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Attachments: FINAL__SeaOne Follow-up to Assistant Secretary Smith 08 JAN 2017.docx

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From: Gordon Arbuckle <gordona123@earthlink.net>
Sent: Sunday, January 8, 2017 7:47:43 PM
To: Smith, Christopher A
Cc: Desouza, Shannon (CONTR)
Subject: SeaOne--Follow up to Friday Discussion

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Good Morning Sir: Attached is a note addressing some of the issues we discussed on Friday. These, in particular, seemed to be important issues as to which you had not been properly advised. I hope this is helpful. By the way, the "natural gas unmixed" language is in Section 2 (a) (5) of the NGA.

Regards, Gordon

Note to Assistant Secretary Chris Smith

January 8, 2017

Follow- up to Friday 1/06/2016 Discussion

Our Friday discussion suggests to me that your staff has given you mistaken advice on the critical elements of your obligations relating to SeaOne's application for authority to ship CGL to non-FTA countries. This information appears to have prevented you from fulfilling your mandatory obligations under the NGA. The more important of these staff misrepresentations, which appear to result from the mistaken belief that exports of natural gas in CGL are subject to the restrictions applicable to LNG and LNG Terminals under Section 3 (e) of the NGA as amended, are as follows:

1. Staff has provided erroneous advice regarding your mandatory obligation under the Act.

According to Staff's December 23rd letter to SeaOne, the Staff position is that you may not grant SeaOne's application unless you find that such grant is "not inconsistent with the public interest."

In fact, the law is crystal clear. You *"shall"* approve the application "*upon application"* unless you find "*after an opportunity for a public hearing"* that the grant "*will be inconsistent with the public interest."*

Obviously, there is a big difference between the Staff position and the law. The Staff's position is that you cannot approve the application until you find that it is "not inconsistent with the public interest." Under the actual words of the law, unless there is some basis for a finding, after an opportunity for a hearing, that the proposed export will be inconsistent with the public interest, you *must* approve the application. Here, there is no such basis and there has been no opportunity for a hearing. You do not have discretion to deny the application. Rather, you have a mandatory obligation to issue it.

2. Staff apparently has not advised you of your obligation to act based on evidence in the record.

DOE's regulations could not be more clear on this issue:

10 C.F.R. § 590.404 Final opinions and orders.
The Assistant Secretary shall issue a final opinion and order and attach such conditions thereto as may be required by the public interest after completion and review of the record. The final opinion and order shall be based solely on the official record of the proceeding and include a statement of findings and conclusions, as well as the reasons or basis for them, and the appropriate order, condition, sanction, relief or denial.

The record in the SeaOne matter has been closed for over six months and it does not include a shred of evidence either that the grant of the authorization might not be in the public interest or that it, in any way, might be related to authorization of the Gulfport Facility rather than the destination of exports from it. Since June 17, 2016, you have had a mandatory and non-discretionary obligation to approve the application.

3. Staff has given you erroneous advice regarding the applicability of NEPA in this matter.

Apparently staff has advised you that NEPA is applicable, without exception, to all NGA Section 3 decisions. In fact, as the following cases, among many others, show, NEPA is inapplicable to non-discretionary decisions such as your decision in this matter.

Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995): An environmental organization filed suit against the DOI, seeking to enjoin a logging company's construction of a logging road on a right-of-way crossing BLM's forestland. The environmental organization alleged that BLM failed to comply with NEPA's procedural requirements before allowing the construction. The court noted that NEPA is "triggered by a discretionary federal action" and that "case law is . . . forceful in excusing nondiscretionary agency action or agency 'inaction' from the operation of NEPA."

South Dakota v. Andrus, 614 F.2d 1190, 1193-94 (8th Cir. 1980): South Dakota sought to compel the DOI to prepare an EIS before issuing a mineral patent to a company. The court held that the issuance of a mineral patent was not a major federal action requiring an EIS. Specifically, the court held: "Ministerial acts . . . have generally been held outside the ambit of NEPA's EIS requirement. Reasoning that the primary purpose of the impact statement is to aid agency decisionmaking, courts have indicated that nondiscretionary acts should be exempt from the requirement . . . [I]t is at least doubtful that the Secretary's nondiscretionary approval of a mineral patent constitutes an 'action' under 102(2)(C)."

Alaska Wilderness League v. Jewell, 788 F.3d 1212, 1225-26 (9th Cir. 2015): Plaintiffs, in challenging approval of an offshore facility operator's oil spill response plans, argued that the Bureau of Safety and Environmental Enforcement violated NEPA by failing to prepare an EIS before approving the plans. The court notes that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency does not need to consider the environmental effects arising from those actions."

Minnesota by Alexander v. Block, 660 F.2d 1240, 1259 (8th Cir. 1981): in discussing whether an EIS was required under NEPA for certain motorboat use restrictions, the court held:

> For an EIS to be required, some future federal action, on which an EIS may have some effect, must be anticipated….[The regulations at issue] automatically went into effect on January 1, 1979….The Secretary had no discretion or power to

> circumscribe, delay or expand the [regulations]. Because the Secretary has no discretion to act, no purpose can be served by requiring him to prepare an EIS, which is designed to insure that decisionmakers fully consider the environmental impact of a contemplated action.

Consistent with these cases, DOE's regulations specifically provide as follows:

10 C.F.R. § 1021.101 Policy. It is DOE's policy to follow the letter and spirit of NEPA; comply fully with the CEQ Regulations; and apply the NEPA review process early in the planning stages for DOE proposals.
§ 1021.102 Applicability.
(a) This part applies to all organizational elements of DOE except the Federal Energy Regulatory Commission.

(b) This part applies to any DOE action affecting the quality of the environment of the United States, its territories or possessions.
10 C.F.R § 1021.104 Definitions.
(b) In addition to the terms defined in 40 CFR part 1508, the following definitions apply to this part:
Action means a project, program, plan, or policy, as discussed at 40 CFR 1508.18, that is subject to DOE's control and responsibility. Not included within this definition are purely ministerial actions with regard to which DOE has no discretion.

Your mandatory decision to approve SeaOne's application is not an "action" under the law or DOE's regulations. No environmental review is required or authorized.

* * * *

Although our discussion revealed a number of other instances (most of which were discussed in our letter to you of January 3, 2017) in which your Staff has given you erroneous advice, those outlined above are of critical importance since your reliance on the Staff advice in these three areas has left you in a position of having not performed a mandatory legal obligation. It is neither sufficient nor relevant to defend this failure by reference to policies followed in the regulation of LNG exports. LNG is regulated under a different subsection of Section 3. Is should be readily apparent that LNG precedent does not apply to CGL exports.

To summarize, your staff has failed to advise you that: your action to approve SeaOne's application is mandatory; your decision must be based on the record; where the record contains no evidence to support denial, your approval is non-discretionary and non-discretionary decisions are not federal actions under NEPA. The failure to make you aware of these rules of decision has resulted in your failure to fulfill an obligation which is mandatory under the NGA.

The unwarranted delays in your decision, which again appear to be attributable to improper advice from your Staff, could, instead, be interpreted as an intentional effort to delay implementation of an important new and sustainable technology. Of even greater concern is that continued failure to act

will affect decisions regarding long-term, fuel procurement commitments and thus deprive affected Caribbean countries of the economic and environmental benefits of CGL technology. This truly is a matter where conscience compels immediate action, and such action is clearly within your authority. We ask that you promptly issue an order that states that:

1. You have reviewed the record in the SeaOne Matter;
2. There is no evidence in the record to support a conclusion that granting the application will be inconsistent with the public interest or that conditions on the authorization are appropriate; and
3. As required by the statute, the application is granted.

This is a simple, just and legal solution to a long-standing and unduly contentious issue. We trust that you will take the proper course and issue the necessary order.

Respectfully submitted,
Gordon Arbuckle
Counsel to SeaOne Gulfport LLC