STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

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| DOWNEAST LNG, INC. AND | ) | |
| DOWNEAST PIPELINE, LLC | ) | Applications for: Air Emission, |
| Robbinston, Calais, Baring Plantation, | ) | Site Location of Development, |
| Baileyville, Princeton | ) | Natural Resources Protection Act, |
| Washington County, Maine | ) | and Water Quality Certification |
| | ) | |
| # A-000960-71-A-N | ) | |
| # L-23432-26-A-N | ) | |
| # L-23432-TG-B-N | ) | |

**MOTION TO DENY APPLICATIONS WITHOUT PREJUDICE**

Intervenors Nulankeyutmonen Nkihtahkomikumon (We Take Care of Our Land) and its individual member-intervenors; Save Passamaquoddy Bay - U.S. and its individual member-intervenors; Fundy North Fishermen's Association; and Fundy Weir Fishermen's Association ("Movants") move the Board of Environmental Protection ("BEP" or "the Board") to deny, without prejudice, the pending applications filed by Downeast LNG, Inc. and Downeast Pipeline, LLC ("DeLNG") (hereinafter, "application" or "proposal") for approval to construct an LNG terminal in Robbinston, Maine.

DeLNG's application does not meet threshold DEP rules that limit what applications BEP can review and when. These threshold DEP rules – rules that require financing for the project be in place, and that title, right or interest be secured at the outset – are intended to protect the BEP, DEP staff, and third parties from wasting time and scarce public resources in reviewing applications to merely provide speculative advantage through early regulatory approval of highly uncertain development ideas. They also protect the public and Maine's natural resources from speculative projects.

These threshold DEP rules require that any applicant:

(1) demonstrate financial capacity to construct, operate, and maintain the project, 38 M.R.S.A. § 484(1); DEP Rules Ch. 373(1)(A);

(2) demonstrate title, right or interest to use the property as proposed, DEP Rules Ch. 2(11)(D) & Ch. 372(9); and,

(3) demonstrate the ability to begin construction of the LNG terminal within two years, and complete construction within five years, DEP Rules Ch. 372(12)(F) & (G).

These three requirements go to the very core of whether DeLNG's application is timely, because DeLNG's application has fundamental difficulties that preclude its ability to meet these requirements. Movants believe that the BEP should deliberate and decide this motion now, well before the scheduled July hearing, because a BEP determination that any one of these three obligations has not been met (or will not be met in the very near term) means that the long, resource-intensive July hearing would be unnecessary.

Movants respectfully request that the Chair promptly issue a briefing schedule on this motion and schedule oral argument thereon (or, alternatively, schedule a show-cause hearing where DeLNG can attempt to meet its burden on these fundamental issues).

## I. INTRODUCTION AND BACKGROUND

### A. The Race.

This application has a back-story. DeLNG is in a race. This race has over forty competitors in the United States, including onshore and offshore LNG terminal projects proposed or identified by project sponsors in *seventeen* locations along the Eastern Seaboard of the United States: four in Massachusetts (two offshore terminals already approved by the Coast Guard and a third potential proposal, all off Boston, and one already-FERC-approved proposal in Fall River, MA); one offshore terminal proposed for

Long Island Sound and another New York proposal; one already-FERC-approved terminal in New Jersey; one proposal for Philadelphia; one already-FERC-approved terminal in Maryland and another proposed for Baltimore; and four terminals proposed for Georgia and the Florida/Bahamas coast. In Maine, of course, intervenors-competitors Quoddy Bay, LLC and North East Energy Development Company are in the race, by proposing terminals in Perry and Calais, respectively.[1] In addition, five potential terminals in eastern Quebec and the Maritimes are also part of this race.

DeLNG and all the other East Coast LNG competitors/developers are each jockeying and pressuring for rapid regulatory approvals of their particular onshore or offshore LNG development idea, to capture a portion of the urban East Coast natural gas market. These LNG competitors/developers, including DeLNG, know that only a few such facilities will ever be economically viable or necessary to meet projected demand, but all are competitively seeking to "be the ones," and are responding to an open-competition policy adopted by FERC in 2002.[2] These competitors also believe that if *their* particular LNG project crosses the finish line and obtains required regulatory approvals, then the race prize they will have won – development licenses – could one day possess significant speculative marketplace value. While this marketplace value could be in the form of the actual applicant constructing the proposed LNG facility at some point in the future when the dust of competition finally has settled, it is equally, if not more

[1] See FERC Maps, "Existing and Proposed North American LNG Terminals," and "Potential North American LNG Terminals," attached as Exhibits 1 and 2. Available at, respectively, http://www.ferc.gov/industries/lng/indus-act/terminals/exist-prop-lng.pdf and http://www.ferc.gov/industries/lng/indus-act/terminals/horizon-lng.pdf.

[2] See FERC LNG Policy description, available at http://www.ferc.gov/industries/lng/indus-act/policy.asp.

probable that these LNG developer/competitors believe that the market value of their permits will reside in the permittees' ability to some day either:

(1) sell the permits and the project to another developer, likely a major established player with deep pockets and an industry track record, and thus an entity possessing the financial capacity and development expertise to pull off such an expensive and inherently dangerous operation; or

(2) sell the permits and the project to a competitor who is interested in buying out the rights to the project to ensure that this competition is quieted and the competing project is never developed.

In short, DeLNG and its competitors in the race for LNG permits are speculative developers – nothing more and nothing less. The money required to participate in this speculation race goes to fund the costs of the various permitting processes, including the costs for land leases, environmental and geo-technical studies, consultants and attorneys, all expended in an effort to secure marketable approvals from BEP, the Coast Guard, Army Corps of Engineers, and FERC. Once secured, these permits essentially become an option that the permittee can one day use or sell, speculating now that the option will have significant later-day value.

B. BEP's Responsibility in this Race.

As an economic development concept, there may be nothing wrong with this speculation or permit race. But while such speculation may be completely acceptable for financial entrepreneurs, and is an understood part of the FERC process, Maine's permitting laws place conditions and limits on how and when Maine's permit approvals may be obtained. Maine laws control this permit race through standards established by

statute, DEP rule, and supporting case law to protect the public interest and treasury, as this review process is expensive and resource intensive. Approval of speculative permits also ties up and pre-commits important shoreline and other areas at the expense of other potential industrial or non-industrial use, whether public or private.[3]

For these reasons, Maine law prohibits the DEP from approving applications for projects that amount to mere speculation, and are not, in reality, ready-to-build, development proposals with available financing. As outlined in the statutory and rules provisions below, each competitor before BEP can enter the race for permits only when, as an applicant, it can demonstrate that all the financial requirements and property rights needed to build the project are in place, and therefore expenditure of the significant and scarce BEP and DEP resources needed to oversee and adjudicate the application process – resources that are both volunteer- and taxpayer-financed – are protected for real projects, and not misspent on projects that cannot demonstrate they will be constructed after the lengthy review process. Simply put, under Maine law the issues of whether and when to review an application, particularly a complicated and large application, are not solely the prerogative of the applicant.

C. <u>DeLNG Posture with BEP at the Starting Line – A Brief Overview.</u>

DeLNG has placed before BEP an LNG development proposal that *might* at some future, unknown time gain the necessary financial backing to be constructed, but currently lacks this backing, and that *might,* at some future unknown time, overcome major legal barriers due to own choice of a terminal site. Specifically:

[3] For instance, should permits for this LNG facility be approved, this act of approval, regardless of construction, would significantly impact the prospects for attracting capital needed for any new ecotourist, fishing, tourism, or other types of area development that backers believe to be incompatible with a large-scale LNG terminal and heavy industrialization of Passamaquoddy Bay.

- Financial capacity. The financial capacity evidence presented by DeLNG in its application *does not include any statement from any financial entity that actually commits to fund construction, operation and maintenance of DeLNG's proposal if permits are obtained,* as required by DEP Rules Ch. 373(B)(4). No bank, hedge fund, or venture capitalist has stepped forward to tell the BEP that "if you and other regulatory bodies approve DeLNG's proposal, we will provide the equity and debt financing necessary to construct this project." Instead, DeLNG attempts to finesse this gaping financial capacity hole by mustering commitment from an entity named Kestrel Energy Partners, LLC, promising to merely "arrange" financing should all approvals be obtained. Site Location Application § 3, Appendix A. As demonstrated below, any offer to "arrange" financing – an industry "term of art" – is significantly different than an "intent to fund" as required by DEP rules, and is laden with broad escape-clause contingencies tied to unspecified future market conditions and the investment climate.
- Title, right or interest. Just as DeLNG was getting situated in the BEP starting block, on February 14, 2007 the Government of Canada (in a long-foreshadowed action, and consistent with its past actions on proposed industrial projects in Eastport), informed the United States that it will not allow LNG tankers to pass through Head Harbour Passage – DeLNG's sole supply route for natural gas. Simply put, without Canadian approval this proposed LNG import facility would not be able to receive LNG. DeLNG has no right to the shipping lanes necessary to use the site as it proposes. Whether or not Canada ultimately prevails in its legal position – and Movants do not ask the Board to make a judgment on who will prevail – DeLNG is asking the BEP to wholly ignore the extreme relevance of Canada's action to the question of whether DeLNG possesses sufficient title,

right or interest to conduct the importation activity on which its project critically depends. Further, DeLNG itself admits that it is in the awkward position of not having legal control over all lands necessary to construct and operate its proposed LNG import facility.[4]

- Construction beginning in two years, completed in five. In filings before FERC DeLNG concedes that Canada's legal right to prohibit importation of natural gas to DeLNG's proposed terminal cannot and will not be adjudicated or resolved by FERC as part of the permit review process there.[5] As such, unless Canada surprisingly relents in its position, which as discussed below seems extremely unlikely (and which DeLNG, to date, has not demonstrated otherwise), it is inconceivable that DeLNG's proposal could be constructed in the time periods required by DEP's regulations.

In overview, this motion addresses the fact that DeLNG has failed to demonstrate three separate requirements all of which are necessary for BEP to go forward *at this time* with application review. While it is up to DeLNG to decide whether to participate in the permit race, participation before the BEP must be according to Maine law. It is not.

## II. ARGUMENT

### A. The Application Submitted by DeLNG Does Not Demonstrate the Financial Capacity to Construct, Operate, and Maintain the Facility as Required by the Site Location of Development Law.

The Site Location of Development Law and associated regulations require applicants to demonstrate the financial commitment to construct, operate, and maintain

[4] DeLNG Application to FERC, Resource Report 11, Response to FERC Staff Comments at 3, attached as Exhibit 3.

[5] DeLNG Response to Consolidated Motion (FERC) (Apr. 3, 2007) at 2 ("As Movants [SPB-US et al.] note, '[t]he safety issues addressed by FERC are necessarily limited to those within the sovereignty of the United States.'")

all aspects of the proposed development. 38 M.R.S.A. § 484(1); DEP Rules Ch. 373(1)(A) ("The Board shall consider all relevant evidence to" financial capacity). The application must include evidence that "affirmatively demonstrates" the financial capacity for the development. DEP Rules Ch. 373(1)(B). There are various methods of demonstrating financial capacity under the rules. The rules make provision for major projects, such as LNG import terminals, that require funding but where there "can be no commitment of money until approvals are received." DEP Rules Ch. 373(1)(B)(4). In such cases, applicants must secure "a letter of 'intent to fund' indicating the amount of funds and their specified uses." *Id*.

DeLNG's financial capacity statement is insufficient to meet its burden under 38 M.R.S.A. § 484(1) and DEP Rules Ch. 373(1)(A). Although the application has been deemed complete for processing, Movants respectfully submit that a close read of DeLNG's application shows that the application fails to demonstrate that DeLNG now possesses the financial capacity for construction, operation, and maintenance of the proposed LNG terminal.

DeLNG submitted, as evidence of financial capacity, a letter from one Kestrel Energy Partners, LLC.[6] That letter, however, does not demonstrate the required "intent to fund" *construction, operation, and maintenance* of the proposed LNG import terminal, as required by DEP Rules. Instead, the Kestrel letter quite explicitly commits to financing *only* the permitting process. As to construction, operation, and maintenance, Kestrel limits its commitment to merely *arrange* financing if permitted.

> I write on behalf of Kestrel Energy Partners, LLC ("Kestrel") to inform you of our commitment to finance Downeast in the *permitting* of an LNG receiving terminal to be constructed in Robbinston, Maine and to

[6] Attached as Exhibit 4 ("Kestrel letter").

> *arrange* the necessary financing to complete construction of the terminal once permitted.

Site Location Application § 3 (December 2, 2006) Ex. 4. (emphases added).

In the financial world, the difference between "intent to fund" and "intent to arrange financing" is very important. Affidavit of Jarold Levey, attached as Exhibit 5, ¶ 4. "Arrange" simply means that Kestrel will attempt to secure financing if and when DeLNG can demonstrate that its project is worthy of financing at some future date. "Arrange" neither binds Kestrel (or *its* funders) to provide actual funding, nor are there apparent consequences if ultimately Kestrel is unable to pull together needed money. *Id*. at ¶¶ 4-6. Thus, DeLNG has not demonstrated an "intent to fund." *Id*.

Further, DEP Rules allow for approval contingencies, but no others. Indeed, to read "approvals" as used in Rule 373(1)(B)(4) to mean more than federal, state and local permits or authorizations (for example, for "approvals" to depend on future market conditions or a developer's credit worthiness) would create an exception that entirely swallows the whole. And, an "intent to fund" letter is the *least* substantial evidence allowed by the DEP Rules, see generally DEP Rules Ch. 373(1)(B)(1)-(6). Simply put, DeLNG's evidence does not satisfy even this minimal standard.

It is also important to note that the investors who have financed Kestrel itself – "Yorktown" and other investors – have financed Kestrel for *only* $38MM. Kestrel letter, Ex. 4; Levey Aff., Ex. 5, at ¶ 7. According to the Kestrel letter, Yorktown is valuated at $730MM and Yorktown's general partner has placed $2.9BN in investments. Kestrel letter, Ex. 4. If the DeLNG project costs $514MM to develop (as asserted by DeLNG[7]) and the debt-equity financing ratio is the customary 80% debt lent by banks and 20%

[7] Site Location Application, Section 3, at p. 2.

equity provided by investors, then equity investment of approximately $103MM would be required. *Id*. This equity amount is far in excess of Kestrel's currently stated available funds of $38MM. Levey Aff., Ex. 5, at ¶ 7.[8] Indeed, Kestrel would not have sufficient equity funding even under an unusual 90% debt to 10% equity ratio.[9] *Id.* In sum, DeLNG should have to demonstrate: (1) a financial commitment of equity funds that goes beyond financing the permitting alone, and is sufficient to constitute the equity portion required for construction and operation of the terminal; and (2) a bank commitment for the debt portion of this project. These demonstrations are not made in the application.

Further, DeLNG's numbers do not add up. Site Location Application § 3, at 1-2. DeLNG claims total costs of $514MM. However, its itemized costs may total to $514MM, or $701.2MM, or $863.2MM. Levey Aff., Ex. 5, at ¶ 12. DeLNG fails to provide "[a]ccurate and complete cost estimates for its project." DEP Rules Ch. 373(B)(1). Its math is unclear.

Where required demonstrations in an application are subsequently determined to be insufficient after the completeness determination has been made by DEP staff, the DEP can request additional information or deny the application for failure to provide necessary information. DEP Rules Ch. 2(11)(B). As explained below, the applicant is unlikely to be able to provide the necessary information to demonstrate financial capacity, so the application should be denied.

[8] From the letter, it is not clear as to whether Yorktown has committed $38MM to Kestrel's DeLNG project, or this $38MM commitment is to the totality of Kestrel's projects, of which DeLNG may be one piece, to which Yorktown has committed only $7.5MM of the $38MM. Under either scenario, financial capacity has not been demonstrated.

[9] DeLNG's FERC application asserts a 50/50 debt-equity ratio for pipeline construction. DeLNG FERC Application at Pipeline Exhibit L. Kestrel itself does not appear to have anywhere near the equity commitment required to meet such a 50/50 debt-equity ratio.

B. Since Application Submittal, the Actions of Canada Preclude DeLNG from Demonstrating Financial Capacity, Title Right or Interest, and the Ability to Construct the Facility in a Timely Manner.

1. Background and Importance of Canada's Action.

An extraordinary fact developed after Downeast LNG's application was accepted for processing by the DEP: Canada barred passage of LNG tankers through Head Harbour Passage. On February 14, 2007, the Government of Canada, in a very clear, top-level statement, informed the United States Government that Canada will not allow LNG tankers through Head Harbour Passage – sovereign Canadian waters and the exclusive passage for tankers to reach DeLNG's proposed facility.[10] Affidavit of Martin van Hueven, attached as Exhibit 7, at ¶¶ 7, 11. Canada's pronouncement is clear and blunt: passage of tankers through Head Harbour Passage would present unacceptable risks to Canadian waters and territory, and Canada will use domestic law to prevent LNG tankers from passing through Canadian waters. Simply, the Government of Canada informed and warned the United States that "the projects cannot proceed as currently envisioned." *Id.* ¶ 7 (quoting Wilson letter, Ex. 6).

In diplomatic terms, the Ambassador's letter is highly consequential. *Id.* Readers of this letter should assume that the Government of Canada's position is firm and that Canada is sure that its position is legally correct. *Id.* ¶ 8. The warning is clear – Canada will keep tankers from passage through Head Harbour – and the conclusion is equally clear: DeLNG should come up with an alternative. *Id.* ¶ 11. The warning is also unambiguous that Canada will use its weight in government-to-government relations with the United States; Canada is willing to play "hard ball." *Id.* ¶¶ 12, 13.

[10] Letter from Canadian Ambassador Michael Wilson to the Federal Energy Regulatory Commission Chair Joseph Kelliher and the Secretary of State Condoleeza Rice and Secretary of Energy Samuel Bodman, attached as Exhibit 6 ("Wilson letter").

Bitter disputes between the United States and Canada either fester or eventually get brokered. *Id*. ¶ 11. If this matter can be resolved, it will be through diplomatic means, by alternative means of settlement such as international arbitration, or at the International Court of Justice. *Id*. ¶¶ 9, 10. Such resolution could easily take several years, and there is no guarantee of success. *Id*. ¶¶ 10, 13. Diplomacy is available, but there is no present basis whatsoever for any assertion that DeLNG has the present right to transit tankers through Head Harbour Passage. Affidavit of David Wirth, Exhibit 8, at ¶ 8. Nor is there any basis for claiming that the right could be established within any specified timeframe, if at all. *Id*. ¶¶ 6-9. If it can be resolved, it is likely to take years. *Id.* ¶ 6.

Canada's action presents a very real obstacle to DeLNG's proposal, and is not to be taken lightly. Substantive arguments before the BEP that go to the merits of Canada's position cannot remove (or strengthen) that obstacle, as U.S. domestic tribunals are without authority over Canada. Van Heuven Aff., Ex. 7, at ¶ 9. Thus, Canada's position that DeLNG's "project cannot proceed as currently envisioned" cannot be ignored or dismissed by the Board. *See id*. ¶ 7, Wilson letter, Ex. 6. In sum, there is no clear path, and certainly no timely path for DeLNG to resolve in its favor Canada's stance. Wirth Aff., Ex. 8, at ¶¶ 6-9.

These facts: (1) cast an obvious, further pall over DeLNG's ability to demonstrate the financial capacity to construct, operate and maintain the proposed facility; (2) until and unless reversed, deny DeLNG the required title right or interest it needs; and (3) preclude any ability for timely construction.

Critically, Canada's position is highly relevant to these BEP's proceedings because it directly impacts substantive rules that the BEP must apply. *See* DEP Rules Ch. 2(11)(D), Ch. 372(9) & Ch. 373. The principles of administrative standing and ripeness underlying these DEP rules are "reasonable and highly desirable, policy-wise, to ensure that . . . governmental officials and agencies should not be required to dissipate their time and energies in dealing with persons who are strangers to the particular governmental regulation and control being undertaken." *Walsh v. City of Brewer*, 315 A.2d 200, 207, n.4 (Me.1974). Regardless of whether Canada is correct, the Applicant still must demonstrate the present title right or interest to use the property as proposed, the present financial capacity to construct, operate and maintain its proposed facility, and the present ability to initiate construction in two years after permits are received and complete construction within five years.

2. Canada's Action and DeLNG's Financial Capacity Demonstration.

The Kestrel letter is now completely irrelevant. Canada's subsequent decision to bar LNG tanker transit to the project site eclipses Kestrel's intent-to-arrange-financing letter regardless of whether it was ever compelling. Canada's action also ensures that DeLNG cannot presently secure financial capacity.

Head Harbour Passage provides the sole potential LNG tanker access to DeLNG's proposed facility, and Ambassador Wilson's letter states that: "I wanted you and the project proponents to be aware of the Government of Canada's position in advance of FERC's formal consideration. This will save them from having to expend resources on projects *which cannot proceed as currently envisioned*." (emphasis added). As stated by Mr. Levey, no bank will finance this project in light of Canada's action, and bank

financing is normally a critical component of the overall financing for these projects. Levey Aff., Ex. 5, at ¶ 9. Banks will not commit to any such financing until resolution of this issue. *Id*. Nor have DeLNG and Kestrel demonstrated substitute equity financiers prepared to make a sufficient financial commitment under these present precarious legal, financial, and political circumstances.

In sum, before Canada's announcement, DeLNG had not demonstrated the financial commitment required by Maine law for further application processing; after Canada's announcement, it is extremely doubtful the obligation imposed by DEP's financial capacity rule can be fulfilled. DeLNG's application should be processed by the BEP only after a current, credible, intent-to-fund document is provided to the BEP.

3. DeLNG's Title, Right or Interest Demonstration is Deficient.

To even qualify as a race participant, Maine law requires DeLNG to demonstrate title right or interest "in *all* of the property that is proposed for [the permitted] development or use." DEP Rules Ch. 2(11)(D) (emphasis added); see also Ch. 372(9); *Walsh v. City of Brewer*, 315 A.2d 200 (Me.1974). "Title, right or interest" is an "indispensable and valid condition for 'applicant' eligibility"– it is a matter of administrative standing. *Walsh*, 315 A.2d at 207. Without such demonstrated title right or interest, an applicant simply has no place before the Board: "The DEP will review an application for a permit *only* when the applicant has demonstrated sufficient title right or interest in all of the property . . . proposed for development or use." *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345, 348 (Me.1995) (emphasis added).

The principle applies to applications for all DEP permits issued under state or federal law. DEP Rules Ch. 2(11)(D). It is intended to prevent an applicant from

wasting an administrative agency's time by applying for a permit or license that it would have no legally protected right to use. *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me.1983); *Walsh*, 315 A.2d at 207 (it is "reasonable and highly desirable, policy-wise, to ensure that . . . governmental officials and agencies should not be required to dissipate their time and energies in dealing with persons who are strangers to the particular governmental regulation and control being undertaken.").

DeLNG cannot meet this basic rule of administrative standing in two ways. First, Canada's stance denies DeLNG the right to use the proposed facility as permitted. *See Walsh*, 315 A.2d at 207. DeLNG cannot now demonstrate that LNG tankers can access the facility and its application, filed before Canada's action, necessarily fails to address this issue. Wirth Aff., Ex. 8, at ¶ 8. Diplomacy is available, but there is no present basis whatsoever for any assertion that DeLNG has the present right to transit tankers through Head Harbour Passage, and thus that DeLNG can use its site as proposed.

The title right or interest principle goes beyond the right to the immediate sites for the import terminal and pipeline. It also encompasses *the right to use the site in the way that the applicant seeks*. *Southridge Corp.* 655 A.2d at 348. DeLNG cannot prove that it has the *right to use* the property as contemplated by the rules and the case law. Site Location Application § 2. "An applicant for a permit to use property in certain ways must have 'the kind of relationship to the ... site,' that gives him a legally cognizable expectation of having the power to use that site in ways that would be authorized by the permit the licensee seeks." *Southridge Corp*, 655 A.2d at 348 (quoting *Murray*, 462 A.2d at 43); *see also Picker v. State of Maine, Department of Environmental Protection*, 2002 WL 1023629 (Me.Super.) (same).

Second, DeLNG itself concedes, in the FERC proceedings, that it does not yet have the title right or interest over all the land necessary for the LNG import terminal. Federal regulations require that DeLNG have full legal control over its so-called "exclusion zone." 40 C.F.R. § 193.2007 ("Exclusion zone means an area surrounding an LNG facility in which an operator or government agency legally controls all activities in accordance with § 193.2057 and § 193.2059 for as long as the facility is in operation."); 40 C.F.R. § 193.2057 ("Each LNG container and LNG transfer system must have a thermal exclusion zone . . .."). 

However, DeLNG states in its application to FERC that,

> there is a small parcel of land, comprised of approximately 228,500 $ft^2$ (5.25 acres) . . . , which is located outside the 80-acre Import Terminal site, but which falls within the thermal exclusion zone of the Import Terminal's second LNG Storage Tank. Downeast LNG has been engaged in communications with the entity which controls this parcel of property and will seek to obtain legal control of such property prior to the commencement of construction of the import terminal.[11]

DeLNG Application to FERC, Resource Report 11, Response to FERC Staff Comments at 3, Ex. 3. Alternatively, DeLNG states that it may reconfigure its project or seek a waiver. *Id.* No such reconfiguration is pending before the BEP.

In contrast, DeLNG's application to BEP makes no mention of this problem. It simply affirms that DeLNG has an option-to-purchase agreement of an approximately 80-acre site. Site Location Application § 2 at 1, ¶ 1.0. No mention is made of its legal right to use this site as an LNG terminal. *Id*. Its burden here is not met.

Moreover, on March 19, 2007, FERC asked DeLNG to provide further required information including clarification of this land's legal status, stating:

[11] At the pre-hearing conference on March 27, 2007, intervenor Bear Creek announced that it owned property within DeLNG's exclusion zone and over which DeLNG would need exclusive legal control. It is not clear whether DeLNG's submission to FERC refers to this same land or is a separate parcel.

> As shown in Appendix B of Resource Report 11, portions of the thermal radiation exclusion zones extend beyond land controlled by Downeast. We note that our minimum filing requirements at 18 CFR 380.12(o)(14) require the applicant to identify how the proposal would comply with the siting requirements of 49 CFR 193. Although Downeast indicates it would either: seek to obtain legal control of the land; seek a partial waiver of the Department of Transportation exclusion zone regulations; or modify the LNG tank design to resolve this issue, the feasibility of these alternatives has not been demonstrated in the current filing. Provide evidence that the currently proposed site and design would be in compliance with the siting regulations under 49 CFR 193.

Letter from Richard Hoffmann, Director of Gas-Environment Engineering, FERC to Robert Wyatt, DeLNG (Mar. 19, 2007) at Information Request, p. 19, ¶ 4.[12] As FERC notes, DeLNG does not have the required legal control over this land, nor has it reconfigured its project or otherwise resolved this issue.[13] Certainly, no reconfigured project is presently pending here.

In sum, DeLNG cannot presently demonstrate the required title, right or interest because it has no present right to supply its facility with LNG, nor does it have the right to use its site as an LNG import terminal.

[12] DeLNG's response to this information request is due on April 9, 2007.

[13] An applicant must demonstrate title right or interest *to the Department's satisfaction*. DEP Rules Ch. 2(11)(D) (emphasis added). The applicant is likely to argue that title, right or interest is fully resolved by FERC having accepted its application, DEP Rules Ch. 2(11)(D)(5), but such a reliance on its FERC application would be unsound. First, acceptance of a FERC application is not conclusive, but simply one of several "method[s] of proving title, right or interest," and use of a single method does not supplant the overarching requirement that "an applicant shall demonstrate *to the Department's [BEP's] satisfaction* sufficient title, right or interest in all of the property that is proposed for development." *Id*. (emphasis added). Secondly, the FERC notice was issued prior to Canada's action, which completely changes the title right or interest landscape and considerably weakens any prior weight of the FERC notice. Third, as explained here, FERC itself cannot yet determine if DeLNG has sufficient legal control over land required for its proposed facility. Fourth, an application may be denied if, after its acceptance if it is determined that an application either did not have, or no longer has, title, right or interest. DEP Rules Ch. 2(11)(D).

4. DeLNG Cannot Meet its Burden to Begin Construction within Two Years and Complete Construction within Five Years

DeLNG's significant problems make it highly unlikely, if not impossible, for the project to be timely constructed. "Timely" is precisely defined to mean that:

(1) "If the construction or operation of the activity is not begun *within two years*, this approval *shall* lapse." DEP Rules Ch. 372(12)(F) (emphasis added) and;

(2) "If the approved development is not *completed within five years* from the date of the granting of approval, the Board may reexamine its approval and impose additional terms or conditions or prescribe other necessary corrective action to respond to significant changes in circumstances which may have occurred during the five-year period." DEP Rules Ch. 372(12)(G) (emphasis added).

These timing rules ensure that before construction and operation of a project actually begins, that construction and operation has been evaluated under DEP's current environmental and other standards. When BEP enacts new or updated rules – as it has done many times in the last decade to improve environmental protection – the public has the right to expect that projects are built under current rules, especially for major industrial facilities. It defeats the entire idea behind progressive improvement in environmental management to license a project that has little to no likelihood of timely construction. Presently approving permits for an option, or for construction that may only commence years hence effectively awards the applicant with grandfathered 2007 permitting standards that subsequently could be updated and improved a few years later, and thereby denying to BEP the opportunity to apply updated standards when a proposed project is actually ripe to go forward. For these important policy reasons, DEP has

adopted a clear, definitive two-year deadline by which construction must commence. Alternatively, a permit "shall" lapse. DEP Rules Ch. 372(12)(F).

Yet DeLNG has provided the DEP with no demonstration that it can comply with this clear, definitive deadline. To the contrary: it will likely take far longer than two years after permitting before a shovel turns earth, if ever. Given the controversy with Canada, and the absence of needed funding, it appears impossible that "construction or operation of the activity" will begin "within two years." Wirth Aff., Ex. 8, at ¶ 6-9. Any approval granted by the Board today — after consumption of significant time, energy, and resources — would be outdated if, as expected, construction cannot commence within the timeframes allowed by the rules. *See id*.

The same principles that underlie administrative standing apply here. An application is not ripe if it cannot be timely built. DeLNG's application is not ripe.

## III. REQUESTED PROCEDURE.

Movants respectfully request the BEP to immediately review these issues and deny the application without prejudice.[14] Early Board review could result in dramatic savings of time and resources to the BEP, DEP staff, and parties. Further, as the denial would be without prejudice, the relative interest in saving considerable time and expense outweighs any potential prejudice to the Applicant. Indeed, DeLNG jumped the gun. It can hardly claim prejudice if, because of the severe, above-described defects, the Board places DeLNG back where it belongs in the race.

Movants suggest the following procedure to accomplish the rules' purposes and ensure an expeditious process. First, within 15 days of notice from the BEP, Applicant

[14] Denial of required permits such as a Clean Water Act § 401 Certification, 33 U.S.C. § 1341, Clean Air Act permit, and permits requisite to a CZMA consistency determination does not constitute a waiver of state authority or otherwise risk preemption of Maine's programs.

should file an answer with affidavits demonstrating that all its burdens are presently met. Non-Movant intervenors should be allowed the opportunity to comment on the same time schedule. Movants would reply 10 days after receipt of Applicant's answer. The BEP should then hold a non-testimonial hearing, at its earliest convenience. Alternatively, the Board could schedule a show-cause or testimonial hearing with pre-filed testimony.

## IV. CONCLUSION.

DeLNG cannot presently meet the Board's administrative standing requirements. The Board should review these preliminary issues now. The BEP process will be more efficient and effective through such a process. DeLNG can refile if and when it obtains true financial commitment(s), title right or interest in all land required, and access from Canada to its proposed site, or, alternatively, if DeLNG chooses to relocate its project as suggested by the Government of Canada.

Respectfully submitted on April 10, 2007

by: ___/S/_____

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