

DOWNEAST LNG, INC and) APPLICATIONS FOR AIR EMISSION,
DOWNEAST PIPELINE, LLC) SITE LOCATION OF DEVELOPMENT,
Robbinston, Calais, Baring Plantation) NATURAL RESOURCES PROTECTION ACT,
Baileyville, Princeton) WATER QUALITY CERTIFICATION
Washington County, Maine)
#A-000960-71-A-N) SEVENTH PROCEDURAL ORDER
#L-23432-26-A-N)
#L-23432-TG-B-N)

This Order sets forth the Chair’s ruling on the Motion to Strike filed by Downeast LNG, Inc. and Downeast Pipeline LLC (Downeast LNG) on September 7, 2007.

1. On September 7, 2007, Downeast LNG filed a Motion to Strike from the record certain public comment materials submitted at the public hearing sessions on July 17 and 19, 2007 or in writing prior to the comment deadline. The challenged materials include the following:
 - Jessie Davies: July 17, 2007 letter and attachment entitled: “A summary of the historical earthquake activity in the province of New Brunswick” by Kenneth B.S. Burke;
 - Dr. Leigh Smith: July 17, 2007 letter addressing a number of issues including seismic risk;
 - Dr. Robin Hadlock Seeley: July 17, 2007 letter regarding invasive species;
 - Dr. Thomas Trott: July 18, 2007 letter and accompanying book entitled “Ecosystem Modeling in Cobscook Bay, Maine: A Boreal, Macrotidal Estuary” Northeastern Naturalist, Volume 11, Special Issue 2, 2004;
 - Art MacKay: Materials included his resume, draft technical report entitled “Identification of Ecologically and Biologically Significant Areas in the Bay of Fundy, Gulf of Maine” by M-I Buzeta and R. Singh; copy of book entitled “Marine and Coastal Systems of the Quoddy Region, New Brunswick”, edited by Martin L. H. Thomas, Department of Fisheries and Oceans, Ottawa 1983.
 - Quoddy Link Marine: July 19, 2007 letter and accompanying materials on whale sightings;
 - Dr. Lesley Pinder: Statement and accompanying materials on noise and light pollution;
 - Mary Meyers: Statement and accompanying U.S. Government Accountability Office (GAO) document dated May 7, 2007 on “Maritime Security: Opportunities Exist to Further Clarify the Consequences of a Liquefied Natural Gas Tanker Spill”;
 - Janice Harvey: July 19, 2007 letter submitted on behalf of the Fundy Baykeeper Program and attachments including excerpts from “Identification of Significant Marine and Coastal Areas in the Bay of Fundy” by Buzeta, Singh, and Young-Lai, 2003, and photographs of water discoloration in Oak Bay, NB in the vicinity of the Bayside Marine Terminal;
 - Brian W. Flynn: July 13, 2007 statement regarding impacts of an LNG release on the environment and public health;
 - Alan Brooks: July 18, 2007 letter submitted on behalf of Quoddy Regional Land Trust;
 - Fred Hartman: July 18, 2007 letter regarding impacts to wildlife;

- Janice Meiners: July 20, 2007 letter regarding fishing weirs; and
 - Jon Bragdon: July 19, 2007 letter regarding history of accidents associated with LNG.
2. In its motion to strike, Downeast LNG argues that: A) some of the public witnesses presented themselves as experts and/or submitted materials of a technical nature and, therefore, should have been subject to cross-examination; B) some of the public witnesses are members or supporters of the intervenor group Save Passamaquoddy Bay *et al.* (SPB) or were initially proposed as witnesses for SPB and, therefore, should have presented any testimony that is of a technical nature during the portion of the hearing reserved for SPB's witnesses; and C) some of the public witnesses presented evidence related to safety issues over which the Board does not have jurisdiction in this proceeding.
 3. On September 12, 2007, SPB filed a response in opposition to the motion to strike. In its response, SPB argues that Downeast LNG did not object to the challenged testimony or seek to question the challenged witnesses during the hearing and that it is now too late to do so. SPB also argues that the Board has not previously prohibited members of the public, including technically-versed individuals, from either testifying or submitting technical information for the Board's consideration. With respect to individuals who were previously identified as witnesses for SPB, SPB argues that, in the case of Ms. Harvey, she was removed from the witness list very early in the proceeding and had a right to testify as a member of the public. In the case of Mr. MacKay, SPB argues that he is not a member of any party to the proceeding and that he had a right to testify on his own behalf on material not related to the previously stricken testimony. Finally, SPB argues that virtually every witness at the hearing was a supporter of either Downeast LNG or SPB and that support for one party or another is not grounds for striking that person's testimony from the record.

Ruling:

The Maine Administrative Procedure Act (5 M.R.S.A. § 9051-A(1)) provides that "interested persons may prepare and submit evidence and argument to the agency..." and that the provisions governing intervention "not be construed to limit public participation in the proceeding in any other capacity" (5 M.R.S.A. § 9054(2)). Further, the Board is explicitly charged with providing for "credible, fair and responsible public participation in department decisions" (38 M.R.S.A. §341-B). Accordingly, the Board is reluctant to strike evidence offered by a member of the public that is timely filed in accordance with the rules.

In accordance with the statutes cited above and Chapter 2, section 16 of the Board's rules, the Board and the Department routinely invite and accept written comment, including technical information, on a pending application. While such comment is often general in nature, there is no requirement that a person or organization that has technical expertise in an area relevant to the review criteria for an application become an intervenor in an adjudicatory proceeding in order to share information or views with the Board or Department.

Some of the evidence which is the subject of the applicant's motion to strike was sent to the Board while the record was open or simply handed in at the hearing, a method of commenting which the members of the public were told they could use, as the number of people wishing to testify was very large and hearing time was limited. Evidence that is sent to the Board or Department or handed in at a hearing is not given under oath or subject to cross-examination, and it will generally be accorded less weight than evidence presented by persons testifying at a public hearing. To the extent that any such evidence is irrelevant to the review criteria in this proceeding, it will be disregarded.

To the extent that the challenged evidence was submitted at the hearing by persons testifying, Downeast did not request to see the documents being submitted or request cross-examination. The Board acknowledges that, given the number of persons testifying, the public testimony sessions of the hearing were not conducive to the examination of the documents these witnesses offered for consideration. However, if Downeast had voiced its objections at the hearing the witnesses could have responded to the objection and the Board could have allowed cross-examination. The parties were informed in pre-hearing conferences that while cross-examination of the numerous members of the public generally does not occur due to time constraints and the nature of the testimony, it is not prohibited. Counsel for the parties were strongly encouraged to attend the evening sessions of public testimony for the express reason that substantive evidence may be submitted.

Finally, while the parties were cautioned not to put on during the evening sessions testimony from officers or officials that should be part of that party's case in chief, the fact that a person is an employee, member, or supporter of one party or another to the proceeding is not, in and of itself, sufficient grounds to strike that person's testimony or evidence.

Therefore, the challenged submissions will be allowed, as follows:

Dr. Leigh Smith, Dr. Robin Hadlock Seeley, Dr. Thomas Trott, and Brian Flynn: These persons, who may be considered experts in their respective fields, did not testify at the hearing but submitted written comments of a technical nature for the Board's consideration. The fact that they did not testify at the hearing, were not available for cross-examination, and not under oath goes to the weight their submissions will be given, but not the admissibility. To the extent the submissions stray into areas not relevant to the review criteria, they will be disregarded. With respect to the book submitted by Dr. Trott, the Board notes that the technical papers contained in the book have as their primary focus Cobscook Bay and, therefore, may have limited relevance to this proceeding. The comments of Mr. Flynn largely focus on safety issues outside of those which the Board will consider under the statutory criteria, and thus will have limited relevance.

Dr. Lesley Pinder and Mr. Fred Hartman: These witnesses may be considered experts in their respective fields. They appeared at the hearing under oath and were available for questioning by the parties. Their written statements were submitted at the hearing and were available for examination. Their testimony is relevant to the review criteria in this proceeding.

Quoddy Link Marine: Lisa Eldridge, the co-owner of Quoddy Link Marine, testified at the hearing on the presence of whales in areas through which the LNG tankers would pass. She was available for cross-examination. Her written submissions are directly related to her oral testimony, and are relevant to the review criteria.

Mary Myers and Jon Bragdon: Both Ms. Myers and Jon Bragdon testified at the hearing, and thus were available for cross-examination. The GAO report on Maritime Security attached to Ms. Myers written statement contains some information on the chemical and physical properties of LNG (similar to that submitted by some of the parties to this proceeding); however, it primarily discusses safety issues which the Board will not be considering. Mr. Bragdon's written statement also focuses on aspects of the safety of LNG tankers and facilities which are outside of the Board's review criteria. To the extent these two items focus on matters outside of the Board's consideration, they will be of limited relevance.

Janice Meiners: Ms. Meiners' written statement provides information on the location of fishing weirs. These weirs appear to be located outside of Maine's coastal waters and, therefore, the information is of limited relevance.

Alan Brooks: Mr. Brooks is the Executive Director of the Quoddy Regional Land Trust. His letter contains information relevant to the review criteria in this proceeding. There is not a requirement that an organization such as the Quoddy Regional Land Trust intervene in a proceeding in order to present relevant evidence for the Board's consideration. The fact that Mr. Brooks did not testify and his statement was not presented under oath will go to the weight of the evidence.

Jessie Davies and Janice Harvey: Both Ms. Davies and Ms. Harvey were identified as potential witnesses for SPB early in this proceeding. SPB subsequently filed a request to substitute other witnesses for Ms. Davies and Ms. Harvey. That request was granted with a finding that the request was filed sufficiently in advance of the deadline for pre-filed testimony to make prejudice to any party highly unlikely (Third Procedural Order). The fact that Ms. Davies and Ms. Harvey were initially identified as witnesses for another party does not preclude them from testifying or submitting information on their own behalf or on behalf of another organization not party to this proceeding. Ms. Davies submitted a technical paper written by a professor at the University of New Brunswick on earthquake activity in the province of New Brunswick. While Ms. Davies was available for cross-examination, the fact that the author of the paper she submitted was not available for questioning will go to the weight of the evidence. Ms. Harvey is the Director of the Fundy Baykeeper Program of the Conservation Council of New Brunswick. The fact that Ms. Harvey was not present at the hearing for questioning will go to the weight of the evidence.

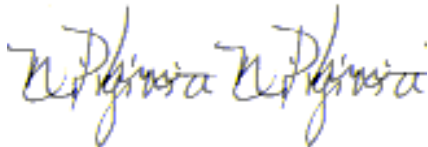
Art MacKay: Mr. MacKay was originally a witness for SPB. His pre-filed testimony consisted of technical information on LNG tankers and safety, and was stricken from the record. In its response to the Motion to Strike, SPB states that Mr. MacKay is not a member of any party to the proceeding. Mr. MacKay testified as Executive Director of the St. Croix Estuary Project on matters not related to the testimony which was stricken from the record. At the hearing, Downeast was explicitly given an opportunity to object to Mr. MacKay's testimony, but declined to do so. The fact that the authors of the challenged report, which is in draft form, and the authors of the various chapters in the book were not available for cross-examination will go to the weight of the evidence.

4. Appeal

Any appeal of this Order to the full Board must be filed by Friday, October 5, 2007 at 4:00 pm and will be considered by the Board immediately prior to the public hearing on Thursday, October 25, 2007.

DONE AND DATED AT AUGUSTA, MAINE THIS 27th DAY OF SEPTEMBER, 2007

BOARD OF ENVIRONMENTAL PROTECTION



BY: _____
Virginia N. Plummer, Chair