



Save Passamaquoddy Bay

A 3-Nation Alliance

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US Department of Justice
c/o US Senator Angus King

2016 February 18; rev March 16 (renumbered sections)

**Re: Federal Energy Regulatory Commission, Downeast LNG Docket Nos.
PF14-19, CP07-52, CP07-53, and CP07-53-001;
& Freedom of Information Act Appeal No. FY15-129;
& FERC's Violation of FOIA, NEPA, and of the Public Interest**

Dear US Department of Justice,

Throughout nearly 12 years of three LNG (Liquefied Natural Gas) terminal-siting proposals in downeast Maine, Save Passamaquoddy Bay grassroots stakeholder organization has been the brunt of FERC's ongoing, systemic, flagrant, and unbridled Contempt of the Law and Public Interest regarding Freedom of Information Act (FOIA) and National Environmental Policy Act (NEPA) compliance.

Directive & Memo on Openness & FOIA Compliance

President Obama issued a memorandum in early 2009 instructing government departments to operate openly and cooperatively regarding Freedom of Information Act (FOIA) requests.^[1] Then-Attorney General Eric Holder sent to the departments a 2009 March 19 memo on Presumption of Openness referencing President Obama's 2009 directive.^[2] FERC's own website links to both President Obama's FOIA directive and to the Attorney General's memo.^[3]

History

We will focus our complaint on recent issues with FERC. On 2015 September 27, Save Passamaquoddy Bay eFiled an online FOIA request with FERC for minutes, notes, transcripts, and/or recordings from the 2015 August and September Conference Calls in the Downeast LNG proceedings.^[4] We requested expedited service. A copy of our web-form FOIA request was not automatically supplied to us (e.g., by automatic return email); thus, we had no record of our FOIA request—an unprofessional treatment of the public, contrary to the public interest.

¹ See accompanying file: **01_Obama_Memo_2009jan21.pdf**

² See accompanying file: **02_AG_Memo_to_Departments_and_Agencies_2009.pdf**

³ See accompanying file: **03_FERC_FOIA_Memo_link.jpg**; <http://www.ferc.gov/legal/ceii-foia/foia.asp>

⁴ See accompanying file: **04_FOIA_RequestFormData_FOIA-2015-129_Robert_Godfrey.pdf**

On 2015 October 27, FERC External Affairs Director Leonard M. Tao rejected our request for expedited service. In his rejection, Director Tao falsely stated that we had not specified the need for urgency to inform the public. In fact, we had made such an indication by selecting the following choice in the online FERC FOIA request form:

An urgency to inform the public concerning actual or alleged Federal government activity (this option available only for requesters primarily engaged in disseminating information) [5]

The FERC FOIA online form provides a field where the requester swears that statements re justification for expedited service are true. I made that testament. In spite of that, Director Tao refused our request, claiming that we had supplied insufficient justification. Apparently, FERC does not value swearing to justification on its own form. Why, then, does FERC ask the requester to swear to justification on the form?

Director Tao further indicated in his letter that our request for expedited service was rejected since we had not provided sufficient credible documentation supporting expedited treatment. We note that the FOIA request form does not illustrate what kind of evidence is considered “credible”; however, Save Passamaquoddy Bay had provided the following justification for expedited service:

Save Passamaquoddy Bay disseminates information regarding LNG-related activities in North America, and especially regarding such activities related to Passamaquoddy Bay in Maine.[6]

Note: Save Passamaquoddy Bay has been an intervenor in three FERC LNG proceedings (Quoddy Bay LNG, Calais LNG, both now dead; and the current Downeast LNG proposal), with hundreds of filings to those FERC dockets. We have been disseminating information to the public since 2004 regarding those and other FERC proceedings in North America. We have engaged with the FERC Office of External Affairs on numerous occasions. FERC knows who we are, and knew when we made our Expedited Service request that we disseminate information to the public regarding FERC activities.

On October 27, we received an email containing a copy of our FOIA request data, along with Mr. Tao’s letter indicating that two documents had been found in response to our request. The letter indicated that the documents had been redacted, and provided his justification for the redactions. The two redacted documents were also included.[7]

On 2015 November 3, FERC Office of General Counsel Michael Watson — using a spoofed caller ID number — called and spoke with me about our FOIA request. Mr. Watson stated that since Director Tao had already complied with our request, **he asked that Save Passamaquoddy Bay withdraw our Appeal for Expedited Service.**

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See accompanying files:

07-1_2015Oct27_DETERMINATION_email.pdf

07-2_2015Oct27_Email_Attachments.pdf

I indicated that since Director Tao had supplied **comprehensively-redacted** copies of **FERC eLibrary previously-published non-redacted Bi-Weekly Conference Call Summaries** (see Illustrations 1 & 2, below), that **Director Tao had not complied with our request, at all; we did not believe those brief Conference Call Summaries were the only records of the Conference Calls.** It is inconceivable that no notes would have been taken during the conference calls; more documentation must exist. (It turned out later that our suspicions were correct.) We believed Director Tao had not fully complied with our request. Mr. Watson indicated he would look into our request and call back by **November 5.**

**What FERC Had Previously Published to the Public Docket
2015 August 3**

Office of Energy Projects – Division of Gas Environment and Engineering – Gas Branch 1		Project No.: PF14-19-000		
Bi-Weekly Conference Call				
Date of Meeting: Monday, August 3, 2015 10:00 am EST		Project: Downeast LNG Export Project		
Meeting Attendees:				
Name	Representing	Office/Location	Phone	Email
Jay Clement	U.S. Army Corps of Eng.	Manchester, ME	207-623-8367	jay1.clement@usace.army.mil
Brian Hopper	NOAA National Marine Fisheries Service	Annapolis, MD	801-427-8401	brian.d.hopper@noaa.gov
Rob Wyatt	Downeast LNG	Robbinston, ME	207-454-3925	rw Wyatt@downeastlng.com
John Scott	Tetra Tech	Boston, MA	617-283-5169	John.scott@tetratech.com

Meeting Summary

Project Updates – Downeast LNG

- Revised draft Resource Report (RR) 1 – Project Description will be filed with FERC today. Draft RR5 - Socioeconomics should be filed with FERC next.

Project Updates – FERC

- Will be issuing another project update mailer in the near future.

**What FERC Sent in Compliance to Our FOIA Request
2015 October 27**

Office of Energy Projects – Division of Gas Environment and Engineering – Gas Branch 1		Project No.: PF14-19-000		
Bi-Weekly Conference Call				
Date of Meeting: Monday, August 3, 2015 10:00 am EST		Project: Downeast LNG Export Project		
Meeting Attendees:				
Name	Representing	Office/Location	Phone	Email
	U.S. Army Corps of Eng.	Manchester, ME		
	NOAA National Marine Fisheries Service	Annapolis, MD		
	Downeast LNG	Robbinston, ME		
	Tetra Tech	Boston, MA		

Meeting Summary

Project Updates – Downeast LNG

- [Redacted]

Project Updates – FERC

- [Redacted]

Information withheld pursuant to FOIA Exemptions 5 and 6.

Illustration 1 - Bi-Weekly Conference Call 2015 August 3. The non-redacted document (left) had previously been published on 2015 August 10 to the FERC public docket (Accession No. 20150810-4002). The heavily-redacted document (right) was FERC's 2015 October 27 response to our FOIA request. (To view the two individual documents in a large version, see accompanying file: **Illustration 1.pdf.**)

**What FERC Had Previously Published to the Public Docket
2015 September 14**

Office of Energy Projects – Division of Gas Environment and Engineering – Gas Branch 1		Project No.: PF14-19-000		
Bi-Weekly Conference Call				
Date of Meeting: Monday, September 14, 2015 10:00 am EST		Project: Downeast LNG Export Project		
Meeting Attendees:				
Name	Representing	Office/Location	Phone	Email
Shannon Crosley	FERC	Washington, DC	202-502-8853	Shannon.Crosley@ferc.gov
Tim Timmerman	U.S. EPA	Boston, MA	617-918-1025	Timmermann.timothy@epamail.epa.gov
Rob Wyatt	Downeast LNG	Robbinston, ME	207-454-3925	rwatt@downeastlng.com
John Scott	Tetra Tech	Boston, MA	617-283-5169	John.scott@tetratech.com

Meeting Summary

Project Updates – FERC

- Will be issuing another project update mailer in the near future.

Project Updates – Downeast LNG

- Downeast LNG is re-looking at the design of the liquefaction train, which has affected the schedule and submittal of remaining draft Resource Reports.
- There was recent decision by Town of Robbinston to close the school, and Downeast is talking with the Town and evaluating how this may impact the Project, including draft Resource Report 5 (Socioeconomics).

General Discussion

- General issues associated with permitting of compressor stations for pipeline projects in New England.

Future Bi-weekly Calls

- It was agreed that until further notice, future bi-weekly calls will be held only on as-needed basis. When needed, notification will be made the week prior.

**What FERC Sent in Compliance to Our FOIA Request
2015 October 27**

2

Office of Energy Projects – Division of Gas Environment and Engineering – Gas Branch 1		Project No.: PF14-19-000		
Bi-Weekly Conference Call				
Date of Meeting: Monday, September 14, 2015 10:00 am EST		Project: Downeast LNG Export Project		
Meeting Attendees:				
Name	Representing	Office/Location	Phone	Email
	FERC	Washington, DC		
	U.S. EPA	Boston, MA		
	Downeast LNG	Robbinston, ME		
	Tetra Tech	Boston, MA		

Meeting Summary

Project Updates – FERC

- [REDACTED]

Project Updates – Downeast LNG

- [REDACTED]

General Discussion

- [REDACTED]

Future Bi-weekly Calls

- [REDACTED]

Information withheld pursuant to FOIA Exemptions 5 and 6.

Illustration 2 - Bi-Weekly Conference Call 2015 September 14. The non-redacted document (left) had previously been published on 2015 September 15 to the FERC public docket (Accession No. 20150915-4001). The heavily-redacted document (right) was FERC's 2015 October 27 response to our FOIA request. (To view the two documents in a large version, see accompanying file: **Illustration 2.pdf.**)

Having not received a promised response by November 5 from Michael Watson of FERC General Counsel, on **November 27** I called FERC Secretary Bose's office, indicating that FERC had not complied with our FOIA request. **Amazingly, a mere 10 minutes later, an additional 10 pages of documents from the Conference Calls with Downeast LNG were produced via email in response to our request.** We later received hard copies of those documents by post.^[8]

On **2015 December 1**, we received an email from Brenda Greer of some unnamed office within FERC, containing a letter from FERC Associate General Counsel Charles A. Beamon in response to our request for **expedited service of our 2015 July 25 FOIA request.**^[9] The message indicated that since the requested documents had already

⁸ See accompanying file: **08_SUPPLEMENTAL RESPONSE FY15-129 Robert Godfrey.pdf**

⁹ See accompanying file: **09_BrendaGreer_FOIA Appeal FY15-129.pdf**

been provided our request for expedited service was moot. Perhaps FERC does not comprehend the meaning of “expedited.”

Due to **FERC’s earlier violation of FOIA**, FERC’s claim of having fulfilled our FOIA request at the December date lacks veracity. *Mooting* our request for *expedited* service was unwarranted and disingenuous. It smacks of FERC attempting to coverup their poor handling of our FOIA request from its onset. Moving from the two single-pages heavily-redacted response of Mr. Tao to a 10-page non-redacted response when we involved the FERC Secretary proves our point.

FERC’s 2017 Budget Request^[10] is rife with unconvincing claims of being responsive, transparent, and thorough to strengthen the public trust in its activities^[11]:

1. FERC claims that its authorizations are based on thorough environmental analysis, and claims “to produce the high quality results expected by the American people” ^[12];
2. FERC claims to “earn the public trust”^[13] by “Facilitat[ing] public trust and understanding of Commission activities by promoting transparency, open communication, and a high standard of ethics”^[14];
3. “Trust and understanding increase acceptance of FERC decisions and reduce the potential for contentiousness toward FERC rules and regulations”^[15];
4. “The Commission also promotes a high standard of ethics, which encourages public confidence in the Commission’s activities and ability to fulfill its responsibilities” and, “Commission staff is highly interactive and responsive to its stakeholders”^[16];
5. “To promote transparency and public confidence in the Commission’s programs, Commission staff responds to requests under the Freedom of Information Act, 5 U.S.C. § 552”^[17]; and

¹⁰ See accompanying file: **10_FERC Fiscal Year 2017 Budget Request.pdf**

¹¹ *Ibid.*, page 36.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*, page 45.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*, page 46.

6. “Timely communication with stakeholders helps to demonstrate a spirit of transparency and openness that is essential to maintaining public trust and understanding.”^[18]

Reality belies FERC’s self-congratulatory claims, as we demonstrate in this complaint.*dlb*

1. FOIA Contempt

Considering FERC Office of External Affairs’ violations of FOIA, and its continued dishonest and contemptuous treatment of our FOIA request to-date, including...

- The continued ludicrous attempt by the FERC Office of External Affairs to rationalize redacting previously-published non-redacted documents;
- The FERC Office of External Affairs refusal to produce FOIA-request documents until involvement of the Office of the Inspector General, and our prodding of the FERC Office of the Secretary — **upon which ten (10) more documents were miraculously “discovered”**; and
- An earlier non-compliant response to a 2011 July 25 FOIA request, informing us without credibility that ***FERC does not keep a list of completed and uncompleted permitting requirements for LNG applications***; that we should simply read the complex docket to learn what remains unfulfilled by the applicant ^[19];

...we are convinced that FERC staff have not been, and currently are not, complying with FOIA, Presidential directive, Attorney General advice, or with our requests for documents. We suspect that this is not an isolated case.

The US Department of Justice warned federal departments not to abuse FOIA, in spirit or in act.^[20] FERC’s Office of External Affairs has repeatedly disregarded that warning; enough so, that FERC FOIA violation, and general contempt of the public interest, appears to be ingrained in FERC culture. Herein we demonstrate FERC’s culture of FOIA abuse.

2. NEPA Violations

FERC Staff and Contract Staff, in preparing the Downeast LNG Environmental Impact Statement (EIS) — both the Draft (DEIS) and the Final (FEIS) versions — intentionally and repeatedly ignored and omitted reference to docket comment filings that Save Passamaquoddy Bay provided that were detrimental to the Downeast LNG application.

¹⁸ *Ibid.*, page 47.

¹⁹ See accompanying files:
19_Re-RobertGodfrey-Clarification-RefNumber-FOIA-11-74.pdf
19_Second_Request_to_Comply.pdf

²⁰ See accompanying file: **02_AG_Memo_to_Departments_and_Agencies_2009.pdf**

Save Passamaquoddy Bay's *Whole Bay Study*, a 172-page document prepared by nationally respected Yellow Wood Associates of Vermont, is one such document filed to the docket. It provided significant testimony from economic experts of the negative fiscal impacts that an LNG terminal would bring to the area, yet ***mention of it was intentionally and totally omitted from the EIS in violation of NEPA.***^[21]

Also *intentionally omitted* from the EIS mentioning that the Saint Andrews Blockhouse National Historic Site would fall within the LNG ship Hazard Zone. All impacted historic sites are required to be included in the EIS.^[22]

Again, *intentionally omitted* were Saint Croix Schoodic Band of Passamaquoddy Chief Hugh Akagi's comments to the US Coast Guard, denying approval of the Downeast LNG project.^[23] (Pleasant Point and Indian Township tribal governments also filed opposition to the proposed Downeast LNG project^[24] were also *intentionally ignored*.) In addition, documentation of the significant Passamaquoddy spiritual and cultural site at the proposed LNG terminal was *intentionally ignored*.^[25]

3. FERC NAFTA Violation

FERC and the US Department of State, in their opinion that Downeast LNG has the right to defy Canada's prohibition of LNG ship transits through Canada's Head Harbour Passage and Canadian portions of Passamaquoddy Bay^[26], are in violation of the North American Free Trade Agreement (NAFTA).

NAFTA^[27]

Chapter Twenty-Two: Final Provisions

PART EIGHT: OTHER PROVISIONS

Article 2201: Annexes

Annex II

Reservations for Future Measures

Schedule of Canada

Sector: Transportation

Sub-Sector: Water Transportation

Industry Classification: SIC 4541 - Freight and Passenger Water

²¹ See accompanying files:

21_20140805-5020(29697422).pdf and

21_The Whole Bay Study complete portfolio, Yellow Wood Associates, 2006 Jun 22

²² See accompanying file: **22_Blockhouse_Cannon_Riot_and_Confederation.pdf**

²³ See accompanying file: **23_Passamaquoddy Tribal Objections.pdf**

²⁴ See accompanying file: **24_20140620-5008(29520319).pdf**

²⁵ See FERC Accession No. 20140311-5118:

http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14193566

THIS IS A NON-PUBLIC FILE.

²⁶ See accompanying file: **26_Canada Opposes DeLNG 20130517-5139(28406474).pdf**

²⁷ NAFTA:

<https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=1&secid=f7947ad4-4c5a-483f-b778-04d4c84dc610#Schedule%20of%20CA>

Transport Industry

...

SIC 4549 - Other Water Transport Industries

SIC 4551 - Marine Cargo Handling Industry

SIC 4552 - Harbour and Port Operation Industries

...

SIC 4559 - Other Service Industries Incidental to Water Transport

Type of Reservation: Most-Favored-Nation Treatment (Article 1203)

Description: Cross-Border Services

Canada reserves the right to adopt or maintain any measure relating to the implementation of agreements, arrangements and other formal or informal undertakings with other countries with respect to maritime activities in waters of mutual interest in such areas as pollution control (including double hull requirements for oil tankers), **safe navigation**, barge inspection standards, water quality, pilotage, salvage, drug abuse control and maritime communications. [Bold red emphasis added.]

4. Disingenuous Open Houses

FERC requires LNG applicants to hold Open Houses to inform the public about proposals. At least some of the time, FERC personnel are present at these Open Houses.

Although Open Houses are required, they can be deeply flawed, as we have witnessed with the three proposed LNG terminals in our area: Quoddy Bay LNG and Calais LNG (both now dead), and Downeast LNG, proposals. Here are some of those flaws:

- 4.a. Applicants are not required to advertise the Open House events; when advertising does occur it is not required to be placed adequately enough to reach the affected public. For instance, Downeast LNG's latest Open House advertising was not placed in Canadian news media, even though Canadian communities would be affected by LNG ship-transit Hazard Zones and environmental impacts.
- 4.b. Applicants are not required to be truthful about their proposed projects. In our experience, applicants have been untruthful and misleading with impunity at Open Houses — while being witnessed by FERC personnel. Applicants have told the public that LNG released would simply rise into the atmosphere, even though it would actually hug the ground for considerable time, drifting with the wind, potentially presenting harm to the public. The applicant's misinformation to the public was allowed to stand without correction or admonition from FERC. Since FERC requires the open houses, it should also require the applicants to be truthful to the public at those events.

5. Cart-Before-Horse Cost-Sharing Plans

FERC LNG terminal permitting provides that applicants must provide an unspecified Emergency Response Cost-Sharing Plan with affected communities. Applicants use that nebulous Cost-Sharing Plan as leverage to persuade communities to welcome the development.

In truth, the Cost-Sharing Plan is not developed until *after* FERC issues a permit. Therefore, during the permitting stages, stakeholder communities have no idea what

actual costs would be to local taxpayers; communities are required to depend on applicants' sometimes spurious claims. This provides a biased advantage to applicants against public stakeholder interests. FERC allows — even facilitates — this intentional duping of the public.

Cost-Sharing Plans should be developed early during the permitting process, treating stakeholder communities fairly in negotiations with proposed developments. The current process gives applicants license to abuse negotiations with those communities.

6. Conflict of Interest

FERC projects such as LNG terminals require hiring Contract Staff to deal with the large, complex Environmental Impact Statement (EIS). The applicant nominates three companies to FERC to work as FERC Contract Staff. FERC selects one of the three (although FERC may ask for additional nominees). The selected company then supplies personnel to work on preparing the EIS as FERC Contract Staff. ***FERC Contract Staff are paid directly by the applicant***, usually on a monthly basis.

Contract Staff are in an inherent Conflict of Interest since Contract Staff income is dependent on the applicant:

- 6.1. Applicant is likely to select nominees who are favorable to the project;
- 6.2. Contract Staff are paid directly by the applicant.

Scrutiny shows that FERC's entire annual budget appropriation equals the exact amount of FERC permitting fees paid by applicants, as stated in FERC's FY2016 Budget Request:

FULL COST RECOVERY

The Federal Energy Regulatory Commission (FERC or the Commission) recovers the full cost of its operations through annual charges and filing fees assessed on the industries it regulates as authorized by the Federal Power Act (FPA) and the Omnibus Budget Reconciliation Act of 1986. The Commission deposits this revenue into the Treasury as a direct offset to its appropriation, resulting in no net appropriation.^[28]

Therefore, FERC's annual budget derives entirely from applicants' fees. ***Although Congress appropriates FERC's budget funding, it does so by equaling the budget to the amount of FERC permitting fees.*** There is a ***false separation*** between applicant fees and FERC's annual budget. The reality is that FERC derives its funding entirely from the industries it is responsible for regulating — ***an inherent conflict of interest.***

7. Vapor Barrier Fantasy

LNG terminal permitting requires Pipeline and Hazardous Materials Safety Administration (PHMSA) permitting approval regarding Design Spill Modeling. Such modeling pre-

²⁸ See accompanying file: **28_FY16-Budget-Request, page ii.pdf**

dicts flammable-vapor dispersion distance and thermal radiation distance from an LNG release at the terminal.

Downeast LNG's initial Design Release Modeling indicated that vapor from a release along the jetty would result in flammable vapor extending over private property upon which building could take place ***in violation of regulations***. To resolve this issue, Downeast LNG proposed adding six-foot-tall metal vapor barriers along both sides of the LNG piping on the jetty. Re-performing the Design Release Modeling indicated that the vapor would be contained within the jetty confines, thus complying with PHMSA regulations — ***by incomplete, flawed logic used in the modeling***.

Save Passamaquoddy Bay submitted comments to the FERC Downeast LNG docket on several occasions indicating that the Design Release Modeling was flawed in the following way: it does not consider the consequences of an intentional or unintentional event such as an aircraft impact on the jetty. Such an event could conceivably destroy vapor barrier integrity concurrent to a resulting LNG release, thus returning the conditions to the same as having no vapor barrier, at all. In such an instance, vapor would again extend over private property ***in violation of PHMSA regulations***.

On 2014 December 4, Save Passamaquoddy Bay included a Request for Interpretation of 49 CFR Part 193 from PHMSA.^[29] The request included simultaneous LNG piping and vapor barrier destruction potential scenario. **No response from either PHMSA or FERC ensued.**

Despite our repeatedly pointing out this flaw, **no mention of such potential violation was made in the EIS. FERC intentionally omitted this potential regulatory violation, against the interests of safety and public stakeholders.**

8. Inappropriate Phone Number Spoofing

FERC Office of General Counsel treats the general public as criminals, as evidenced by phone calls from that office to our office. FERC General Counsel repeatedly used Caller ID *spoofing*, and insisted that personnel could do nothing about it. The Caller ID spoofing used by General Counsel makes calls appear to be coming from a phone number other than FERC General Counsel; the spoofed number being used was a ***disconnected number***. When contacting someone suspected of criminal activity, spoofing may be justified. There is no justification in spoofing the calling number when contacting public stakeholders who are complaining of FERC violations of law. General Counsel has been treating the public as criminal when, in actuality, ***it has been FERC who has been violating the law (FOIA & NEPA)***.

9. FERC Failure to Establish Office of Consumer Advocate and Public Participation

In 1978 — over 37 years ago — the Public Utility Regulatory Policy Act (PURPA) was passed, ***providing for a consumer office at FERC*** — but ***that office has never been***

²⁹ See accompanying file: [29_PHMSA_49CFR_Part193_interpretation_request.pdf](#)

created! Public Citizen provides background on this issue, and has a petition to Congress to fund such an office.^[30] However, FERC already could have budgeted this office from existing resources or could have added the required resources to FERC’s annual budget request to Congress. This is clearly an omission intended to exclude consumers and to keep the public uninformed about events at FERC, and to eliminate access to the services such an office would provide to the public.

10. Due Process Failure: Lack of Permitting Requirement Checklist, Delay in Responding to Intervenor Comments, and Non-Text-Searchable Comments in the Environmental Impact Statement

One of our FOIA requests divulged that FERC apparently lacks a clear, comprehensible checklist of permitting requirements, including what requirements have been fulfilled and what requirements remain incomplete — at least, there is not one available to the public. FERC’s online information is also incomplete and misleading.^[31]

FERC policy is to delay responding to cooperating agency, public, and official intervenor comments, questions, and motions until after publishing the Environmental Impact Statement (EIS) — responding to all such public comments *in bulk at virtually the last minute in the permitting process*. Meanwhile, FERC communicates on an ongoing basis with the applicant. That policy puts public stakeholders at a distinct disadvantage; it provides little time for intervenors to respond. In some cases it requires intervenors to file FOIA or CEII requests that can take a full year or more for FERC to comply — potentially not even answering until **after** a Commissioners’ permitting decision, **depriving the public of due process**. What’s more, FERC’s responses in the EIS, at least in our experience, contain submitted comments and motions in image format (sometimes in terrible-resolution) rather than as text-searchable format. Such treatment — making searching Comment text difficult — **places public stakeholders at disadvantage, contrary to the public interest. The public is being denied Due Process.**^[32]

11. Defying Public Interest: Prevarication, Deception, and Contempt

A. Prevarication, Omission, and Speculation. The FERC Downeast LNG Environmental Impact Statement (EIS) is rife with artificial “gilding” by FERC

³⁰ See accompanying file: **30_Advocate Office.pdf**, Public Citizen News, 2015 September/October.

³¹ See accompanying files:
31_00_NO CHECKLIST 2011Aug25 FERC FOIA DETERMINATION LETTER.pdf;
31_01_FERC_abuses_stakeholder_interests.pdf;
31_02_FERC_Processes_for_Natural_Gas_Certificate.pdf; and
31_03_FERC_EIS_Pre-filing_Env_Review_Process.pdf

³² See accompanying file:
32_Email from FERC General Counsel David Morenoff.pdf, including referenced email and attachment, 2015 Feb 10.

staff and contract staff via significant omissions, prevarications, and speculations, invalidating the EIS.^[33]

- B. **FERC Acting as Downeast LNG Proxy.** When Downeast LNG made a significant error regarding regasification volume in its filing to the docket (100 standard cubic feet instead of 100 million standard cubic feet), without any correction to the erroneous filing, FERC published separately to the docket indicating Downeast LNG would regasify 100 million standard cubic feet. No correction of the error ensued to indicate an error had been made; thus, which figure was to be believed, the applicant's filing or FERC's? Why would it be FERC's duty to correct Downeast LNG's error without any action on Downeast LNG's part to correct the error?^[34]
- C. **Misleading Project Area Graphic.** FERC's Downeast LNG project update brochure cover illustrates what is purported to be the project area; however, **it omits the nearly-4,000-foot-long trestle and pier that would jut across the mouth of scenic Mill Cove.** The omission gives the false impression of lower negative visual impact, less impact on riparian rights, and less hazard presented to private property in the US and Canada.^[35]
- D. **FERC's Anti-Public Interest Policy.** FERC's claimed policy is that fossil fuel pipelines and LNG terminals are in the public interest, and that the marketplace should determine which energy projects succeed or fail. **FERC's position defies climate reality — especially considering US participation in the 2015 United Nations Climate Change Conference.**

During the 2015 December 1 House Energy & Commerce Committee "Oversight of the Federal Energy Regulatory Commission" hearing, the four sitting FERC Commissioners (Chairman Norman Bay, Commissioner Cheryl LaFleur, Commissioner Tony Clark, and Commissioner Colette Honorable) testified before the

³³ See accompanying files:
33_01_20140605-5124(29457203).pdf,
33_02_20140605-5124(29457204).pdf,
33_03_20140605-5124(29457205).pdf,
33_04_20140605-5124(29457206).pdf,
33_05_20140605-5124(29457207).pdf,
33_06_20140605-5124(29457208).jpg,
33_07_20140625-5010(29539739).pdf,
33_08_20140625-5010(29539740).pdf,
33_09_20140625-5010(29539741).pdf, and
33_10_20140625-5010(29539742).pdf

³⁴ See accompanying file: 34_20141014-5108(29845120).pdf

³⁵ See accompanying files:
35_20151020-5031(30964087).pdf,
35_20151020-5031(30964088).pdf, and
35_20151020-5031(30964089).pdf

committee.^[36] During that hearing, Rep. Olson of Texas stated that public opposition to FERC-permitted projects is “**out of control.**”^[37] Commission Chairman Bay related to the Committee that **there is more public opposition than in the past**, including protesters disrupting FERC Open Meetings and in-the-field Scoping Meetings. Chairman Bay stated that **many communities clearly oppose more infrastructure.**^[38] Commissioner Clark’s testimony regarding pipeline development said there is “just say no” intervention — more “no infrastructure, anywhere” intervention. He further stated that such opposition “causes all kinds of reliability and cost impacts to consumers if all infrastructure is blocked.”^[39]

What the FERC Commissioners failed to observe and mention is that increased public opposition, protests, and disruptions are due to public realization that...

1. **Fossil fuels are driving rapid climate change that challenges mankind’s existence, and**
2. **FERC is intentionally oblivious to those concerns, in favor of satisfying fossil-fuel industry near-term profit interests—in exchange for FERC’s sole source of funding, and in exchange for revolving-door employment opportunities with the industries being regulated.**

The preponderance of evidence indicates that **fossil fuel mining and usage is rushing the planet toward a catastrophic climate tipping point.** Thus, **FERC is not representing the public interest; quite the opposite.** FERC represents fossil fuel industry interests, facilitating fossil-fuel projects, even in the face of climate catastrophe. **FERC promotes near-term fossil fuel industry profits while increasing climate degradation that threatens wellbeing of Americans and the world. Ultimately, FERC’s policy and practice are in direct defiance of public interest and wellbeing.**

The correct FERC policy would be to consider fossil fuel projects as intrinsically contrary to the public interest unless applicants can irrefutably demonstrate that there is no viable non-climate-changing alternative. Public interest — public and planet survival — requires a diametric reversal of FERC policy and action.

FERC’s pro-fossil-fuel industry defies reality, public interest, and the law.

³⁶ “**Oversight of the Federal Energy Regulatory Commission**” hearing, House Energy & Commerce Committee, 2015 Dec 1, video; <http://energycommerce.house.gov/hearing/oversight-federal-energy-regulatory-commission>

³⁷ *Ibid.*, video time: 15:00.

³⁸ *Ibid.*, video time stamp: 15:58.

³⁹ *Ibid.*, video time stamp: 15:56.

11. Court Decision Re Illegal Government Employee Activities

The US Supreme Court determined in 2013 that government employees' status as employees does not hold them harmless from tort for illegal activities of their employment.^[40] **FERC Staff, Contract Staff, and Commissioners are liable for legal infractions "within the scope or office of employment."**^[41]

Conclusion

CONSIDERING THAT...

- FERC obviously violated NEPA in the Downeast LNG EIS, and FOIA in its responses to our information request;
- External Affairs staff continued efforts to justify redacting information that did not qualify for redaction;
- FERC's failure to search for and provide the requested documents until being embarrassed by our contacting the Inspector General and the FERC Secretary,

...why should the public believe FERC, now? Quite simply, we do not believe FERC has fully satisfied our FOIA request; **it is likely that there are more documents that have not been forthcoming.** It is also likely that these are not isolated events; **it illustrates FERC's non-public-interest culture.**

FERC has been violating the law with impunity. The Public's distrust of FERC is well deserved; it calls for Congressional, media, and Department of Justice scrutiny of all operations, practices, policies, and performance.

THEREFORE,

The public **and government** should not be satisfied; our FOIA request has not been fulfilled until a federal agency **independent from** FERC has completed the search for applicable documents;

FERC has failed to comply with NEPA in the Downeast LNG EIS;

FERC and PHMSA have failed to consider obvious potential consequences regarding vapor fence destruction and LNG release;

FERC policy and operations are contrary to public long-term interest, convenience, and wellbeing;

⁴⁰ **Millbrook v United States**, US Supreme Court decision, 2013 Mar 27; Government personnel are not shielded against liability; http://www.supremecourt.gov/opinions/12pdf/11-10362_2d9g.pdf

⁴¹ *Ibid.*

FERC LNG terminal applications should **require applicants to demonstrate that their projects will not contribute to climate change; else the applicant be rejected;**

FERC's systemic anti-public-interest culture warrants Department of Justice investigation of, and corrective action against, current FERC policy, FERC staff, contracted staff, and Commissioners, as well as PHMSA; and

Instead of regulating, FERC is complicit in violating multiple laws.

Our request of the Department of Justice:

1. **Conduct an independent investigation of FERC compliance and culture regarding Freedom of Information Act requests, especially regarding:**
 - 1.a. Denial of Requests for Expedited Service;
 - 1.b. Denial of Requests for Waiver of Fees;
 - 1.c. Thoroughness of searches for requested documents;
 - 1.4. Contempt in responses to FOIA requests.
2. **Make special enquiry into how FERC tracks permitting requirement completion, and why FERC does not provide that information in easy-to-understand format to the public.**
3. **Investigate FERC conflict of interest** regarding Contract Employees' contributions to the Downeast LNG Environmental Impact Statement — including FERC Staff and Contract Staff handling of details indicating against applicants' interests, and how FERC will ensure that such misdeeds do not occur in the future;
4. **Investigate what scientific justification PHMSA uses in approving vapor barriers to prevent regulatory violation** when sabotage or accident could eliminate vapor barrier integrity simultaneous to an LNG release;
5. **Investigate how the existing FERC permitting procedure provides numerous opportunities for corrupting the permitting process;** how the Commissioners are isolated from knowing about improprieties throughout the process;
6. **Determine how appointing members of the FERC Commission could be performed without introducing conflicts of interest** on the Commissioners' parts;
7. **Extend investigations to all previous FERC and PHMSA projects;** and
8. **Determine who at FERC and PHMSA have violated the public trust** throughout the permitting chain of events, and take appropriate punitive action.

Very truly,

/s/Robert Godfrey

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