
No. CP07-62-000
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**UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF COMMERCE**

**AES SPARROWS POINT LNG, LLC
MID-ATLANTIC EXPRESS, LLC,**

Appellants,

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT,

Respondent.

Appeal from Denial of Coastal Zone Consistency

**PRINCIPAL BRIEF OF THE
MARYLAND DEPARTMENT OF THE ENVIRONMENT
UNDER THE COASTAL ZONE MANAGEMENT ACT**

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STATEMENT OF THE CASE

This case presents an effort by AES Sparrows Point LNG, LLC (“AES”) to override the Maryland Department of the Environment’s (“MDE”) denial of consistency pursuant to the Coastal Zone Management Act, 16 U.S.C. § 1451, *et seq.* (“CZMA”) for a liquefied natural gas import terminal and associated 88-mile transmission pipeline at a time when AES has not yet obtained, or provided sufficient information to obtain, the permits that comprise Maryland’s networked coastal zone management program (“CZMP”). Those permits are coordinated under a single, umbrella permitting mechanism established under Maryland’s Coastal Facilities Review Act, Md. Code Ann., Envir. § 14-501 *et seq.* (“CFRA”). In addition to information describing what the project is and what resources it will impact, CFRA requires the preparation of a statement of the economic, fiscal, and environmental impact of the project akin to the Environmental Impact Statement (“EIS”) required by the Federal Energy Regulatory Commission (“FERC”) under the National Environmental Policy Act, 42 U.S.C. § 4231 *et seq.* (“NEPA”). *See* Md. Code Ann., Envir. § 14-506(a); *see also* 18 C.F.R. § 380 *et seq.* In addition to a State CFRA permit, construction of the terminal and pipeline requires two federal authorizations that similarly require the preparation of an EIS under NEPA, namely, a permit from the U.S. Army Corps of Engineers (“Corps”) under § 404 of the federal Clean Water Act, 33 U.S.C. § 1344, and § 10 of the Rivers & Harbors Act, 33 U.S.C. § 403, for the dredging and filling activities associated with the Project and a FERC license for the construction and operation of the facility itself.

MDE’s and the Corps’ review of this project is in its early stages. While AES submitted applications for all of the State and federal authorizations in January 2007, it has not yet provided all the information necessary to support the applications, and the necessary NEPA

documentation – which will describe the environmental context in which all of these decisions are made – will not be prepared for many months to come. At this stage, neither AES nor MDE knows with certainty the extent of the resources that will be impacted, but they do know that AES has not yet obtained the State permits that comprise Maryland’s networked CZMP. Accordingly, MDE on July 9, 2007, denied federal coastal zone consistency (“Federal Consistency”) on two alternative grounds: (1) the Project is not consistent with the Maryland CZMP because AES has not obtained the relevant networked permits; and (2) MDE does not have sufficient information to determine whether the Project is consistent with, and permissible under, its networked CZMP. This appeal to the Secretary of Commerce (“Secretary”) followed.

STATEMENT OF FACTS

AES Sparrows Point Project

1. AES proposes to construct and operate a new liquefied natural gas (“LNG”) terminal on the Sparrows Point peninsula within the Baltimore Harbor and, through an affiliated corporate entity (Mid-Atlantic Express, LLC), construct an 88-mile transmission pipeline from the terminal to interstate natural gas connections in Eagle, Pennsylvania (together, “the Project”). Resource Report No. 1 (“RR-1”) at 1.

2. The Project involves: (a) the dredging of shipping lanes and turning basin in front of the proposed LNG terminal; (b) the processing and re-use of the dredged material; and (c) the construction of the pipeline through, under, and across wetlands and waterways.

3. AES proposes to dredge the waters in front of the Sparrows Point facility to a depth sufficient to accommodate the tankers that would offload at the terminal, which have a deeper draft than the ocean-going vessels that traditionally operate in the Baltimore Harbor.

4. The sediments in Baltimore Harbor have been contaminated by decades of industrial use and are impaired by several chemical constituents, including PCBs, chromium, zinc, lead, mercury, nickel, copper, cyanide, and chlordane. RR-2 at 14. Fish consumption advisories were issued in 1986, and expanded in 2001, for chlordane, PCBs, and dieldrin. *Id.*

5. AES's initial sampling results indicate that the sediments in front of the Sparrows Point project site have concentrations of chemical constituents that "are generally similar to concentrations in sediments within other portions of the Baltimore Harbor/Patapsco River/Back River system." RR-2 at 19. The affected sediments have particularly elevated levels of poly aromatic hydrocarbons (PAH) and heavy metals. *See, e.g.,* RR-2 at 19.

6. AES proposes to de-water the dredged material and process it by adding Portland cement and other additives as a bulking agent. Processing the dredged material in this manner is not expected to remove contaminants, but AES believes that the addition of Portland cement will bind the contaminants in the material and prevent their future release. Although AES has not performed leachate testing on the processed dredged material, it states that it "will ensure that PDM meets applicable environmental standards prior to use and placement as fill material." RR-1 at 29.

7. AES proposes to provide the processed dredged material to a number of end-users for a variety of uses, ranging from use as a roadbed to reclamation of abandoned mine sites. While AES has indicated that it has already discussed with the use of the material with potential end-users, AES has not provided MDE with any details as to where and how the material would be used. RR-1 at 35; RR-2 at 39.

8. Construction of the pipeline will run across numerous wetland and stream systems. While AES has provided cross-sections of these stream crossings and has estimated the

total wetland and waterway impacts associated with the construction of the pipeline, it will not know the precise extent of the impacts until after FERC has approved the Project and easements from all affected landowners, including Baltimore Gas & Electric and the Maryland State Highway Administration, have been obtained.

Maryland's Coastal Zone Management Program

9. Maryland's CZMP is a networked program, comprised of existing State laws and regulations applicable to a given project.

10. 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.

11. The networked laws applicable to the Project are:

- (a) Tidal Wetlands Act, Md. Code Ann., Envir. § 16-101 *et seq.*, COMAR 26.24;
- (b) Nontidal Wetlands Protection Act, Md. Code Ann., Envir. § 5-901 *et seq.*, COMAR 26.23;
- (c) Waterway Construction Act, Md. Code Ann., Envir. § 5-501 *et seq.*, COMAR 26.17.04;
- (d) Air Quality Control Act, Md. Code Ann., Envir. § 2-101 *et seq.*, COMAR 26.11;
- (e) Water Appropriation and Use Act, Md. Code Ann., Envir. § 5-501 *et seq.*, COMAR 26.17.01; and
- (f) Water Pollution Control Act, Md. Code Ann., Envir. § 9-301, *et seq.*, COMAR 26.08.02.

See Letter from Elder A. Ghigiarelli, Jr., to Christopher H. Diez (July 9, 2007) at 2 (included in the Appendix at Apx. 40).

12. Under Maryland law, all of the State permits required for a coastal facility are obtained through an umbrella permitting process established under CFRA. *See* Md. Code Ann., Envir. § 14-505.

13. The Project requires two separate federal actions that are subject to § 307 of the CZMA: (1) the Corps authorization pursuant to § 10 of the Rivers & Harbors Act and § 404 of the Clean Water Act; and (2) the FERC license.

The State CFRA Permit Process to Date

14. On August 31, 2006, MDE met with AES to discuss CFRA and its requirements, the applicable State permits encompassed by CFRA, and Maryland's networked CZMP. In the course of the meeting, MDE explained that the Federal Consistency determination would be based on compliance with all required State authorizations/permits.

15. On January 8, 2007, AES submitted its application to FERC for authorization to site, construct, and operate a liquefied natural gas ("LNG") receiving terminal and associated facilities pursuant to § 3(a) of the Natural Gas Act and Parts 153 and 350 of the FERC regulations. AES's FERC application did not include a statement that the proposed Project is consistent with the Maryland CZMP, as required by 15 C.F.R. § 930.57.

16. On January 9, 2007, AES submitted its CFRA application to MDE and two applications to the Corps: One for the pipeline and one for the dredging necessary to meet the terminal's ship traffic. Both Corps applications were included in AES's CFRA application and included a statement that the proposed Project was consistent with the Maryland CZMP. The submission of that statement to MDE triggered the six-month consistency review period for the Corps permit in accordance with 15 C.F.R. § 930.60.

17. On April 6, 2007, MDE informed the Corps of the status of the State's review and that MDE would need additional time to complete its consistency review. AES was copied on the letter. Letter from Elder A. Ghigiarelli, Jr., to Joe DaVia, Corps (April 6, 2007) (Apx. 3).

18. On April 18, 2007, MDE met with AES to discuss status of the State's review and requested that AES agree to stay the six-month Federal Consistency timeclock for the Corps permit in order to ensure consideration of a complete record. AES indicated during the meeting that staying the six-month timeclock would not be a problem.

19. On April 27, 2007, MDE published a Notice in the Maryland Register announcing receipt of AES's CFRA application, identifying the State permits/approvals required for the Project, and including a statement that the State's Federal Consistency determination would be based on compliance with these applicable State laws and regulations. (Apx. 5.)

20. On May 7, 2007, MDE wrote AES informing it that "the activities/project descriptions contained within the Resource Reports are numerous[,] vague[,] and not site-specific" and requesting additional information on forty-six separate items raised by its application for tidal wetlands and nontidal wetlands and waterways authorizations from MDE. Letter from Elder A. Ghigiarelli, Jr., to Christopher Diez (May 7, 2007) (Apx. 7).

21. By letter dated May 9, 2007, MDE informed AES that the Federal Consistency timeclock on the FERC license had not yet begun because AES had not included the required consistency certification in its FERC application. MDE reiterated in the letter its request that AES agree to stay the Federal Consistency timeclock until such time as the Secretary of MDE is prepared to issue a decision on the CFRA permit application. Letter from Elder A. Ghigiarelli, Jr., to Kent J. Morton (May 9, 2007) (Apx. 19).

22. On May 9, 2007, MDE met with the Corps to discuss dredging issues and the status of the agencies' respective reviews.

23. On May 22, 2007, MDE hosted a meeting with the Corps, EPA, and FERC (which requested the meeting) to discuss issues associated with the proposed dredging and dredged material disposal.

24. On May 30, 2007, AES responded to MDE's May 7, 2007, request for additional information on the wetlands and waterways applications (Apx. 21).

25. On June 5, 2007, MDE met with the Corps, EPA, and FERC to discuss the additional data and information required by the regulatory agencies, including additional information about the dredging required for the Project and the testing and disposal of the dredged material.

26. 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) ("*AES II*"). The Court specifically held that the amendment (commonly referred to as "Bill 9-07") was: (a) a valid part of the County's Critical Area protection program that did not need to be approved by NOAA; (b) enforceable as part of Maryland's CZMP; and (c) was not preempted by the Natural Gas Act. *Id.* at 6-7.

27. On June 25, 2007, MDE sent AES a follow-up letter to its May 9, 2007, letter reiterating that AES still had not submitted a consistency certification to FERC that would commence the six-month Federal Consistency timeclock on the State's review of the FERC license, and still had not responded to MDE's request that AES stay the Federal Consistency timeclock. MDE stated in the letter that, unless AES agreed to stay the timeclock until such time as MDE was prepared to render its CFRA decision, MDE would have no choice but to process a

Federal Consistency denial of the project. Letter from Elder A. Ghigiarelli, Jr., to Kent J. Morton (June 25, 2007) (Apx. 22).

28. On June 29, 2007 – more than two months after a stay was first discussed and only ten days before the conclusion of the six-month review period – AES responded to MDE’s May 9 and June 25 letters and informed MDE that it would not stay the Federal Consistency timeclock. In its letter, AES also addressed the issue of whether it had ever certified consistency for the FERC license, concluding that the filing of its CFRA application in January 2007 constituted the necessary certification. Letter from Kent J. Morton to Elder A. Ghigiarelli, Jr. (June 29, 2007) at 2-3 (Apx. 24). AES reiterated this position in a separate letter to FERC of the same date, but eventually provided the missing certification that “[t]he proposed activity complies with the enforceable policies of Maryland’s approved management program and will be conducted in a manner consistent with such program.” Letter from Kent J. Morton to Kimberly D. Bose (June 29, 2007) (Apx. 27); *cf.* 15 C.F.R. § 930.57(b) (setting forth required certification language).

29. On July 3, 2007, the Corps wrote to AES requesting additional information on thirty-eight separate items relating to the environmental impact of the dredge and fill activities associated with the Project. Letter from Joseph P. DaVia to Christopher Diez (July 3, 2007) (Apx. 29).

30. On July 5, 2007, MDE wrote to AES informing it of the status of MDE’s review of AES’s May 30 response to MDE’s May 7 request for additional information on the wetlands and waterways permit application. MDE told AES that it was reviewing the information AES had provided and that additional information was still required, particularly with respect to the end use of the processed dredged material and the waterway impacts associated with Project’s

many stream crossings. MDE alerted AES to the fact that a second detailed information request would be forthcoming. Letter from Elder A. Ghigiarelli, Jr., to Christopher H. Diez (July 5, 2007) (Apx. 35).

31. AES responded to MDE's July 5th letter on the next day, providing some additional information, referring MDE back to the Resource Reports, and otherwise dismissing MDE's concerns as "picayune in nature." In the same letter, AES pressed MDE for a consistency determination by July 9th. Letter from Kent J. Morton to Elder A. Ghigiarelli, Jr. (July 6, 2007) (Apx. 37).

32. As of July 9, 2007, AES had not yet obtained the CFRA permit that encompasses the networked State permits that comprise Maryland's CZMP. Accordingly, on July 9, 2007, MDE denied Federal Consistency on the Corps permit, noting that it would continue to review AES's certification of the FERC license and would render a determination prior to the close of the review period on or about December 29, 2007. Letter from Elder A. Ghigiarelli, Jr., to Christopher H. Diez (July 9, 2007) (Apx. 40).

Post-Objection Events

33. On July 21, 2007, AES responded to the Corps' information request dated July 3, 2007. Letter from Christopher Diez to Joseph DaVia (July 21, 2007) (Apx. 44).

34. On August 1, 2007, MDE met with AES, FERC, the Corps, and EPA to discuss the status of the State and federal reviews of the application(s). There was a lengthy discussion about the need for additional sediment sampling. MDE noted in the meeting that a second request for additional information on the wetlands and waterways application was being prepared.

35. On August 15, 2007, MDE issued AES a second request for additional information concerning the Project. AES's response was provided on August 30th, which response is currently under review. Letter from Elder A. Ghigiarelli, Jr., to Christopher Diez (Aug. 15, 2007) (Apx. 46).

36. On August 30, 2007, AES responded to MDE's August 15th request for additional information. Letter from Kent J. Morton to Elder A. Ghigiarelli, Jr. (Aug. 30, 2007) (Apx. 55).

37. On September 26, 2007, AES submitted the results of the additional sampling of the area proposed to be dredged, as required by the Corps and EPA. Letter from Christopher Diez to Joseph DaVia (Sept. 26, 2007) (Apx. 56).

38. As of the date this brief was filed, FERC had not yet released a schedule for the preparation of its EIS.

39. It is MDE's understanding that, as of the date this brief was filed, Baltimore Gas & Electric has expressed concern about the effect of AES's use of its right-of-way, while the Maryland State Highway Administration has denied AES access to its rights-of-way.

SUMMARY OF ARGUMENT

MDE's denial of Federal Consistency is based on the AES's failure to obtain the State permits that comprise Maryland's networked CZMP and is consistent with the Department of Commerce's CZMA regulations, which expressly state that the lack of State networked permits can constitute the basis for such a denial. MDE identified the permitting statutes that comprise Maryland's CZMP and stated that "consistency with the CZMP is established by obtaining the State permits and authorizations required under the networked State laws." These laws *are* the enforceable policies of Maryland CZMP – a fact of which AES is well aware – and there is no

provision of law or regulation that supports dismissing MDE's denial on the mere fact that it did not use the words "enforceable policies."

While MDE had sufficient information to determine that the Project had not obtained the networked State permits, it did not have information sufficient to determine whether the Project and its environmental impacts were otherwise consistent with the CZMP. This is a complex project involving a variety of different environmental impacts ranging from dredging tidal waters, to crossing nontidal streams, to the potential land-application of the contaminated dredged material processed at the facility. While AES has provided a significant amount of information about the Project, MDE is still waiting on, among other things, additional information about the ultimate use of the processed dredged material and the final impact figures for the pipeline crossings – information critical to its assessment of the environmental impact of the Project. While that impact may well be acceptable in the end, at this point, MDE simply does not know.

Nor does MDE or the Secretary know how the Fourth Circuit will decide the issues raised by AES in its appeal of the District Court decision in *AES II*. While that decision does not affect the Secretary's determination in this appeal, it potentially will provide a third basis for MDE's denial of consistency, namely, that the Project is inconsistent with Maryland's Critical Area program and, therefore, its CZMP.

Given the legal and factual questions that have yet to be answered about the Project, it is difficult to see how the Secretary could determine that the Project is "consistent with the objectives or purposes of the Act," 15 C.F.R. § 930.130(d) at this time. The national interest furthered by the Project cannot "outweigh[]" the adverse coastal effects of the Project, 15 C.F.R. § 930.121(b), and until those effects are identified with a greater degree of specificity in the

NEPA process, it is impossible to perform the required balancing test. And while the putative national interests that might be served by increased access to natural gas are, of course, outside of MDE's area of expertise, even a cursory sampling of national energy policy statements suggests that further reliance on foreign energy sources is not the way to go. A reasonable alternative that would permit the activity to be conducted in a manner consistent with Maryland's CZMP exists: AES should allow the review process to run its course and secure the required authorizations and permits. By insisting on this appeal at this point in the process, AES seeks to force the Secretary to render a decision before a complete account of the Project's impacts can be made. This appeal should be dismissed without prejudice and the CZMA review remanded back to MDE and stayed so that Maryland's Federal Consistency review process can proceed.

ARGUMENT

I. MDE'S OBJECTION ON THE BASIS THAT AES HAS NOT OBTAINED THE STATE PERMITS THAT COMPRISE MARYLAND'S NETWORKED CZMP IS CONSISTENT WITH, AND EXPRESSLY SANCTIONED BY, APPLICABLE REGULATIONS AND SUPPORTED BY THE RECORD.

The preamble to the Department of Commerce's "Coastal Zone Management Act Federal Consistency Regulations of 2006" (the "2006 CZMA Regulations") makes crystal clear that MDE is well within its regulatory rights to deny Federal Consistency on the grounds that AES has not obtained its CZMP-networked permits:

Removing State permits from necessary data and information only affects starting the six-month review period. *This change does not affect the States' ability to require that a State permit (which contains State enforceable policies) be issued in order to find a project consistent or object to an activity because the applicant did not obtain the State permit within the six-month period.* This does not result in "pre-judging" the State permit if the permit is not acted upon within the six-month CZMA review. States may object to the consistency certification while providing that the objection will become a concurrence if the State permit is issued.

71 Fed. Reg. 788, 813 (Jan. 5, 2006) (emphasis added). This is precisely what MDE has done in this case.

AES does not contend in its brief that MDE's denial of Federal Consistency was legally inappropriate on this ground,¹ but contends instead that it is invalid because, according to AES, the Objection does not "describe how the proposed activity is inconsistent with specific enforceable policies" of Maryland's CZMP. Brief at 7 (emphasis in original). This elevates form over substance.

The applicable CZMA regulation states that "State agency objections that are based on sufficient information to evaluate the applicant's consistency certification shall describe how the proposed activity is inconsistent with specific enforceable policies of the management program." 15 C.F.R. § 930.63(b). The term "enforceable policy" is defined as "State policies which are legally binding through . . . laws, regulations, land use plans, ordinances . . . by which a State exerts control over private and public land and water uses and natural resources in the coastal zone." 16 U.S.C. § 1453(6a). Under Maryland's networked CZMP, the networked laws applicable to a coastal project *are* the enforceable policies; an applicant need only obtain the required state permits and authorizations to demonstrate consistency.

MDE specifically identified each of the applicable networked statutes in its July 9th letter objecting to AES's certification of consistency for the Corps permit. (Apx. 41.) While AES may contend that MDE did not specifically state that these statutes constitute the "enforceable policies," AES cannot seriously contend that it did not know that to be the case. MDE informed

¹ AES did, however, contend in its June 29, 2007, letter to MDE that "Maryland's Coastal Zone Management Program . . . while it may be a 'networked' program as described in your letter, cannot require issuance of any or all State or local permits/approvals as a precondition to a determination of consistency." Letter from Kent J. Morton to Elder A. Ghigiarelli, Jr., (June 29, 2007) at 2.

AES of the nature of its networked CZMP with AES on numerous occasions, beginning in August 2006 and continuing right up until the denial of consistency on July 9, 2007. *See* Letter from Elder A. Ghigiarelli, Jr., to Joe DaVia, Corps (April 6, 2007) (copying AES) (Apx. 3); Letter from Elder A. Ghigiarelli, Jr., to Kent J. Morton (May 9, 2007) (Apx. 19). Had AES not understood what was required to demonstrate consistency, it presumably would not certified that “the proposed works are consistent with Maryland’s Coastal Zone Management Program.” *See* CFRA Application (Jan. 9, 2007) (included with AES brief). For AES to suggest that it was somehow caught unaware is simply not credible.

In sum, Maryland’s denial of Federal Consistency is procedurally valid because AES has failed to secure any of the permits and authorizations that make up the specific enforceable policies of Maryland’s CZMP. Thus, even if AES had submitted all of the information requested by MDE, the fact that they have yet to secure the necessary State permits is independent grounds for denial of consistency.

II. MDE’S OBJECTION ON THE BASIS OF INSUFFICIENT INFORMATION IS LOGICAL, PROCEDURALLY SOUND, AND SUPPORTED BY THE RECORD.

AES has not, however, provided all of the information necessary to render decisions on both the State permits and Federal Consistency and this provides a second, independent ground for denial of consistency. *See* 15 C.F.R. § 930.63(a) (providing that “[a] State agency may assert alternative bases for its objection”); 15 C.F.R. § 930.63(c) (stating that “state agency objection may be based upon a determination that the applicant has failed, following a written State agency request, to supply . . . information necessary for the State agency to determine consistency”). The absence of information is not due to a lack of effort on AES’s part; AES has provided volumes of information and data about the Project and its environmental impact. MDE does not

have the information it needs to render a fully-informed consistency determination because the final contours of the Project have not yet taken shape.

Specifically, MDE lacks information about the Project that is necessary for it to make a permitting decision under the State laws that determine consistency with its CZMP. For example, with respect to the pipeline, MDE will not know the precise alignment and crossing locations until AES has easement agreements with the affected landowners and FERC has approved the project. Indeed, AES has acknowledged that:

Assuming FERC approves the Project and issues a certificate of public convenience and necessity, AES will complete land owner agreements and obtain access to the properties at that time, the impacts to wetlands and water body areas will be refined and resubmitted to the MDE and the ACOE and the appropriate mitigation measures will be updated as well.

Letter from Elder A. Ghigiarelli, Jr., to Christopher Diez (Aug. 15, 2007) (item No. 16) (Apx. 50). Because MDE will not know the actual “revised and resubmitted” impacts associated with the pipeline until after FERC approval, it cannot now make a fully informed consistency determination.

Other, larger questions remain outstanding with respect to the LNG facility itself. MDE believes that the 4.0 million cubic yards of dredging proposed by AES, if approved, would constitute the largest volume of dredge material removal approved by Maryland for a single project. The nature and extent of the contamination of this dredged material could pose a significant hurdle to the environmental acceptability of this Project. While removing contaminated sediments can, as AES points out, be an environmental benefit, the dredging process can also re-suspend long-dormant contamination and spread it to other, less contaminated areas. *See, e.g., Connecticut v. U.S. Dept. of Commerce*, 2007 WL 2349894, at 9-10 (Aug. 15, 2007) (recognizing potential environmental impact of re-suspending sediments). In

light of the environmental risks involved, the Corps requested additional sediment sampling data, which AES only recently provided. *See* Letter from Christopher Diez to Joseph DaVia (Sept. 26, 2007) (Apx. 56).

AES's proposal to "process" this contaminated material with Portland cement and other additives presents its own environmental risk. Processing the dredged material in the manner proposed by AES is not designed to *remove* the contaminants, only *bind* them into the resulting mixture – referred to by AES as "processed dredged material" or "PDM." *See* RR-2 at 39. While AES asserts that the PDM "will not leach contaminants once it has been processed," *id.*, it has not provided any data to support its claim. MDE has never reviewed or approved a "recycling" process similar to that proposed by AES. In light of the contamination at issue, it cannot permit the process to move forward without a demonstration that contaminants in the PDM will not simply leach out over time, thereby spreading the contamination elsewhere.

Furthermore, after processing the dredged material, AES intends to supply it to end-users for uses ranging from mine reclamation, landfill capping and closure, and Brownfield redevelopment sites to highway embankments, structural and non-structural fill, and "[m]anufactured top soil." RR-1 at 35. AES has not, however, provided MDE with the names of any specific end-users that would be interested in receiving and using the material or the locations of any such end-uses. *Id.* Depending on the results of the toxicological studies, it may well be acceptable from an environmental and human health standpoint to use the material, say, as a roadbed, but it may be entirely unacceptable to use the material to reclaim abandoned mines – particularly where there is an existing groundwater connection. Again, while AES states that it "will ensure that the PDM meets applicable environmental standards prior to use and placement

as fill material,” RR-2 at 39, MDE and the other resources agencies require more than the applicant’s assurances in carrying out its environmental stewardship responsibilities.²

None of this should come as a surprise to AES; MDE has informed AES on more than one occasion that, until it has concrete information about the end use of the contaminated dredged material and the final pipeline impacts, it will not be in a position to render a consistency determination on the merits of the Project. *See, e.g.*, Letter from Elder A. Ghigiarelli, Jr., to Christopher Diez (May 7, 2007) (Apx. 7); Letter from Elder A. Ghigiarelli, Jr., to Christopher H. Diez (July 5, 2007) (Apx. 35).³ Indeed, despite its denial of consistency, MDE has continued its review of the Project and, as promised in the July 5th letter, has made a second request for additional information in response to AES’s May 30th and July 6th letters. *See* Letter from Elder A. Ghigiarelli, Jr., to Christopher Diez (Aug. 15, 2007) (Apx. 46). AES’s response, which was provided on August 30th, is currently under review. The Corps, for its part, also requested additional sediment sampling data (Apx. 29), which MDE and the other resource agencies have only recently received. (Apx. 56).

² In addition, if the PDM cannot be re-used in the manner proposed, AES indicates that the 4 million cubic yards of contaminated dredged material would have to be disposed of through “off-site disposal, open ocean disposal at approved off shore locations, and upland fill sites.” RR-2, at 40. Disposal of dredged material presents a number of challenges. Existing disposal sites are at, or near, capacity; development and permitting of new disposal sites is difficult; and ocean dumping would require approval from the Corps and EPA and would require a whole new round of analyses.

³ MDE disagrees with AES’s suggestion that MDE waited until “one business day prior to the end of the six-month consistency review period,” Brief at 4, to provide a written request to supply additional information. The July 5th letter was only Maryland’s *last* indication before denying consistency that it would need more information; leading up to that, there were near-constant discussions with AES as to what information was needed by Maryland to properly process the State permits that, together, determine consistency. Nor is there anything in 15 C.F.R. § 930.63 prohibiting the state from requesting information within a specific period before the expiration of the six-month consistency review period.

AES itself acknowledges that “[c]areful consideration of practicable and permissible disposal options for the dredged material is warranted based on anticipated volumes and sampling results.” RR-2 at 19. MDE agrees but simply cannot say whether these aspects of the Project are permissible or consistent with its CZMP at this early stage and, Maryland maintains, the Secretary similarly is in no position now to conclude that this Project – with all of these open questions – is consistent with the CZMA.⁴

The CZMA is, for the states, a voluntary program. *Connecticut*, 2007 WL 2349894 at 3. In exchange for developing a CZMP, the states receive two things: federal funding to implement their plans and the consistency requirement – “a kind of reverse preemption provision that assures a state that, with certain exceptions, federal agency activities or federally-sponsored activities affecting the coastal zone will be consistent with the state-created and federally approved coastal management plan.” *Id.* (quoting Joseph J. Kalo, *Coastal and Ocean Law* at 192 (2007)). In this respect, the CZMA “established a longstanding policy insuring the involvement of local and state officials in the protection of coastal areas.” *AES II*, 2007 WL 1826889 at 4. Allowing AES to force a premature consistency determination and then overriding that determination on an incomplete record would undermine the “integral role” that Maryland and the other states play “in carrying out this Congressional policy,” *id.*, and make a mockery of the “incentive” that Federal Consistency was meant to be. *Connecticut*, 2007 WL

⁴ Understanding that complete information about the Project would not be available for some time, Maryland offered AES the opportunity to toll the review period in accordance with 15 C.F.R. § 930.60(b) – a mechanism meant to address situations such as this one. *See* 2006 CZMA Regulations, 71 Fed. Reg. at 795 (“When appropriate, the applicant and the State could agree, pursuant to § 930.60, to stay the six-month period until a specific date to allow for issuance of the State permit.”). AES refused (Apx. 25), choosing instead to litigate the energy merits of its proposal on an incomplete environmental record.

2349894 at 3. Accordingly, MDE respectfully asks that the Secretary remand this matter for it to complete its review of this Project.

III. THE UNITED STATES DISTRICT COURT DECISION IN *AES II* IS GOOD LAW AND, UNLESS OVERTURNED ON APPEAL, PROVIDES AN INDEPENDENT GROUND FOR MDE'S OBJECTION.

In a footnote in its denial of consistency, Maryland noted that on June 22, 2007, the United States District Court for the District of Maryland issued its decision in *AES II* upholding a recent amendment to the Baltimore County Zoning Regulations adding LNG terminals to the list of prohibited uses in the Chesapeake Bay Critical Area. *AES Sparrows Point LNG, LLC, et al. v. James T Smith, et al.*, 2007 WL 1826889. In that decision, 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 a part of Maryland's CZMP and not preempted by the Natural Gas Act. *Id.* at 6-7. As MDE indicated in its objection, 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 C.F.R. § 930.63(b).

Although AES attempts to re-litigate in its brief the issues that were decided by *AES II* and that are currently before the Fourth Circuit, there are two reasons why it cannot do so in this appeal. First, principles of *res judicata* applicable to this proceeding preclude the Secretary from further considering this issue. As the Secretary observed in the Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of the Virginia Electric and Power Company (May 19, 1994) ("*VEPCO*"), the doctrine of *res judicata* "provides that if a judgment on the merits of a case has been reached in a prior suit or administrative action, the matter cannot be argued again in a later action." *Id.* at 10. Second, and perhaps more importantly, whether the Project is consistent with Maryland's CZMP is not at issue in this proceeding. The Secretary does not here "consider[] whether the State was correct in its determination that the proposed

activity was inconsistent with its coastal management program;” instead, its review is “limited to determining whether the objection was properly lodged.” *Id.* at 6. Accordingly, the Secretary should decline AES’ invitation to pre-judge the issues before the Fourth Circuit.

IV. AES HAS NOT DEMONSTRATED THAT THE PROJECT IS CONSISTENT WITH THE OBJECTIVES OR PURPOSES OF THE COASTAL ZONE MANAGEMENT ACT.

The CZMA permits the Secretary, upon appeal from the applicant, to find that the “activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security” and override a consistency determination rendered by a state. 16 U.S.C. § 1456(c)(3)(A). The Secretary applies a three-pronged test to determine whether a proposed activity is “consistent with the objectives or purposes of the Act:”

- (a) The activity furthers the national interest as articulated in §302 or § 303 of the Act in a significant or substantial manner;
- (b) The national interest furthered by the activity outweighs the activity’s adverse coastal effects, when those effects are considered separately or cumulatively; and
- (c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.

15 C.F.R. § 930.121. Appellant bears the burden of demonstrating by a preponderance of the evidence that *all three* of the requirements are met. *See id.*; *see also* 15 C.F.R. § 930.127(f) (burden on appellant); Letter from Conrad C. Lautenbacher, Jr., Under Secretary of Commerce, to Steven D. Bell and Jim Petro, Attorney General of Ohio (“Barnes Nursery”), at 5 (Dec. 23, 2003) (same); Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Islander East Pipeline Company, LLC, at 35 (May 5, 2004) (“*Islander East*”) (preponderance of the evidence standard applies). Because AES has failed to submit the

evidence necessary to demonstrate that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security, its appeal should be dismissed.

A. AES Has Not Persuasively Demonstrated That The Project Furthers The National Interest In A Significant Or Substantial Manner.

Maryland has no reason to believe that the Project does not further the national interest in developing and providing energy to meet growing demand for natural gas throughout the eastern seaboard; as observed in several consistency appeals, “it is relatively easy for projects to satisfy the national interest requirement.” *Connecticut*, 2007 WL 2349894 at 6. And while the Secretary is in a better position than MDE to judge what is in the national interest, it appears to MDE that AES is overstating the national significance of the Project. In determining whether a project “significantly or substantially furthers the national interest,” NOAA “encourages” appellants and States to consider three factors:

- (1) The degree to which the activity furthers the national interest;
- (2) The nature or the importance of the national interest furthered as articulated in the CZMA; and
- (3) The extent to which the proposed activity is coastal dependent.

Coastal Zone Management Act Federal Consistency Regulations of 2000, 65 Fed. Reg. 77124, 77150 (Dec. 8, 2000) (“2000 CZMA Regulations”). The determination of substantial contribution to the national interest will depend not on broad generalities, but on the facts of the particular appeal. *Islander East*, at 6 n.26.

Applying these three factors, AES’s argument that the Project promotes the national interest by “further[ing] the national interest in major coastal-dependent energy facilities,” Brief at 15, “develop[ing] . . . the resources of the Nation’s coastal zone,” *id.* at 19, and “preserv[ing], protect[ing] . . . restor[ing] [and] enhanc[ing] the resources of the Nation’s coastal zone”. . . is

overstated. While it is true that the CZMA provides for giving priority consideration to coastal dependent uses and orderly processes for siting major facilities relating to energy, the passage AES quotes is actually part of a much larger statement of policy:

[T]he national policy is to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs . . . which programs should at least provide for: . . . priority consideration . . . to coastal dependent uses and orderly processes for siting major facilities relating to energy.

16 U.S.C. § 1453(6). The actual policy articulated in the CZMA is that the states should be encouraged and assisted to implement policies that give *expedited* consideration to the energy projects, not that such projects should somehow get a free pass. CFRA effectuates that policy by providing energy projects a one-stop, unified, umbrella permit instead having to seek and obtain several separate State permits.

AES's argument that its project is in the national interest because it results in the "development" of coastal areas is similarly overstated. While building an LNG terminal and pipeline may meet the plain dictionary meaning of "develop," it does not here, as AES contends, allow for the use of coastal zone "for a particular purpose that was previously not available." Brief at 19. As a factual matter, LNG is already available through another coastal facility, namely, Dominion Cove Point, located in Calvert County, Maryland, on the Chesapeake Bay just north of the Patuxent River. RR-10 at 10. This facility is currently undergoing an expansion that will increase the storage of LNG from 7.8 billion cubic feet (Bcf) to 14.5 Bcf – enough energy for approximately 50 million homes each day. *See* RR-10 at 10; *see also* FERC Dockets Nos. CP05-130-000, 001, 002; CP05-132-000, 001. Hence, the AES project would not constitute "a use for the coastal zone for a purpose that was not previously available."

Nor does the Project provide for a new use simply because it provides for the dredging of Baltimore Harbor sediments to depths that have not previously been maintained. Factually, that may be true; LNG tankers require channel and turn-around depths greater than other ocean-going vessels. But the need for such depths is driven solely by AES's Project. The Port of Baltimore is ranked nationally in the top 15 for overall tonnage of cargo handled annually and dredges shipping channels to accommodate the vessels that use the harbor facilities. *See* Maryland Port Administration's home page, www.marylandports.com (Apx. 76). As evidenced by AES's brief, the Port has never found it necessary to dredge to the depths proposed by AES. To assert that dredging to accommodate the vessels that would use the AES project is "development" because it accommodates those vessels is circular at best.

Finally, AES's assertion that the Project will preserve, protect, restore, and enhance coastal zone resources, by facilitating the use of clean-burning natural gas, improving water quality, and removing contaminated sediment from Maryland waterways is optimistic at best. *See* Brief at 22-28. At first blush, it is difficult to imagine how an industrial project involving large-scale dredging and the construction of an 88-mile pipeline through wetlands and waterways could "preserve," "protect" or "restore or enhance the resources of the Nation's coastal zone for this and succeeding generations." 16 U.S.C. § 1452(1). To be sure, should the Project eventually be permitted under CFRA, AES will have demonstrated that its impacts will be avoided and minimized to the fullest extent practicable, Md. Code Ann., Envir. § 5-907, COMAR 26.24.02.03B(1), but that does not mean that the Project presents an overall *benefit* to the environment, just that its impacts have been minimized to the maximum extent practicable.

More specifically, though, the benefits of the Project that AES touts are unproven and, in some instances, double-edged. For example, while natural gas may well be "clean burning," the

combustion of natural gas is one of the largest sources of greenhouse gas emissions in the United States – one of the primary drivers of climate change. See Paulina Jaramilla, *et al.*, *Comparative Life-Cycle Air Emissions of Coal, Domestic Natural Gas, LNG, and SNG for Electricity Generation*, 41 JOURNAL OF ENV'T'L SCI. AND TECH. 6290 (2007). One of the policy goals of the CZMA is:

to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs . . . which . . . should at least provide for . . . plans for addressing the adverse effects upon the coastal zone of . . . sea level rise.

16 U.S.C. § 1452(2)(k); *see also* 16 U.S.C. § 1451(l) (urging states to “anticipate and plan for” global warming and sea level rise). It is debatable that a facility that contributes, at least indirectly, to the problem of sea level rise through greenhouse gas emissions promotes the goal to preserve, restore or enhance the coastal zone.

Similarly, AES’s assertion that the deep dredging it proposes will benefit the Chesapeake Bay by removing contaminated sediments is similarly dubious. In those areas of the proposed dredging that have not been previously dredged, re-suspending these sediments into the water column may be *more* detrimental to the environment than leaving them in place; it is impossible to say until MDE has had the opportunity to review the latest sediment sampling data. Furthermore, AES does not intend to treat the dredged material to remove the contaminants from the sediments. Rather, it proposes simply to process the material with Portland cement and other additives in an effort to *bind* the contaminants in the material. To date, AES has not provided data sufficient to determine that the end result of the innovative process it proposes will prevent the gradual leaching out of the contaminants over time. If the contaminants do leach out, AES may simply be spreading the contamination elsewhere, although without information about the characteristics and end-uses of the processed material, it is, again, too soon to tell.

While AES stretches the benefits of the Project to fit into some of the policies articulated in the CZMA, it ignores others altogether. For example, in enacting the CZMA, Congress stated that it was the national policy “to encourage the participation and cooperation of the public” as well as the State and federal resource agencies having programs affecting the coastal zone. 16 U.S.C. § 1452(5); *see also id.* § 1452(2)(I) (encouraging states to develop coastal zone programs that provide “timely and effective notification of, and opportunities for public . . . participation in, coastal management decisionmaking”). The primary vehicle for public participation provided under Maryland’s networked CZMP is the notice and comment process, with the opportunity for public informational hearings. *See, e.g.,* Md. Code Ann., Envir. § 5-204 (setting forth public participation requirements for State tidal wetlands, nontidal wetlands and waterways, and water use permits). None of these public participation procedures have begun yet; there have been no comments submitted, no public information meetings held, and no testimony taken. Forcing a consistency determination arrived at without the participation of the public flat out contradicts at least one of the policies that the CZMA is intended to promote.⁵

B. At This Early Stage Of The Process, It Is Impossible To Determine Whether Any National Interest Furthered By The Activity Outweighs The Activity’s Adverse Coastal Effects.

Until the various State and federal permitting processes have run their course and the full environmental impact of the Project is ascertained, the Secretary simply cannot conclude that, by a preponderance of the evidence, that any national interest furthered by the Project outweighs the Project’s adverse coastal effects. *Cf. Islander East*, at 35. “Congress enacted the CZMA in 1972, the same period as other major federal environmental legislation, principally to protect

⁵ This is not to say that the public has not been involved in other aspects of the Project; Maryland’s LNG Task Force held several public meetings and provided numerous opportunities for public involvement outreach about the various pros and cons LNG in general, and the proposed facility in particular. This process did not, however, focus specifically on the environmental issues concerning the Project and its impact on Maryland’s coastal resources.

land and water resources in the coastal zone.” *Connecticut*, 2007 WL 2349894, at 5. While the 1976 amendments to the Act “clarified the national interest in siting energy facilities,” *id.*, the Act remains “a balancing statute – that is, it balances conservation with commercial development.” *Id.*

The Secretary cannot strike that balance in this appeal because it is not yet clear what the adverse coastal effects of the Project will be. MDE, EPA, and the Corps are still working their way through the material submitted by AES and still have numerous questions that need to be answered before a permit decision can be made. FERC, too, is still at the early stages of *its* NEPA review process. While AES has prepared the thirteen “resource reports” required to be submitted with its application for authorization of the facility, *see* 18 C.F.R. § 380.12, FERC has not yet prepared its EIS, its own independent review of the impacts of the Project. *See* 18 C.F.R. § 380.6(a)(1) (stating that an EIS will “normally” be required for the siting, construction, and operation of LNG facilities). In fact, FERC has not yet even established a *schedule* for doing so. While AES bases its arguments about the effects of the proposed activity upon *its own* assertions in the Resource Reports, it is the agency-adopted EIS that will be relied upon by the reviewing agencies.

C. There Is A Reasonable Alternative That Would Permit The Activity To Be Conducted In A Manner Consistent With The Enforceable Policies Of Maryland’s CZMP.

Notably lacking from AES’s brief is any argument as to why there is no reasonable alternative that would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. Maryland’s Nontidal Wetlands Protection Act and the Corps’s § 404 Clean Water Act permitting program each contain a specific requirement that alternatives be considered and no project approved unless it has no practicable alternative. *See* Md. Code Ann., Envir. § 5-907; 33 U.S.C. § 1344(b)(1) (requiring EPA guidelines); 40

C.F.R. § 230.10(a) (EPA guidelines); 33 C.F.R. § 320.4(b)(4) (Corps follows EPA guidelines). Forcing a consistency determination prior to the underlying networked permit processes have been allowed to run their course prevents MDE and the other resource agencies from being able to develop a complete, considered understanding of the potential alternatives available. At this point, allowing the permit process to proceed to its conclusion is the *one* alternative that MDE knows is available, reasonable, and specific. *VEPCO* at 38.

V. AES HAS NOT DEMONSTRATED THAT THE ACTIVITY IS NECESSARY IN THE INTEREST OF NATIONAL SECURITY.

In making its final argument for overriding Maryland's objection – “that the Project is necessary in the interest of national security,” Brief at 28 – AES fails again to carry its burden of persuasion. That burden is particularly “difficult,” *VEPCO* at 53, because it requires AES to demonstrate that “a national defense or other national security interest would be *significantly impaired* were the activity *not permitted* to go forward *as proposed*.” 15 C.F.R. § 930.122 (emphasis added); *VEPCO* at 53 (providing same emphasis).

Beyond general policy goals, AES has not demonstrated how the Nation's interest in the “diversification” of its energy supply, Brief at 28, will be significantly impaired if the Project does not move forward as proposed. AES relies primarily on President George W. Bush's January 23, 2007, State of the Union Address in which he underscored “our vital interest to diversify America's energy supply.” *Id.* But in February 2006, President Bush repeatedly stated in his Advanced Energy Initiative (the “Initiative”) that it is in the national interest to reduce the Nation's reliance upon natural gas. The Initiative identifies as evidence of the diversification of the power sector that “[t]he percentage of new power plants fueled by natural gas has declined from more than 90% when President Bush took office to 64% today. Thanks in part to Administration policies, only 31% of new power plants projected to be built by 2025 will use

natural gas.” Advanced Energy Initiative, National Economic Council, at 10 (Feb. 2006) (Apx. 70).

The Initiative also notes that an increasing amount of LNG – like that which would be provided by the Project – is coming from imports, either via pipeline from Canada or by tanker from Trinidad, Algeria, and other countries. (Apx. 68.) “To enhance our future energy security,” the Initiative continues, “we can and must do more to reduce our future demand for natural gas and foster alternatives for power production.” (Apx. 70.) This resonates with the CZMA, which itself finds a “national objective of attaining a greater degree of energy self-sufficiency.” 16 U.S.C. § 1451(j). It is hard to see how increasing the Nation’s reliance on imported LNG furthers national security, much less that AES has carried its “difficult” burden, *VEPCO* at 53, of demonstrating that national security would be “significantly impaired” were the Project not to move forward. 15 C.F.R. § 930.122.

CONCLUSION

For the reasons stated above, the Secretary should either dismiss the appeal or remand the appeal to MDE to reconsider the Project’s consistency with the enforceable policies of Maryland’s CZMP at such time as all information is available to render a decision under CFRA.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2007, copies of the Brief of Respondent, Maryland Department of the Environment, and accompanying Appendix were sent, via UPS Overnight Mail, postage prepaid, to the following people:

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