

**MARYLAND DEPARTMENT OF THE ENVIRONMENT**

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Deputy Secretary

July 9, 2007

Christopher H. Diez  
Vice President  
AES Sparrows Point LNG, LLC  
Mid-Atlantic Express, LLC  
140 Professional Parkway, Suite A  
Lockport, New York 14094

RE: Federal Consistency Review and Determination  
Proposed AES Sparrows Point LNG Facility

Dear Mr. Diez:

I am writing with regard to the State of Maryland's Federal Consistency review, pursuant to Section 307 of the Federal Coastal Zone Management Act of 1972, as amended (CZMA), of the AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC (collectively "AES") certification that the federally regulated activities associated with the proposed AES Sparrows Point LNG Facility ("Project") are consistent with the Maryland Coastal Zone Management Program (CZMP). This letter has three parts: (1) a discussion of the review period applicable to Maryland's consistency determination; (2) the State's denial of consistency pursuant to 15 CFR § 930.63(b); and (3) the State's denial of consistency under 15 CFR § 930.63(c) on the grounds that AES has not provided sufficient information necessary for the State to make a federal consistency determination.

#### The Review Period Applicable to Maryland's Consistency Determinations

As you are aware from prior correspondence (attached), the Project requires two separate federal actions that are subject to § 307 of the CZMA: (1) the U.S. Army Corps of Engineers (Corps) authorization pursuant to Section 10 of the River and Harbors Act and Section 404 of the Clean Water Act, and (2) the Federal Energy Regulatory Commission (FERC) license. With regard to each federal license and permit, § 307 of the CZMA requires the applicant to "certify" in the application for federal authorization that "the proposed activities comply with, and will be conducted in a manner consistent with, the State's Coastal Zone Management Program." See also 15 CFR Part 930, § 930.57(a). Section 930.57(b) of the federal consistency regulations

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specifies that the applicant's consistency certification shall be in the following form: "The proposed activity complies with the enforceable policies of (name of State) approved management program and will be conducted in a manner consistent with such program." Once the appropriate certification is made, the State has six months in which to render its consistency determination.

With respect to the Corps' permit, MDE received the AES consistency certification and supporting data and information on January 9, 2007, in the form of AES's application for Maryland's Coastal Facilities Review Act (CFRA) permit. Pursuant to the federal consistency regulations, MDE is required to render its consistency determination within six months from that date. With respect to the FERC license, however, MDE notified AES that it had not included the required consistency certification, pursuant to 15 CFR Part 930, § 930.57(b), in its application for the FERC license and that, therefore, the six-month review period had not yet begun. See May 9, 2007, letter from Elder Ghigiarelli to Kent J. Morton. In a letter to FERC dated June 29, 2007, AES noted its disagreement with MDE and asserted that it believed the review period began in January, when it submitted its CFRA application. In the same letter, however, AES included the certification that MDE believes had been missing.

Given AES's position that the review period began as early as January 9, 2007, and, therefore, expires as early as today, July 9, 2007, MDE is rendering a consistency determination on both the Corps permit and the FERC license in this letter. However, because MDE continues to believe that the six-month review period did not begin for the FERC license until June 29, 2007, when AES made the appropriate certification, MDE will continue to review AES's certification of the FERC license and will render a determination prior to the close of the review period on or about December 29, 2007.

#### Denial of Consistency Pursuant to 15 CFR § 930.63(b)

Because Maryland's CZMP is a networked program, consistency with the CZMP is established by obtaining the State permits and authorizations required under the networked State laws. For the AES Sparrows Point LNG Facility ("Project"), the applicable networked laws include the following:

- Tidal Wetlands Act, Md. Code Ann., Envir. § 16-501 *et seq.*,
- Nontidal Wetlands Protection Act, Md. Code Ann., Envir. § 5-901 *et seq.*,
- Waterway Construction Act, Md. Code Ann., Envir. § 5-501 *et seq.*,
- Air Quality Control Act, Md. Code Ann., Envir. § 2-101 *et seq.*,
- Water Appropriation Act, Md. Code Ann., Envir. § 5-501 *et seq.*,
- Water Pollution Control Act, Md. Code Ann., Envir. § 9-301, *et seq.*,

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While AES has submitted applications for authorizations under each of these laws, it has not yet obtained the permits necessary for the State to concur with AES's consistency certification. Accordingly, the State objects to the AES certification that the proposed activities are consistent with the Maryland CZMP. Please note, however, that the State's objection will become a concurrence if all applicable networked State permits are issued.<sup>1</sup>

Denial of Consistency Pursuant to 15 CFR § 930.63(c)

As you know, this is a complex project, involving impacts to a variety of different resources and raising a number of regulatory issues ranging from the protection of wetlands to community safety to the disposal of material dredged from Baltimore Harbor. Much of the information MDE needs to complete its review of the project is still being developed by AES and others. The reviews being carried out by both the Corps and FERC are themselves in their infancy. See, e.g., July 3, 2007, letter from Vance Hobbs, Chief, Maryland Section Northern, U.S. Army Corps of Engineers, to Christopher Diez, AES (requesting additional information on 38 separate items). In fact, the FERC has not yet released even a schedule for the preparation of its Environmental Impact Statement.

Based on its review of the AES application for a CFRA permit and the supporting Resource Documents, MDE requested additional information with regard to the impacts to wetlands and waterways resulting from the proposed dredging and dredged material disposal, and the proposed pipeline. MDE received the AES response to its request on May 31, 2007. As I stated in my letter to you dated July 5, 2007 (attached), MDE's review of this response is ongoing, and based on our review to date, additional information/clarification is still required, particularly with regard to the proposed recycling facility/disposal of the dredged material. MDE received AES's response to that letter on July 6, 2007, and is currently preparing a comprehensive response to the AES May 31, 2007, submittal, which will soon be provided to AES.

The Department simply cannot render a complete substantive consistency determination based on incomplete information; doing so would not serve the interests of the environment, the people of Maryland, and, in the long run, AES. Accordingly, MDE asked AES to stay the federal consistency review period to give MDE the time to receive and consider the information necessary to carry out a comprehensive review of the project and its consistency with Maryland's networked CZMP. AES's refusal to agree to a stay leaves MDE with no choice but to object to

<sup>1</sup> The Department notes that, on June 22, 2007, the United States District Court for the District of Maryland upheld a recent amendment to the Baltimore County Zoning Regulations adding LNG terminals to the list of prohibited uses in Chesapeake Bay Critical Areas. *AES Sparrows Point LNG, LLC et al. v. James T. Smith, et al.*, Memorandum Opinion, Civ. No. RDB-07-325, 2007 WL 1826889 (D.Md. June 22, 2007). The Court specifically held that the adoption of the amendment (commonly referred to as "Bill 9-07") into the County's Critical Area protection program was not preempted by the Natural Gas Act. Unless overturned on appeal, the U.S. District Court's decision would constitute an independent grounds for objection to AES's federal consistency certification(s) under 15 CFR § 930.63(b).

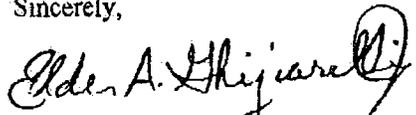
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the AES certification. Accordingly, MDE provides as an alternative basis for its objection that AES has not provided sufficient information necessary for the State to make a federal consistency determination. Please note, however, that MDE continues to review the project under CFRA and on the assumption that the 6-month review period for the FERC license did not begin to run until June 29, 2007, and, if appropriate, will provide notice of the insufficiency of the information AES has provided at a later date. See 15 CFR § 930.60(a)(1).

Pursuant to 15 CFR Part 930, subpart H, and within 30 days from receipt of this letter, AES may request that the Secretary of Commerce override this objection. In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the CZMA, or is necessary in the interest of national security. A copy of the request and supporting information must be provided to MDE, the Corps, and FERC. The Secretary of Commerce may collect fees for administering and processing your request.

If you have any questions, please contact me at (410) 537-3763, or by e-mail [eghigiarelli@mde.state.md.us](mailto:eghigiarelli@mde.state.md.us).

Sincerely,



Elder A. Ghigiarelli, Jr.  
Deputy Administrator  
Federal Consistency Coordinator  
Wetlands and Waterways Program

EAGJr:cma

cc: David Kennedy, NOAA  
Joanne Wachholder, FERC  
Joseph DaVia, Corps  
Kent J. Morton, AES  
Shari T. Wilson, Secretary, MDE  
Judah Prero, AAG, MDE  
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