

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE**

AES Sparrows Point LNG, LLC)
Mid-Atlantic Express, L.L.C.)
)
Appellants,)
)
vs.)
)
Maryland Department of)
the Environment)
)
Respondent.)

Case No. _____

**REQUEST OF AES SPARROWS POINT LNG, LLC AND MID-ATLANTIC EXPRESS,
L.L.C. TO SUPPLEMENT THE CONSOLIDATED RECORD**

AES Sparrows Point LNG, LLC and Mid-Atlantic Express, L.L.C. (collectively “AES”) hereby respond to the letter written by the National Oceanic and Atmospheric Administration (“NOAA”) to AES and the Maryland Department of the Environment (“MDE”) regarding supplementation of the consolidated record in the above-captioned proceeding, as authorized by the statutory and regulatory authority conferred on the Secretary of Commerce (“Secretary”) to supplement the consolidated record. *See* 16 U.S.C. § 1465(b)(3); 15 C.F.R. §§ 930.127(i)(4) & 930.130(a)(2). In support of this Request, AES states the following:

I. Background

On January 10, 2008, NOAA notified the parties in the instant appeal by letter (“NOAA Letter”) that certain documents have been added to the consolidated record pursuant to the Secretary’s authority. The NOAA Letter also states that the parties “may request

supplementation of the consolidated record with any other information necessary for the Secretary to complete this appeal” and that any such request should be submitted by January 25, 2008. NOAA Letter at 2. Specifically, the NOAA Letter states:

While the parties are free to request that the record be supplemented with any relevant information, most helpful may be information addressing: a) the newly included documents listed [in the NOAA Letter]; and (b) the following areas of disagreement which have been identified by the parties in their briefs:

- Pipeline-related impacts to waterbodies and wetlands;
- Impacts of dredging (including the dredging in the Project area that occurred in late 2006 and the associated water quality certification provided by the Maryland Department of the Environment);
- Impacts of the disposal of processed dredged materials.

Id. AES is filing this Request in response to the NOAA Letter.

II. Justification For Supplementing The Consolidated Record With The Identified Documents

The Secretary is authorized to supplement the consolidated record in a consistency appeal with “supplemental information specifically requested by the Secretary to complete a consistency review under the [Coastal Zone Management Act]” and/or “clarifying information submitted by [AES] related to information in the consolidated record.” 16 U.S.C. § 1465(b)(3)(A)(ii); 15 C.F.R. § 930.130(a)(2)(ii). Supplementation of the consolidated record with the documents herein identified is fully consistent with this authority. These documents fall into four overlapping categories justifying their inclusion in the consolidated record.

A. Documents Addressing “Newly Included Documents”

The NOAA Letter identifies, *inter alia*, five documents accepted to supplement the record, noting that such documents were “referenced in briefs filed by the Appellants and the State.” NOAA Letter at 2. The subject documents provide information regarding the environmental impact of AES’s proposed dredging, including results of core sampling requested

by the U.S. Army Corps of Engineers (“USACE”) and responses to data requests issued by MDE pertaining to the disposal of dredge materials. The NOAA Letter specifically requested additional information addressing these “newly included documents,” which is consistent with the Secretary’s authority to request information from the parties necessary to complete his consistency review. *See* 16 U.S.C. § 1465(b)(3)(A)(ii); 15 C.F.R. § 930.130(a)(2)(ii). As described below in Section III, Document Nos. 1-3 and 8-17 are directly responsive to this request.

B. Documents Addressing Areas of “Disagreement”

In addition, the NOAA Letter requested documents concerning certain “areas of disagreement [related to environmental impacts] which have been identified by the parties in their briefs.” NOAA Letter at 2. Supplementation of the consolidated record with Document Nos. 1-4, 7-17 and 25 is consistent with the Secretary’s authority because these documents are directly responsive to NOAA’s request for supplemental information on these areas of disagreement to assist the Secretary in completing his consistency review. *See* 16 U.S.C. § 1465(b)(3)(A)(ii); 15 C.F.R. § 930.130(a)(2)(ii).

C. Documents Providing Clarifying Information

The Secretary has the authority to add documents to the consolidated record that contain information clarifying materials already part of the consolidated record. *See id.* All of the documents identified below in Section III provide such clarifying information by updating, supplementing or further explaining the relevance to this appeal of the documents already part of the consolidated record in this appeal, including, for example, the record materials cited in AES’s briefs.

D. Documents Appropriate to Complete the Record

Document Nos. 1-9, in addition to being responsive to the NOAA Letter, were submitted to the Federal Energy Regulatory Commission (“FERC”) on or before September 10, 2007 — the date AES filed its Notice of Appeal and copies of the consolidated record with NOAA. These documents are appropriately considered as part of the initial consolidated record in this appeal. *See* 15 C.F.R. § 930.127(i)(1). These documents were part of the record maintained by the FERC,¹ the lead Federal permitting agency for the projects underlying this appeal that is charged with maintaining the consolidated record, at the time this appeal was filed.² Supplementation of the record with Document Nos. 10 and 18-24, which were submitted to the FERC after September 10, 2007, is likewise appropriate because they would have been part of the initial consolidated record were this appeal filed today. *See* Letter from NOAA to the Parties in the Consistency Appeals of Weaver’s Cove Energy, LLC and Mill River Pipeline, LLC, January 2, 2007, *available at* <http://www.ogc.doc.gov/czma.htm>.

¹ The decisional record before the FERC for these projects is maintained at the FERC’s eLibrary, located at <http://www.ferc.gov/docs-filing/elibrary.asp>, in Docket Nos. CP07-62 (AES Sparrows Point), CP07-63, CP07-64, and CP07-65 (Mid-Atlantic Express Pipeline). For each document identified as part of the FERC record, the date the document was filed with the FERC is provided.

² *See* 15 C.F.R. § 930.123(d). In submitting the initial consolidated record to NOAA, AES included the set of documents that MDE had listed as the documents to be included in the record. AES did not include Document Nos. 1-9 in that submission because NOAA’s regulations do not contemplate supplementation by the appellant of the record that is identified by the state agency. Nevertheless, NOAA’s regulations provide that the consolidated record includes all materials before the lead Federal permitting agency, which in this instance includes all of the materials before the FERC.

III. Individual Document Descriptions and Justifications

AES submits that each document identified below should be included in the consolidated record for the reasons set forth in Section II, which reasons are more specifically discussed below:

Document #1. AES Response to the FERC March 16, 2007 Data Request (dated April 5, 2007).

This document was prepared in response to a data request issued by the FERC and other cooperating agencies, and it provides information and data regarding almost every facet of the activities that are the subject of the consistency review, including the substantial benefits and limited environmental impacts of the activities under review in this appeal. For example, AES's response to Data Request ALT #4 demonstrates that processed dredge materials ("PDM") derived from dredge material from the New York/New Jersey harbors with similar or greater levels of contamination compared to dredge materials from the area proposed to be dredged by AES have been safely recycled and deployed for end-use applications. *See* AES Reply Brief at 11. This directly underscores that "there is sufficient evidence in the record to determine that the proposed end-uses for PDM will be environmentally acceptable regardless of the specific end-users and their locations." *See id.* at 11-12. Therefore, in consideration of the foregoing, this document should be included in the consolidated record in this appeal because it provides both information requested by the Secretary and clarifying information. *See* 16 U.S.C. § 1465(b)(3)(A)(ii); 15 C.F.R. § 930.130(a)(2)(ii). Further, it was made part of the decision record at the FERC on April 5, 2007, before the filing date of this appeal.

Document #2. FERC March 16, 2007 Data Request (dated March 16, 2007).

This document is the FERC data request issued to AES that prompted the preparation of Document #1. Therefore, this document should be included in the consolidated record for this appeal for the same reasons justifying the inclusion of Document #1. It was made part of the decision record at the FERC on March 16, 2007, before the filing date of this appeal.

Document #3. AES Revised Application for a Section 404/10 Permit for the States of Maryland and Pennsylvania Submitted to the USACE (dated April 13, 2007).

This document is the applicants' permit application before the USACE. It was prepared in response to a request from the USACE dated February 8, 2007 for a reformatted Section 404/10 permit application, and provides information and data regarding the dredging activities and jurisdictional wetlands-related pipeline construction activities under review in this appeal. The application demonstrates that the impacts from dredging will be temporary and minimal. Therefore, this document should be included in the consolidated record in this appeal because it provides both information requested by the Secretary and clarifying information. *See*

16 U.S.C. § 1465(b)(3)(A)(ii); 15 C.F.R. § 930.130(a)(2)(ii). Further, it was made part of the decision record at the FERC on April 18, 2007, before the filing date of this appeal.

- Document #4. AES Submission of Updated Topographic Maps of Possible Pipeline Route Variations (dated April 19, 2007).
- Document #5. AES Submission of Supplemental Responses to Certain Geology Questions from the FERC March 16, 2007 Data Request (dated May 1, 2007).
- Document #6. AES Submission of Tables in Response to U.S. Coast Guard Request 3.ee from the FERC March 16, 2007 Data Request (dated May 1, 2007).
- Document #7. AES Submission of Table 8.3.2-1 (Attachment LURA6c) in Response to Land Use, Recreation and Aesthetics Request 6 from the FERC March 16, 2007 Data Request (dated May 21, 2007).

These documents were all prepared as supplements to the AES Response to the FERC March 16, 2007 Data Request. Their inclusion in the record would provide for a more complete decision record. Document #7 in particular provides information and data on land uses affected by the Mid-Atlantic Express Pipeline proposal, including a quantification of the total area of wetlands and waterbodies that will be affected along the entire pipeline route. It demonstrates that the total area of wetlands and waterbodies affected by the pipeline will be limited, and therefore provides support for AES's argument that the environmental impacts from the pipeline will be minimal. *See* AES Brief at 25; AES Reply Brief at 12-13. For these reasons, and the reasons set forth in the justification for Document #1, these documents should be included in the consolidated record in this appeal pursuant to 16 U.S.C. § 1465(b)(3)(A)(ii) and 15 C.F.R. § 930.130(a)(2)(ii). Further, these documents were all made part of the decision record at the FERC before the filing date of this appeal.

- Document #8. AES Response to the Issues and Questions Raised in the Minutes from the June 5, 2007 Interagency Meeting on Dredging and Dredged Materials Disposal (dated June 14, 2007).

This document provides AES's response to questions related to AES's proposed dredging and issues discussed at the June 5, 2007 interagency meeting on dredging among the FERC, USACE, the U.S. Environmental Protection Agency, and MDE. It underscores that there is substantial evidence to demonstrate that potential water quality impacts from project-related activities will be insignificant in magnitude, limited in scope and temporary in duration. *See* AES Reply Brief at 9. Accordingly, this document should be included in the consolidated record in this appeal because it provides both information requested by the Secretary and clarifying information. *See* 16 U.S.C. § 1465(b)(3)(A)(ii); 15 C.F.R. § 930.130(a)(2)(ii). Further, it was made part of the decision record at the FERC on June 14, 2007, before the filing date of this appeal.

- Document #9. Minutes from the June 5, 2007 Interagency Meeting on Dredging and Dredged Material Disposal Conducted in Baltimore, MD (dated June 5, 2007).

This document summarizes the questions and issues related to AES's proposed dredging and dredge materials disposal discussed at the June 5, 2007, interagency meeting among the FERC, USACE, the U.S. Environmental Protection Agency, and MDE. It also prompted the preparation of Document #8. Therefore, this document should be included in the consolidated record in this appeal for the same reasons justifying the inclusion of Document #8. It was made part of the decision record at the FERC on June 5, 2007, before the filing date of this appeal.

- Document #10. AES Supplemental Response to the MDE August 15, 2007 Data Request Regarding Dredging and Dredged Materials Disposal (dated December 4, 2007).

This document was prepared as a supplement to the AES Response to the MDE August 15, 2007 Data Request, which was deemed part of the consolidated record by the NOAA Letter. It provides information and data pertaining to project dredging activities and disposal of dredged materials. In particular, it includes letters from two landfill operators, Waste Management and Allied Waste Services, indicating that they can accommodate dredge spoils from the project for disposal and/or beneficial use. These letters confirm AES's position that it will be able to dispose of dredge materials, including PDM, in an environmentally-acceptable manner. See AES Reply Brief at 10-12. This is also responsive to MDE's request for information about end-users. See MDE August 15, 2007 Data Request at 4a. See also MDE Brief at 16. Therefore, this document should be included in the consolidated record in this appeal because it provides both information requested by the Secretary and clarifying information. See 16 U.S.C. § 1465(b)(3)(A)(ii); 15 C.F.R. § 930.130(a)(2)(ii). It was made part of the decision record at the FERC on December 5, 2007.

- Document #11. USACE Section 404/10 Dredging Permit Issued to BWI - Sparrows Point, LLC (dated May 6, 2005).
- Document #12. Permit Agreement between the Maryland Port Administration and BWI - Sparrows Point, LLC for the Disposal of Dredged Materials at Hart-Miller Island (dated October 13, 2004).
- Document #13. Extension of Term of Permit Agreement between the Maryland Port Administration and BWI - Sparrows Point, LLC for the Disposal of Dredged Materials at Hart-Miller Island (dated January 31, 2006).
- Document #14. State of Maryland Board of Public Works Tidal Wetlands License Issued to BWI - Sparrows Point, LLC and Related Maryland Department of the Environment Water Quality Certification Issued to BWI - Sparrows Point, LLC (July 6, 2005).

- Document #15. Bulk Sediment Analysis for BWI - Sparrows Point, LLC Shipyard Dredging and Hart-Miller Island Dredge Materials Disposal (dated November 7, 2006).
- Document #16. BWI - Sparrows Point, LLC Joint Federal/State Application for the Alteration of Any Floodplain, Waterway, Tidal or Non-tidal Wetland in Maryland (undated).
- Document #17. USACE Baltimore District Notice of Comment Period on BWI - Sparrows Point, LLC's Section 404/10 Dredging Application (undated).

These documents pertain to the issue of “dredging in the Project area that occurred in late 2006 and the water quality certification provided by the Maryland Department of the Environment” identified in the NOAA Letter. NOAA Letter at 2. Together, these documents show that potential water quality impacts from a dredging project similar in scope to and located in the same area as that proposed by AES has already been approved by the relevant federal and state permitting agencies and that such impacts will be minimal. More specifically, by comparison, they demonstrate that the dredging and disposal AES proposes to undertake will not exceed applicable water quality criteria in any manner to cause significant water quality impacts. *See* AES Reply Brief at 9-10 & n. 5. Further, these documents, particularly Document No. 15, are directly related to the information contained in the AES Response to the USACE July 3, 2007 Data Request, which was deemed part of the consolidated record by the NOAA Letter. These documents also support the conclusion that AES’s proposed dredging will contribute to the improvement of the condition of the Chesapeake Bay by removing the top layer of contaminated sediments, *see* AES Brief at 22-23; AES Response to USACE July 3, 2007 Sampling Request (September 26, 2007); AES Addendum to Its Response to USACE July 3, 2007 Sampling Request (October 12, 2007), insofar as they recognize that BWI - Sparrows Point, LLC dredging activities will also improve the condition of the Chesapeake Bay by removing the top layer of contaminated sediments in some of the same areas proposed to be dredged by AES. Finally, the documents related to dredge materials disposal from the BWI - Sparrows Point, LLC dredging activities at Hart-Miller Island show that disposal and recycling of dredge materials from AES’s proposed project will be environmentally acceptable. *See* AES Reply Brief at 11, n. 11. Accordingly, these documents should be included in the consolidated record in this appeal because they provide both information requested by the Secretary and clarifying information. *See* 16 U.S.C. § 1465(b)(3)(A)(ii); 15 C.F.R. § 930.130(a)(2)(ii).

- Document #18. FERC Letter Requesting AES to File a New Preferred Pipeline Route Alignment or Identify a New Preferred Route that Would Avoid the I-695 Corridor Altogether (dated October 22, 2007).
- Document #19. AES Response to FERC October 22, 2007 Letter Regarding the Pipeline Route and the I-695 Corridor (dated November 1, 2007).
- Document #20. AES Addendum to Resource Report 10 Regarding the Pipeline Route and the I-695 Corridor (dated November 19, 2007).

- Document #21. AES Application to the Maryland State Highway Administration for an Exception from its Utility Policy (dated December 11, 2007).
- Document #22. Minutes of November 8, 2007 Meeting between AES and the Maryland State Highway Administration (dated November 8, 2007).
- Document #23. AES Letter to MDE Regarding the Pipeline Route and the I-695 Corridor (dated December 21, 2007).

These documents provide information pertaining to MDE's claim that "[i]t is MDE's understanding that, as of the date this brief was filed . . . the Maryland State Highway Administration ["MSHA"] has denied AES access to its rights-of-way." MDE Brief at 10. As these documents demonstrate, the MSHA has never denied AES access to its rights-of-way for longitudinal placement, or temporary or permanent use. MSHA has only required AES to submit an application for an exception from its Utility Policy for those areas of the pipeline route that would be longitudinally located within the controlled access highway right-of-way, and this application was submitted to the MSHA on December 11, 2007. Furthermore, Documents #18 and #19 provide information and data on pipeline route alternatives that would eliminate the need for an exception from MSHA. Accordingly, these documents should be included in the consolidated record in this appeal because they provide clarifying information regarding materials already part of the consolidated record. *See* 16 U.S.C. § 1465(b)(3)(A)(ii); 15 C.F.R. § 930.130(a)(2)(ii). These documents were made part of the decision record at the FERC either on or shortly after their document dates.

- Document #24. Filing of Information Discussed at FERC Technical Conference Regarding the Use of the Baltimore Gas and Electric Company's Right-of-Way for the Mid-Atlantic Express Pipeline (dated January 24, 2008).

This document includes a Memorandum of Agreement between Mid-Atlantic Express, LLC and the Baltimore Gas and Electric Company ("BGE") and right-of-way diagrams, which directly address an issue regarding the use of BGE's right-of-way for the Mid-Atlantic Express Pipeline that was the subject of a FERC technical conference held on January 15, 2008. This issue was also raised by MDE in its brief. *See* MDE Brief at 10 ("It is MDE's understanding that, as of the date this brief was filed, Baltimore Gas and Electric has expressed concern about the effect of AES's use of its right-of-way."). This filing shows that the Mid-Atlantic Express pipeline can be accommodated within BGE's right-of-way consistent with planned transmission improvements contemplated by BGE, and in a manner that does not change the environmental impacts and associated mitigation measures identified by AES in its prior submittals. Accordingly, these documents should be included in the consolidated record in this appeal because they provide clarifying information regarding materials already part of the consolidated record. *See* 16 U.S.C. § 1465(b)(3)(A)(ii); 15 C.F.R. § 930.130(a)(2)(ii).

- Document #25. Letter from AES to MDE Regarding the MDE January 23, 2008 Data Request (dated January 25, 2008).

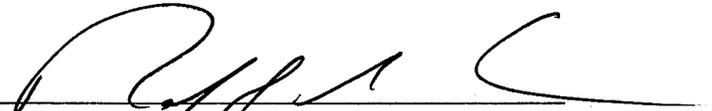
This document is a letter from AES to MDE regarding the MDE January 23, 2008 Data Request. It addresses MDE's request for information regarding pipeline-related impacts to

waterbodies and wetlands, as well as PDM. Therefore, this document should be included in the consolidated record in this appeal because it provides both information requested by the Secretary and clarifying information. See 16 U.S.C. § 1465(b)(3)(A)(ii); 15 C.F.R. § 930.130(a)(2)(ii). With respect to the underlying MDE data request, AES reserves the right to request that the Secretary supplement the consolidated record with AES's responses to this data request as such responses are prepared and submitted to MDE.

IV. Conclusion

For the foregoing reasons, AES hereby respectfully requests that the Secretary supplement the consolidated record in the instant appeal with the documents identified in Section III of this Request.

Respectfully submitted,



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Dated: January 25, 2008

CERTIFICATE OF SERVICE

Consistent with 15 C.F.R. § 930.127, copies of this Request have been sent to the following:

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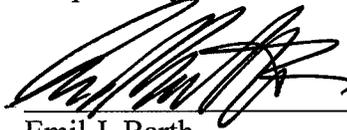
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