completing the entire transit – there is no feasible alternative," LOR enclosure (2) at § C.1.b, appears to be overstated to the extent he subsequently seems to concede towing a tanker backwards out of the channel would be possible; but would "require extraordinary navigational maneuvers [that would] present additional risks."

[199] Appeal at § II.F.1.a, pp. 22-25.

[200] *See, e.g.*, Professional Mariner, "*Casualties: LNG carrier it towed to safety off Cape Cod after failed pump leads to loss of power*" May 2008 at p. 34.

[201] *See also* Appeal at § II.F.1.a. n.20, p. 23 (recounting causalities aboard the LNG tankers MATHEW and POLLENGER).

That said, and leaving for later the issue of towing (dead ship or otherwise) vessels through the Brightman Street bridges,[202] I agree with Weaver's Cove that a narrow channel such as the one through Mount Hope Bay does not, in and of itself, necessarily render a waterway unsuitable for ships constrained by draft[203] or beam. In this case, I view the COTP's unsuitability recommendation for the waterway from Mount Hope Point to Borden Flats as supported only in light of the unsuitability recommendation for Segment Three (based largely on the Brightman Street bridges). That is, the waterway from Mount Hope Point to Borden Flats should be viewed as unsuitable only because of the fact that it serves as a narrow road to a (navigationally unsuitable) dead end. Should the status of the Brightman Street bridges change, the suitability of the federal channel leading thereto should be re-evaluated, from both navigation safety and security perspectives. The COTP's suitability recommendation is accordingly, AMENDED to this end.

C. Waterway Closures potentially resulting from Weaver's Cove's Operations

Within its concerns over the COTP's treatment of the narrow federal channel north of Mount Hope Point,[204] and elsewhere in its brief,[205] Weaver's Cove submits that the COTP placed undue reliance on the fact that security operations and potential casualties may effectively close the waterway to other traffic. The COTP notes that "stoppage of vessel traffic to permit frequent transits could adversely impact navigation safety, particularly for vessels subject to transit restrictions through the old Brightman Street Bridge and for vessels that would have to exit the relative safety of the navigation channel and await the LNG tanker's passage in less-safe waters outside the channel."[206] For its part, Weaver's Cove points out that there is relatively little commercial traffic through the Fall River area itself, and that, with respect to any security enforcement flotilla that might ultimately be devised and deployed, its very job would be to limit vessel traffic. Moreover, Weaver's Cove notes that it intends to coordinate its arrival schedule with the coal ships that transit the area to "avoid any conflict in channel use."[207]

After considering these arguments and the underlying record, I find the fact that portions of Narragansett Bay, Mount Hope Bay, and the Taunton River would be effectively closed by the escorted transit of an LNG carrier during the limited period of time it would take a tanker to traverse these areas, to pose little threat to navigation safety in and of itself. Similarly, I find the potential that an emergency situation might practically close – or cause the Coast Guard to legally close – a waterway until such emergency abates, to be of little concern when considering navigation safety in isolation. Accordingly, I have given it no weight in my assessment of the COTP's navigation safety-based suitability determination. I note, however, that further study would be required (*if* the waterway were later found suitable based on changed circumstances) to

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[202] *See* Appeal at §§ II.F.1.b.(7), p. 36; II.F.1.a, pp. 22-24; discussed, below, at pp. 43-46

[203] The issue of under keel clearance is discussed, below, at § II.E, p. 39

[204] Appeal at § II.F.1.a., p.25.

[205] Appeal at § II.F.1.b.(1). p 25, (4), p. 32.

[206] LOR, enclosure (2) at § C.1.j, p. 28.

[207] Appeal at § II.F.1.b.(4) ¶ 3, p. 33.

determine what, if any, impacts such foreseeable closures would have in environmental and security contexts – especially given the increased frequency of deliveries associated with the pending "smaller tanker" proposal.

D. The PAWSA Workshop and Report

Elsewhere in its appeal, Weaver's Cove suggests that it was inappropriate for the COTP to discount the alleged findings of PAWSA and security workshops and that, in accordance with NVIC 05-05, the COTP "should have reconvened the PAWSA group and considered all aspects of the new proposal."[208] As previously discussed,[209] there is no requirement for the COTP to initiate the contractor-facilitated PAWSA process or to rely on any one group or process in completing his analysis. It was appropriate for the COTP to have considered the PAWSA report to the extent it contained still-relevant information, despite the intervening changed circumstances regarding the old Brightman Street bridge, because it was considered along with all of the other supplemental materials submitted by Weaver's Cove.

E. Under Keel Clearance (UKC)

Weaver's Cove contends that the COTP inappropriately gave too much weight to concerns about UKC. Specifically, it states that while the "LOR makes much of under keel clearance, the LOR failed to address the fundamental fact that the smaller tankers have a shallower draft than the larger tankers previously proposed, which were discussed in the FERC review and which were not objected to by the Coast Guard at the time of the FERC review.[210]

The issue of UKC is principally discussed in the Letter of Recommendation as follows:

> Inbound transits of a laden LNG tanker through the dredged channel in Mount Hope Bay and the Taunton River are possible only with sufficient tidal lift. A delay in the transit while the tanker is in of these channel could result in the vessel losing its tidal lift and could cause a temporary grounding.[211]

Elsewhere, the COTP notes that "conditions favorable to inbound and outbound transits are severely limited by proposed vessel's length, breadth, and draft, available daylight hours, wind, minimum two-mile visibility, and infrastructure."[212] Finally, the issue appears as a "risk factor" considered by the COTP.[213]

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[208] Appeal at § II.F.3.a. ¶3, p. 47.

[209] *See* above at § I.B.2.i., p. 18.

[210] Appeal at § II.F.1.b.(10), p. 40.

[211] LOR, enclosure (2) at § B.2.C.(10)(e).

[212] *Id.* at § C.1.c.(1)(g).

[213] *Id.* at § C.1.c.(5)(j) ("Probability of accurate draft calculation, under-keel clearance, and transit time from sea to allow for bridge transit without grounding in the dredged channel.")

These statements and considerations are supported by the fact that the control depth of the channel at issue is currently 35 feet MLLW.[214] While Weaver's Cove has committed to dredging the channel to 37 feet, even this depth leaves tidal state (and potentially tidal lift) a necessary consideration for the "range of ship sizes" proposed by Weaver's Cove, which extend to vessels drawing up to 37.5 feet if the old Brightman Street bridge is removed.[215] To the extent Weaver's Cove continues to suggests, as recently as in its October 9, 2007 submission to the COTP, that the final design draft of its LNG ships remains undetermined,[216] it was appropriate for the COTP to consider this issue in the manner he did.

Aside from the treatment in the Letter of Recommendation itself, the October 9, 2007 submission to the COTP suggests that the topic of UKC was discussed between the parties in a September 4, 2007 meeting. In apparent reply to those conversations, Weaver's Cove notes that while a UKC of 10% of a vessel's draft is "an *ad hoc* international standard," it is not generally applied to vessels operating in sheltered waters at slow speeds and with tug assist.[217] There is a good argument that the slow speed and corresponding lack of squat anticipated in the transits at issue make a 10% UKC standard conservative in this case. Moreover, UKC, like many other factors, does not render the waterway unsuitable in and of it self. Still, given the unknown margins created by lack of definitive drafts and depth figures, UKC remains a valid factor to consider.

F. Air Draft

Turning from beneath, to above its proposed vessels, Weaver's Cove questions the COTP's treatment of vertical clearance. Noting that "the record evidence before the COTP clearly demonstrates that the LNG tankers have sufficient air draft to pass underneath all bridges and overhead wires on the transit at all states of tide"[218] it contends the COTP's Letter of Recommendation was nonetheless "written so as to suggest that Weaver's Cove had failed to provide the COTP with necessary information, namely the air draft of the LNG tankers. The suggestion is baseless and ignores the record." The text at issue appears in section B.2.c.(10)(f) of enclosure (2) to the Letter of Recommendation, which reads:

> while Weaver's Cove provided no specifics as to the height of its proposed LNG tankers, it did state that that tankers would be designed to safely pass beneath the Mount Hope and Braga Bridges, each of which have a minimum clearance of 135 feet at Mean High Water. The overhead power cables in Fall River have a minimum clearance of 150 feet at Mean

[214] *See* NOAA Chart No. 13227.

[215] Weaver's Cove letter to COTP of February 21, 2007 at 1.

[216] Weaver's Cove letter to COTP of October 9, 2007 at 8 ("…the actual depth being dependent upon the final design draft of the LNG ships").

[217] *Id.* at 6-8.

[218] Appeal at § II.F.3.c., p. 50.

> High Water, so vessels designed to pass safely beneath the Mount Hope and Braga Bridges would also pass safely beneath the overhead power cables."[219]

Weaver's Cove points out that an "Air Draft at Normal Ballast Arrival [of] 38.200" meters is labeled on a "General Arrangement drawing" that was provided as an attachment to its February 21, 2007 submittal the COTP.

As previously noted, however, Weaver's Cove has also stated that the final dimensions of its proposed tankers remains subject to change.[220] With that in mind, the COTP's comments could be read to suggest that he was unclear on whether other tankers might have different vertical clearances. Regardless, to the extent both parties agree that air draft does pose a substantive concern from a navigation safety perspective, there is no real disagreement on this point to resolve.

G. The Turn near the Braga Bridge

Weaver's Cove questions the COTP's treatment of the bend in the channel just north the Braga Bridge.[221] In his Letter of Recommendation, the COTP observed that:

> As a tanker approaches the Braga Bridge from the south, it must turn approximately 55 degrees to port while passing under the bridge, in close proximity to piers and the USS MASSACHUSETTS. Conversely, when approaching the Braga Bridge from the north, a tanker must head directly towards the USS MASSACHUSETTS and the adjacent commercial piers, and then turn approximately 55 degrees to starboard to pass parallel to the USS MASSACHUSETTS and underneath the Braga Bridge.[222]

For its part, Weaver's Cove claims that this analysis is in error because if "the LNG tanker (inbound and loaded) were to make a 55 degree port turn 'under the bridge' it would run aground in the shallow water to the northwest of the channel." Further, it states, "the purported concern about a 55 deg[ree] turn has no factual foundation and ignores the Coast Guard's experience elsewhere."

Having reviewed the chart and record on this point, I agree that the change in base course (i.e., the "turn") from under the Braga Bridge to a course preceding the one a vessel must make to line up on the Brightman Street bridge is 55 degrees. Weaver's Cove's assertion that such a turn "would necessarily result in grounding outside the channel" would be true if a vessel were to turn a full 55 degrees while immediately under the bridge. Such a literal, immediate interpretation overlooks the advance and transfer associated with such a turn. Thus, I do not think the COTP intended such an interpretation. Regarding the turn itself, the maneuver is an aspect of the transit worth noting. Like so many of the factors already discussed, the requirement for such a maneuver does not render the waterway unsuitable for commercial traffic in and of itself. The

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[219] LOR, enclosure (2) at § B.2.c.(10)(f).

[220] *See* Weaver's Cove letter to COTP of February 21, 2007 at 1.

[221] *See* Appeal at §§ II.F.4.a ¶¶ 4-6, pp.52-52; and III.A. ¶ 2, p. 57.

[222] LOR, enclosure (2) at § B.2.c.(3), p. 6.

repeated presence of large vessels making large turns in relatively close proximity to piers and moored vessel does, however, remain a relevant consideration. I agree with the COTP's treatment of this issue.

H. Nighttime Transits

In its appeal, Weaver's Cove contends that the COTP failed to actually consider the record before him because the Letter of Recommendation discussed nighttime transits as though they were part of the LOI proposal.[223] Weaver's Cove asserts that it "did not propose nighttime transits. And the NEMP Report specifically precludes nighttime transits." Therefore, it contends, "by not taking into account these two facts in the record this aspect of the Letter of Recommendation is arbitrary and capricious and is contrary to the record."

The possibility of nighttime transits was, however, proposed by Weaver's Cove in its initial Letter of Intent. The last sentence of section six, entitled "LNG Vessel Characteristics & Frequency of Shipments," of enclosure one to the LOI notes that: "After sufficient experience is gained it is intended to also adopt nighttime berthing and un-berthing operations." This same language is repeated in Weaver's Cove's February 2, 2006 change of information letter.[224] Similarly, Weaver's Cove's October 9, 2007 submission to the COTP notes: "As was the case and is in Boston Harbor, once sufficient operating experience has been gained there will be opportunity to consider night-time transit…"[225] For its part, while paragraph 10 of the NEMP report recommends that all transits be done during daylight, it too goes on to state that: "Should the pilots feel that night transits of the opening bridges are safe at a later time, they may recommend that to the USCG."

While Weaver's Cove has stated it would agree to limit transits into the Fall River area to daylight only, the COTP's consideration of this issue was appropriate given that the possibility of undertaking nighttime transits (at some point) was repeatedly mentioned in the materials submitted to the Coast Guard. Ultimately, I agree that transiting through the old and new Brightman Street bridges with large commercial vessels at night is ill advised.[226]

I. The Fendering Systems around the Brightman Street Bridges

In addition to Weaver's Cove's previously addressed procedural claims that it was not given fair notice of the COTP's concerns about fendering systems for the Brightman Street bridges,[227] Weaver's Cove questions the substantive relevance of this issue with respect to the suitability of the waterway for its proposed operation. It suggests that any concern for the fender systems

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[223] Appeal at § II.F.1.b.(6) ¶¶ 1-2.

[224] *See* Weaver's Cove letter to COTP of February 2, 2006 at Attachment 1, item #6.

[225] Weaver's Cove submission to COTP of October 9, 2007 at 2.

[226] *See* Regulated Navigation Area: Narragansett Bay, RI and Mount Hope Bay, MA, including the Providence River and Taunton River, Notice of Proposed Rulemaking 71 Fed. Reg. 30108 (May 26, 2006) (proposing limiting commercial vessel transits between the old and new Brightman Street Bridges to during daylight hours).

[227] Discussed, above, at § II.C.2, pp. 27-28.

should be directed at the bridge's owner (the Commonwealth of Massachusetts), not it; and further asserts that

> the old bridge fenders represent no more than cosmetic risk to the LNG tanker as there is no plausible scenario set forth in the record or otherwise under which an allision with the bridge (or the new bridge) could result in damage to the LNG tanker which would jeopardize the cargo containment systems or the vessel's handling or navigability.[228]

This argument discounts the fact that even a minimal puncture or hull breach can have significant environmental consequences.[229] Moreover, this argument assumes that damage to the bridge itself is irrelevant. It is not.

Weaver's Cove and others clearly view the "old, decrepit bridge," as an obstruction to navigation.[230] Nonetheless, by operation of law, it remains. While Weaver's Cove has offered to pay for any damage "in the unlikely even of an allision between the LNG tanker and the fendering system of either bridge," the COTP is charged by regulation to consider the safety and suitability aspects with respect to bridges, not liability.[231] Other commercial maritime interests, while few, transit through these bridges. Indeed, the NEMP is on record as stating that the poorly maintained fendering is the "primary factor" in their refusal to transit the 98 foot opening on vessels with a beam of 90 feet.[232] An allision with an "old, decrepit bridge" could result in its collapse or cause sufficient damage that would force the closure of the waterway. While I agree with Weaver's Cove that the bridge owner is ultimately responsible for upkeep of the bridge,[233] it is appropriate to consider – as one of many factors – the bridge's condition and the risks posed to it by the proposed marine transits.

J. The use of Tugs and their Configuration

Weaver's Cove takes issue with the COTP's conclusion that "the addition of tug boats and tow lines make maneuvering between the Brightman Street bridges even more difficult." Intuitively, tugs should aid in maneuvering vessels in "tight" place, not serve to complicate navigation. The concern in this unique situation, however, is that the additional length added by having a tugboat directly astern of a 725-foot[234] LNG tanker ultimately serves to make a tight situation - the 1100 feet between the old and new Brightman Street bridges – only tighter. As the COTP noted, "A tethered tug astern while absolutely necessary to ensure a commercial vessel

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[228] Appeal at § II.F.b.(5), p. 35.

[229] Even a small hull breach resulting from an allision, however, could result in environmental harm if non-cargo tanks are compromised.

[230] *See* Appeal at § I.C, p. 3.

[231] See 33 C.F.R. § 127.009(c).

[232] Northeast Marine Pilots, "Report on the Feasibility study of the Proposed Weaver's Cove LNG Ship to transit from Sea to the proposed LNG terminal in Fall River," at § 5.b, p. 3.

[233] *See generally*, 33 C.F.R. § 117.7.

[234] The smallest length proposed by Weaver's Cove is 725 feet. The MSI computer simulations were produced with ships modeled to be 732 feet.

transiting through one Brightman Street bridge does not impact the other bridge, nonetheless essentially adds to the length of any tug/ship combination, further reducing available room for maneuvering between the two bridges."[235]

On this point, Weaver's Cove questions the assumption that a tug would be tethered astern of the LNG tanker as it transits through the bridges. Specifically, Weaver's Cove suggests that such a configuration "is not contained within the conclusions of the NEMP Report, and is not otherwise found in the record. Hence, the statement is not based on facts in the record. As a result, it is arbitrary and capricious."[236]

The documents submitted by Weaver's Cove, however, confirm the anticipated presence of a stern tug. In the "Tug Boat Assistance:" portion of its feasibility study, the NEMP explained that "The majority of the transits [in which the pilots participated] were done with [] one assist tug actually attached to the stern of the vessel during each transit of the opening bridges."[237] Similarly, the Brightman Street Bridge Simulation Report, produced by MSI, notes that

> the [model] transits were completed with either one or two tugs. Tug utilization was determined by the individual Pilot controlling the ship for each specific run. Typically, there was either one tug through the center lead aft, or in the case of two tugs, one at the stern and one at the bow.[238]

Thus, the COTP's assumption that a tug would be utilized astern of the LNG tanker is supported by the record.[239] Moreover, the COTP's concern for the combined length of these vessels while engaged in towing and laterally moving a ~725 foot LNG tanker in a 1,100 foot confined stretch of the Taunton River, bounded by bridge abutments, remains a legitimate concern.

K. Simulation Modeling and the Pilots' Professional Judgment

Weaver's Cove contends that the simulation modeling of its proposed vessels, as conducted by Marine Safety International (MSI) in conjunction with the Northeast Marine Pilots (NEMP), supports its position that the intended transits – including between the old and new Brightman Street bridges – can be repeated safely, without incident.[240] It questions what it characterizes as the COTP's "cavalier"[241] dismissal of the data from simulated deliveries that it provided the

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[235] LOR, enclosure (2) at § B.2.c.(8), p.14-15.

[236] Appeal at § II.F.2.a.-b.

[237] *See* NEMP, "Report on the Feasibility study of the Proposed Weaver's Cove LNG Ship to Transit from Sea to the Proposed LNG Terminal in Fall River" (LOR, enclosure (1), document 41) at § 3, p 2.

[238] *See* MSI, "Brightman Street Bridge Simulation Report" of (LOR, enclosure (1), document 48) at ¶6, p. 2.

[239] Any assertion that tugs need not be placed astern casts further doubt on the value of the simulation model which "typically" utilized that configuration.

[240] *See* §§ I.C. ¶4, p. 4 ; I.D.3.b, p. 6; II.B.7, p. 16; II.C.4.¶2, p. 18.; II.F.1.b.(8) ¶¶ 2,3, and 6, pp. 36-7 & 39; II.F.1.b.(12) ¶¶ 3-8, pp. 43-45, II.F.3.b, pp. 48-49; and II.F.3.c., pp. 49-50.

[241] Appeal at § II.F.3.b.(2), p. 49.

Coast Guard, and notes that simulations using similar concept models have been utilized in a variety of other LNG project proposals – ultimately leading to favorable determinations by FERC and the Coast Guard in every other instance.[242] In a closely related point, it questions[243] the COTP's decision to disagree with NEMP's conclusion (based, in large part, on their participation in the MSI-simulated runs) that the proposed LNG vessels can be piloted safely from sea buoy to berth on a repeatable basis.[244]

The COTP, in his Letter of Recommendation, acknowledged his consideration of the MSI models, and the opinion of the pilots based thereon,[245] but ultimately disagreed on the specific issue of the safety of repeated transits between the old and new Brightman Street bridges. I understand and agree with the reluctance to rely heavily on simulated transits for this particular evolution. Undoubtedly, ship simulation is a powerful analytical tool in many situations. Even the most advanced simulators, however, have limitations. In addition to their general qualifying language on these models – as already highlighted by the COTP in his Letter of Recommendation[246] – the NEMP pilots who took part in the simulations commented on such limitations after undertaking certain runs. Tellingly, after run 24010704, one pilot remarked: "Simulator realistic for lining ship up for bridges. Hard to simulate steering ship through bridge."[247]

Other comments from the simulated runs only affirm the COTP's concerns about LNG ships transiting through the Brightman Street bridges. For example, after run 03010701, one pilot remarked: "Wind on port beam, Everything OK until bridge transits. Wind max limit for bridge (15 knots). Rainbow power seemed low for left hand turn in the basin."[248] Similarly, after run 10010701, another pilot commented: "Requires constant monitoring of ship's position in draw (BSB) until stern clears fenders." In fact, during run 24010704, the MSI documentation provided by Weaver's Cove shows an overlap of the tug located astern of the tanker and the fendering around the new bridge – indicating an allision.[249]

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[242] Appeal at § II.F.3.b.(2), p. 49.

[243] Appeal at § II.F.1.b.(8), p. 37 ("…the suggestion that the NEMP conclusion as to repeatable safe transits – conclusions by eleven (11) experience marine pilots after 91 simulations – carry on "nominal weight" is not supported by any rationale or facts or prior Coast Guard precedent. It is also offensive to the experience and care exercised by the NEMP over years of vessel transits in the bays and the simulations and discussions.")

[244] Appeal at §§ I.C. ¶ 4; I.D.3.b; I.D.3.d; II.B.7; II.C.4; II.F.1.b.(8).

[245] LOR, enclosure (2) at §§ B.3.c; C.1.h.

[246] LOR, enclosure (2) at § B.3.c.(1)(a) ("The Northeast Marine Pilots cautioned that the simulator had "inherent limitations" and that the tanker hull design had "not been proven.")

[247] Weaver's Cove navigational and Operational Data submission to COTP of February 21, 2007.

[248] *Id.*

[249] While Weaver's Cove mentions 91 modeled transits have been analyzed in its Appeal, in total, only 43 transits were run using the smaller modeled LNG carrier. Of the data printouts from the 11 transits provided to the COTP, one transit was with the larger Berge Boston LNG carrier without the old Brightman Street Bridge remaining. Thus, for my analysis, 10 runs were considered. One of those 10 runs, one suggests an allision between a tug and the new Brightman Street Bridge occurred.

Admittedly, some of the above comments may have been used to "tune" the model and "train" the pilots on the simulator itself. Nevertheless, I, like the COTP, remain skeptical of the ability to accurately model all of the (human and environmental) factors involved in the unique, tug-intensive, evolution that would be required to bring a ship through one bridge and then walk it laterally to line up for the second opening only 1100 feet away.

In its appeal, Weaver's Cove explains that the COTP's observation that a "stern tug came unacceptably close to the fender of the new Brightman Street bridge"[250] in a simulated run was due to a "break unrelated to the performance of the model that disrupted the pilot's management of the model."[251] Thus, it contends, "[t]his situation would not have arisen had the model been under management control. And in real life, it would not have arisen as the tug master would have been able to maneuver into clear water."[252] This explanation, however, seems to assume that there would never be a scenario where a pilot, master, helmsman, or tug master might not, themselves, be "disrupted" (or distracted) from their "management" of a very tight evolution. I find that the COTP acted prudently in his consideration of the simulations.

With respect to the COTP's deference, or lack thereof, to NEMP's ultimate opinion on the ability to navigate safely through the bridges on a repeatable basis, I note that in addition to considering their written submissions, the COTP took time to meet and talk with NEMP pilots in person by observing an MSI-simulated run, and by accompanying them through the Brightman Street bridges on coal ships – the only ships of a comparable size actually undertaking the evolution in question. It is my opinion that the COTP considered the insight of these unquestionably professional mariners appropriately, along with the other information in the record before him, but ultimately weighed the pilots' opinions in the context of the totality of circumstances.

For the foregoing reasons, I adopt the COTP's analysis and reservations about the modeling and third party opinions regarding the ability to safely transit the Brightman Street bridges with the type and size of vessels proposed by Weaver's Cove at the interval it envisions.

L. The COTP's Professional Qualifications

In the third of five closely related points, Weaver's Cove challenges the COTP's personal credentials, and questions how he can substitute his judgment for that of professional mariners with admittedly far more sea time and personal experience handling vessels in the Taunton River.[253] I am not persuaded by this argument. The diverse duties and responsibilities of a Coast Guard Captain of the Port are fundamentally different from those of commercial pilots, tug boat operators, and other professional mariners.[254] Unlike pilots charged with providing guidance to a

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[250] LOR, enclosure (2) at § C.1.h, p. 27.

[251] Appeal at § II.F.1.b.(12) ¶6, p.44.

[252] *Id.*

[253] *See* Appeal at §§ II.B.7 ¶¶ 7-8, p. 17; II.F.1.b.(8) ¶¶ 4, 6, pp. 37-38.

[254] *See generally*, 33 C.F.R. § 1.01-30 ("Captains of the Port and their representatives enforce within their respective areas port safety and security and marine environmental protection regulations, including, without limitation,

master for the safe navigation of the ship they are on, the COTP is charged with looking at the waterway holistically, and with managing the risks associated with operations therein (be they proposed or existing), by preventing mishaps, causalities and fatalities wherever possible, and responding effectively to minimize the loss of life and property whenever and wherever incidents occur. In this instance, he was responsible for assessing the myriad impacts and risks associated with the proposed recurring operations – not just the ability to maneuver a ship through two bridges on the unique environmental conditions present at any given time. There is nothing in the record to indicate the COTP was unqualified to do that job.

This argument, taken to its logical conclusion, is that for navigation safety issues, COTPs should simply rely on the opinion of the professional pilots and other mariners in their respective ports, who will invariably have more time aboard vessels transiting that area. I agree that pilots, and simulation modeling "experts" such as MSI, are exceedingly helpful to those charged, by law, with assessing the safety of a particular evolution. Such resources, however, are simply among the many opinions and factors to be considered; they are not the final word.

M. The COTP's Observations made aboard Coal Ships

In the fourth of five closely related substantive concerns with the COTP's analysis of the transits between the old and new Brightman Street bridges, Weaver's Cove questions the COTP's consideration of personal observations made while aboard coal ships in the Taunton River.[255] Specifically, Weaver's Cove questions the COTP's reliance on such observations based on the fact that the coal ships at issue are not the same size, and do not have the same maneuvering abilities as the specially designed LNG vessels it proposes to have built. The LNG tankers, which unlike coal ships that the COTP observed, would be maneuvered with bow and stern thrusters, as well as by powerful tractor tugs not currently used in the area.[256]

The record indicates that, of the vessels currently transiting the Taunton River, the coal ships constituted the best readily available, non-simulated platform for the COTP to observe, first hand, the navigationally challenging bridge transit evolution. The COTP's decision to personally observe that maneuver from these ships was due diligence on his part. Moreover, the COTP's Letter of Recommendation analysis readily acknowledges differences between the coal ships operating in the area and Weaver's Cove's proposed LNG vessels.[257]

Regarding the COTP's reliance on his personal observations, I do not interpret his references to such impressions as a proxy for transits aboard the yet-to-be constructed tankers, or as displacing the information submitted from the MSI-simulated runs (also personally observed, in part, by the COTP), which were modeled on the proposed LNG tanker design. Rather, it is clear that the COTP synthesized and considered the simulation data with the benefit of the perspective

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regulations for the protection and security of vessels, harbors, and waterfront facilities; anchorages; security zones; safety zones; regulated navigation areas; deepwater ports; water pollution; and ports and waterways safety.")

[255] *See* Appeal at §§ II.C.4., p. 18; II.F.1.b.(3) ¶ 2, p.31; and II.F.b.(8) ¶ 6, p. 39.

[256] *See id.*

[257] *See* LOR, enclosure (2) at p. 28, Table 3 and accompanying text.

and context gained through his personal observations. I find no harm in this approach, or over-reliance on observations from generically large deep draft vessels that operate in the area.

N. Human Error and Risk

Finally, Weaver's Cove challenges the COTP's treatment of human error and risk.[258] Among other things, it alleges error in the lack of a statistical risk analysis to support the COTP's listing of 17 separate "risk factors" associated with transits through the old and new Brightman Street bridges, and a generalized assertion that "multiplying the probability of all these risk factors, considered together for each transit of the bridges, while also considering the difficulty of the maneuver, leads only to a conclusion that the waterway is not suitable for marine traffic of the dimension, type, and frequency proposed by Weaver's Cove."[259] It also asserts a lack of record support for the COTP's assertion that the increased frequency of Weaver's Cove's smaller tanker proposal makes a risky evolution somehow riskier.[260] In reply, the COTP explained:

> I did not intend to employ a quantitative, statistical risk analysis of this evolution. Again, as you concede, it is undisputable that human error can contribute to marine accidents. The point is that the navigation evolution you propose leaves little to no room for such error – something the simulation modeling data and reports affirmed. Thus, I highlighted a number of places where that error could manifest to help illustrate why, in my professional opinion, navigating the proposed transit route with the type, size, and frequency of ships you propose cannot be done safely on a repeatable basis.[261]

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[258] Appeal at §§ II.B.5.a, p.14; II.D.4.a, p. 20; II.F.1.b (1), pp. 27-30; II.F.1.b (2), pp. 30-31; II.F.1.b.(9), pp. 39-40; II.F.1.b.(10) ¶¶ 3-6, pp. 40-42; II.F.1.b.(11), pp. 42-43; III.A. ¶ 2, p. 57; III.C., p. 63; III.D.2., p. 65.

[259] LOR, enclosure (2) at § C.1.c.(5), p.25. The 17 "factors" listed by the COTP's are: (1) Risk/probability of helmsman error, resulting in a bridge allision; (2) Risk/probability of engine order telegraph operator error, resulting in a bridge allision; (3) Risk/probability of conning error by pilot(s)/master, resulting in a bridge allision; (4) Risk/probability of human error by ship's bow and/or stern thrusters' operator, resulting in a bridge allision; (5) Risk/probability of human error by any of three tug operators that adversely affect control of the tanker, resulting in a bridge allision; (6) Risk/probability of mechanical failure in any of the three tugs adversely affecting control of the tanker while transiting a bridge, resulting in a bridge allision; (7) Risk/probability of coordination error between pilots when two pilots are in the wheelhouse, or between pilot and the master, adversely affecting safety during bridge transits, resulting in a bridge allision; (8) Risk/probability of ship steering failure resulting in bridge allision; (9) Risk/probability of loss of ship's main propulsion resulting in a bridge allision; (10) Probability of accurate vessel draft calculation, under-keel clearance, and transit time from sea to allow for bridge transit without grounding in the dredged channel; (11) Probability of a clear channel without obstructions; (12) Probability that favorable wind predictions are accurate and conservative for safe bridge transit, such that wind gusts do not set the ship onto a bridge while transiting; (13) Risk of mechanical failure of bridge opening systems on the old bridge (assuming the bridge is normally in the down position); (14) Risk of mechanical failure of bridge opening systems on the new bridge; (15) Risk of electrical failure to bridge operating system (old bridge) (assuming the bridge is normally in the down position); (16) Risk of electrical failure to bridge operating system (new bridge); and (17) Probability of bridge operator error in opening the old Brightman Street bridge to a full vertical position (assuming the bridge in normally in the down position).

[260] *See, e.g.*, Appeal at § II.F.1.b.(2), p. 30.

[261] Reconsideration Reply at § 2.b i. n.6, p. 4.

Weaver's Cove views this reply with suspicion[262] and notes, quoting the Coast Guard's own risk-based decision making "101" materials,[263] that it is "unaware of how risk can be assessed in the absence of an analytical process."[264]

As a preliminary matter, I do not take the COTP's reference to "multiplying" the risks associated with the 17 factors he enumerated literally. At least some of the listed factors, such as the risk of a failure on one bridge as opposed to a similar failure on the other, are mutually exclusive to a degree.[265] Thus, some factors simply cannot be multiplied, literally or figuratively. Accordingly, and in keeping with what the COTP's reconsideration reply seems to explain, I view the enumerated "risk factors" as *illustrative* of places in the "system" that would be employed to maneuver an LNG vessel through both bridges where human error, mechanical error, or both, could affect a safe transit.

Drawing from the COTP's listed factors, and looking at the evolution from a human factors perspective, I note that the bridge transit evolution would necessarily involve somewhere between four[266] to nine[267] mariners, each of which would have their own displays, controls, and communications to manage. Just as the "disrupted" loss of "management control" of the MSI-modeled transit observed by the COTP allowed a tug to nearly allide with a bridge,[268] a distraction of any of the aforementioned people could start an error chain that leads to a casualty.

Perhaps anticipating this point, Weaver's Cove suggests that, at its core, a transit through the Brightman Street bridges is closely analogous to moving ships in and out of locks in the St. Lawrence Seaway (without tugs), or the "industry standard sideways berthing and un-berthing maneuvers" carried out "in every port in the world."[269] I disagree. As previously stated, comparisons to potentially *similar* evolutions in other waterways are of limited value given the uniqueness of environmental conditions and configurations for any given port. The proposed evolution requiring the coordinated "locking" of a LNG carrier through such a small, narrow

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[262] Appeal at § II.B.5.a, p. 14 ("…the credibility of this rationale is shown to be suspect as it is not what was stated in the LOR. Among other phrases included in the human error discussion in the LOR are "75-95% of marine casualties," "84-88% of tanker accidents," "75% of allisions, "dependent on the highest probabilities of success," seventeen references to "Risk/probability," risk or "probability" and "multiplying the probability of all these risk factors." If the COTP's citation to these statistical facts and theories does not imply he relied on statistical risk analysis, then his citation to the paper as support for his own general opinions that human error may contribute to the overall risk of the project is misleading at best.")

[263] Appeal at § II.F.1.b (1), p. 27. (citing the Coast Guard Marine Operations Guide, *available at* http://uscg.mil/hq/g-m/advisory/ctac/morg.pdf .

[264] Appeal at § II.F.1.b (1), p. 27.

[265] Should one bridge fail to open, the failure of the second to do so is arguably irrelevant.

[266] The tanker pilot and three tug masters.

[267] Two pilots, the LNG carrier's master, the tanker's helmsman, a engine order telegraph operator (if different from the helmsman, one thruster operator, and the three tug masters.

[268] Discussed above, at pp. 44-46.

[269] Appeal at § II.F.1.b.(1), p. 26.

stretch of river, bounded on both sides by concrete bridge abutments, with a heavy reliance on multiple, powerful tractor tugs for each and every transit, is unique.

Thus, is it not surprising that the record does not contain further statistical analysis of the various components associated with taking a deep draft vessel (of any significant size) through the Brightman Street bridges. None is needed to support the simple proposition that transit through these bridge leaves little margin for error, and that human error may contribute to a casualty in any number of places in that transit. Even without quantifying that risk, viewing such risk (generically) as a percentage, any increase in the number of times such an evolution is undertaken mathematically increases the raw number of incidents that could be expected to occur.

Conclusion

In consideration of the foregoing analysis, I AFFIRM the COTP's determinations, analysis, and ultimate recommendation contained in his Letter of Recommendation and Reconsideration Reply, subject to the comments and qualifications contained in this letter. Specifically, I modify the COTP's recommendation on the waterway from near Sandy Point, Prudence Island, Rhode Island to the proposed facility in Fall River, Massachusetts, and conclude that it is unsuitable from a navigation safety perspective for the type, size, and frequency of LNG marine traffic associated with Weaver's Cove's proposal, as amended. However, should the status of the Brightman Street bridges change, the suitability of the federal channel leading thereto should be re-evaluated, from both navigation safety and security perspectives.

Based on the conclusions described above, Weaver's Cove's appeal is DENIED.

Should Weaver's Cove feel aggrieved by this action, it may appeal this letter ruling to the Assistant Commandant for Marine Safety, Security and Stewardship, pursuant to 33 C.F.R. §127.015(c)(1). Any such appeal must be submitted, in writing, within 30 days of receipt of this letter. Appeal of my determination should be addressed to:

Commandant (CG-5)
2100 2nd Street, S.W.
Washington, DC 20593

If the delay in presenting a written appeal would have an adverse impact on Weaver's Cove's operations, it may request to make an oral presentation, but a written request must be submitted within five days of any such oral presentation.

Sincerely,

T. S. Sullivan
Rear Admiral, U.S. Coast Guard
Commander, First Coast Guard District

16000
001-08-08479

Enclosures: (1) The COTP's Letter of Recommendation and "Administrative Record"
(2) Weaver's Cove's Request for Reconsideration and Supporting Exhibits
(3) Weaver's Cove's Appeal and Supporting Exhibits
(4) Assembly of Correspondence between the Coast Guard and Weaver's Cove

Copy: COMDT (CG-5)
Commander, Atlantic Area (Am)
Federal Energy Regulatory Commission
U.S. Army Corps of Engineers, New England District
U.S. Congressional Delegations for Massachusetts and Rhode Island
City of Fall River