

No. _____

**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.

**REPLY BRIEF ON APPEAL OF AES SPARROWS POINT LNG, LLC
AND MID-ATLANTIC EXPRESS, L.L.C.
UNDER THE COASTAL ZONE MANAGEMENT ACT**

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I. CLARIFICATION OF FACTS

AES Sparrows Point LNG, LLC and Mid-Atlantic Express, L.L.C. (together, “AES”) set forth the relevant facts underlying this appeal in their Principal Brief (“AES Br.”). While AES does not concur with the factual description presented by the Maryland Department of the Environment (“MDE”) in its Principal Brief (“MDE Br.”), two MDE assertions require correction: First, MDE claims that its July 9, 2007 objection to AES’s consistency certification (“Objection”), AES Br. Apx. at A-2, only applied to the United States Army Corps of Engineers (“USACE”) permits. MDE Br. at 9. To the contrary, MDE plainly objected to AES’s proposed development activities (“Project”) to be undertaken under *both* the requested Federal Energy Regulatory Commission (“FERC”) authorizations and the USACE permits. Objection at 2 (“MDE is rendering a consistency determination on both the Corps permit and the FERC license in this letter”). AES therefore has properly requested an override of MDE’s Objection as to both the USACE and FERC permits. Second, MDE states that AES was initially receptive to a stay of the six-month consistency review under the Coastal Zone Management Act (“CZMA”), but then reneged. MDE Br. at 6, 8. However, AES could not accept the *indefinite* stay ultimately proposed by MDE in its June 25 letter, *see* MDE Apx. at 23, which would violate the CZMA regulations, 15 C.F.R. § 930.60(b) (requiring a “specific date on when the stay will end”).

II. MDE’S OBJECTION DID NOT COMPLY WITH THE CZMA REGULATIONS

With respect to AES’s threshold arguments that MDE failed to comply with the CZMA regulations in issuing its Objection, MDE asserts that AES “elevates form over substance.” MDE Br. at 13. The very purpose of the threshold determination, however, is to evaluate the State’s compliance with required procedures (“form”) in issuing an objection. 15 C.F.R. § 930.129(b); *Decision and Findings in the Consistency Appeal of Henry Crosby* (Dec. 29, 1992), at 3 (“*Crosby*”). AES’s arguments are therefore well-taken.

A. MDE's Objection Based On Inconsistency Was Defective And Thus Invalid

For an objection based on inconsistency under 15 C.F.R. § 930.63(b), the Secretary must determine whether the “State has cited policies that are part of its management program, and has explained how the proposed project will be inconsistent with those policies.” *Crosby* at 3 n.2. Because consistency review under Maryland’s coastal management program (“MCMP”) is based on specific policies, *see* MCMP at 339, MDE’s mere listing of statutes by which MCMP policies are purportedly implemented falls well short of identifying specific enforceable policies of the MCMP with which the Project is inconsistent and explaining “how the [Project] will be inconsistent with those policies.” MDE’s statement that the MCMP is a networked program does not excuse its failure to satisfy this requirement.

MDE’s objection under 15 C.F.R. § 930.63(b) is further undermined by its own defense of this objection in its Principal Brief, where it claims it did *not* have sufficient information to make a consistency decision. *See* MDE Br. at 14. Section 930.63(b), by its terms, only pertains to “State agency objections that are based on sufficient information.” Consequently, MDE’s objection based on Section 930.63(b) should be overridden.

B. MDE's Objection Based On Insufficient Information Was Also Invalid

MDE argues that its objection based on insufficient information under 15 C.F.R. § 930.63(c) is “procedurally sound,” MDE Br. at 14, even though it also objected under Section 930.63(b) based on having sufficient information, Objection at 2. Asserting both objections together is contrary to the CZMA regulations, which state that “[a] state agency may assert alternative bases for its objection, as described in paragraphs (b) and (c) of this [Section 930.63].” 15 C.F.R. § 930.63(a). This provision requires a State to choose between an objection based on paragraphs (b) or (c); it does not allow the State to object *in* the alternative. MDE’s claim that it can choose both bases for an objection creates an illogical situation whereby the

State can simultaneously object based on both having and not having sufficient information. *See* AES Br. at 8-9. Because its bases for objection conflict, MDE's objection based on insufficient information, which it made as an "alternative basis," Objection at 4, should be rejected as procedurally deficient.

It is also uncontested that MDE failed to describe in the Objection "the necessity of having [additional] information to determine the consistency of the activity with the management program." 15 C.F.R. § 930.63(c). *See* AES Br. at 10. MDE's failure to include such a description flatly violates the requirements for an objection based on insufficient information, requiring that it too be overridden as a threshold matter.

C. AES's Arguments Regarding Bill 9-07 Are Not Barred By *Res Judicata*

MDE argues that under the doctrine of *res judicata* the decision in *AES Sparrows Point LNG, LLC v. Smith*, No. RDB-07-325, 2007 WL 1826889 (D. Md. June 22, 2007) upholding Bill 9-07 must be accepted here. *See* MDE Br. at 19-20 (citing *Decision and Findings in the Consistency Appeal of Va. Elec. & Power Co.* (May 19, 1994) ("*VEPCO*"). MDE misreads *VEPCO*: The Secretary there did *not* state that his interpretation of the CZMA is bound by *res judicata*. Instead, he held that *res judicata* did not apply in that case, *VEPCO* at 11, and he disagreed with the suggestion that another agency's decision could have preclusive effect on Secretarial decisions under the CZMA, since it is the Secretary to whom Congress committed authority to interpret and apply that statute, *id.* at 65 n.90.

MDE also errs when it asserts that the court "specifically held that . . . Bill 9-07 . . . was a part of Maryland's CZMP" for federal consistency review. MDE Br. at 19. While the court held that Bill 9-07 is "enforceable at the state and local levels," it did *not* hold that Bill 9-07 is a policy of the MCMP that is enforceable in federal consistency review. The court's

decision by its terms does not circumscribe the Secretary's authority to determine whether Bill 9-07 is an "enforceable policy" of the MCMP that can be cited as grounds for an objection.

Moreover, MDE's theory that Bill 9-07, because adopted under a Maryland state law that is referenced in its MCMP, automatically becomes an "enforceable policy" for CZMA purposes is also contrary to the Office of Ocean and Coastal Resource Management's ("OCRM's") recent interpretative guidance. OCRM concluded that state and local laws *cannot* become MCMP policies via "incorporation by reference." They must be specifically approved by the National Oceanic and Atmospheric Administration ("NOAA") before they have any MCMP status. NOAA, *CZMA Federal Consistency Overview* (Aug. 10, 2007), at 5. Bill 9-07 was not approved by NOAA and cannot be considered a policy of the MCMP as MDE contends.

III. THE PROJECT IS CONSISTENT WITH THE OBJECTIVES OF THE CZMA

A. Element 1: AES Has Demonstrated That The Project Furthers The National Interest In A Significant And Substantial Manner

MDE states that it "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" and also acknowledges that this element of the Secretary's review ("Element 1") is typically satisfied in a consistency appeal. MDE Br. at 21. Yet, MDE contends that AES "is overstating the national significance of the Project." *Id.* MDE is wrong. The Project significantly and substantially furthers the national interest articulated by the CZMA. *See* AES Br. at 15-24.

1. The Project Furthers the National Interest in Siting Major Coastal-Dependent Energy Facilities

MDE takes issue with AES's contention that the siting of major coastal-dependent energy facilities in the coastal zone is a proper objective set forth in CZMA Section 303(2)(D),

concluding that AES therefore overstates the Project's significance. MDE Br. at 21-22. MDE's position is contrary to controlling precedent.

First, Section 303(2)(D) evinces a national interest in having such facilities sited in the coastal zone. *See Decision and Findings in the Consistency Appeal of Islander East Pipeline Co., L.L.C.* (May 5, 2004), at 8 (“*Islander East*”) (“Islander East’s Project involves the location of a coastal dependent major energy facility in the coastal zone. The Project therefore furthers the national interest of CZMA § 303(2)(D)”; Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000) (“Final Rule 2000”) (recognizing that the “the siting of energy facilities” is an objective of the CZMA). This confirms the correctness of AES’s analysis in its Principal Brief.

In addition, NOAA has found that a proposal for a major coastal-dependent energy facility is “[a]n example of an activity that significantly or substantially furthers the national interest [in] the siting of energy facilities” because “[s]uch activities are coastal dependent industries with economic implications beyond the immediate locality in which they are located.” Final Rule 2000 at 77,150. Because the Project is a “major coastal-dependent energy facility,” it significantly and substantially furthers the national interest in such facilities, and thus satisfies Element 1. *See* AES Br. at 16-19. *Cf. Islander East* at 5-6.

2. The Project Furthers the National Interest in Development

MDE next argues that AES overstates how the Project will *develop* the coastal zone, MDE Br. at 22-23, which is a national interest articulated in CZMA Section 303(1). MDE concedes that the Project meets the “plain dictionary meaning of ‘develop,’” MDE Br. at 22, which alone is sufficient to satisfy Element 1, *see Connecticut v. U.S. Dep’t of Commerce*, No. 3:04cv1271, 2007 WL 2349894, at *6 (D. Conn. Aug. 15, 2007). MDE argues, however, that because “LNG is already available through another coastal facility [in Maryland],” this Project

does not constitute development of the coastal zone. MDE Br. at 22. But MDE misconstrues the precedent supporting AES's position. In *Islander East*, the Secretary found that a proposal for a pipeline constituted "development" of the coastal zone because it "modifies the [Long Island] Sound's bottom to allow its use for a particular purpose that was previously not available" or, alternatively stated, because it would result in the "changed use of *a portion* of Long Island Sound." *Islander East* at 6 (emphasis added). The proper inquiry under Element 1 is not whether the proposed activity would be unique or novel, but whether the activity will use a certain *portion* of the coastal zone for a "changed use." Because the portions of the coastal zone where AES proposes to construct and operate its Project are not presently used for natural gas infrastructure, and because the Project involves development as that term is plainly understood, the Project constitutes "development" of the coastal zone and satisfies Element 1.

As to the proposed dredging, MDE claims that AES's analysis of the development associated with dredging is "circular," because the dredging is only necessitated by the Project. MDE Br. at 23. That claim of "circularity" is completely specious, since it suggests that "development" for purposes of Element 1 can only be a changed use of the coastal zone wholly independent of the coastal-dependent project. This is not the criteria set forth for "development" in *Islander East* or *Connecticut v. U.S. Department of Commerce*.

3. The Project Furthers the National Interest in Preserving, Protecting, Restoring and Enhancing Coastal Zone Resources

MDE also argues that the Project will not further the national interest in preserving, protecting, restoring, and enhancing coastal zone resources. MDE Br. at 23. But MDE offers no evidence to refute AES's demonstration that the Project will benefit and enhance the coastal zone within the meaning of CZMA Section 303(1). *See* AES Br. at 22-24. MDE's questions about the positive environmental impacts of the Project-related dredging and the

recycling of dredge materials do not refute AES's evidence, as described in Section III-B below and in AES's Principal Brief. Equally unavailing is MDE's assertion that the environmental advantages of using natural gas as a fuel are "unproven," *see* MDE Br. at 23-24, since this assertion is contrary, *inter alia*, to the Secretary's finding in *Islander East* that natural gas is clean-burning and can reduce pollution. *Islander East* at 10. *See also* Resource Report ("RR") 10 § 10.3.2 (AES Br. Apx. at A-9).

4. Public Participation

Lastly, MDE contends that AES's analysis under Element 1 ignores other policies of the CZMA, particularly with regard to public participation, and that AES is "[f]orcing a consistency determination arrived at without the participation of the public." MDE Br. at 25. MDE's contentions have no merit. AES demonstrated how the Project furthers "one or more CZMA goals," *see, e.g.,* *Islander East* at 6 n.26, and has a statutory right to a consistency determination upon the expiration of the six-month review deadline. *See* 16 U.S.C. § 1456(c)(3)(A). It is MDE's responsibility, not that of AES, to provide for public participation in its consistency review, *see* 15 C.F.R. § 930.61, during that six-month review period.

B. Element 2: AES Has Demonstrated That The National Interest Furthered By The Project Outweighs Any Adverse Coastal Effects

MDE argues that "[u]ntil 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 [*sic*] any national interest furthered by the Project outweighs the Project's adverse coastal effects." MDE Br. at 25. This misstates the nature of the Secretary's review. The Secretary's review is *de novo*, *see* Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 788, 822 (Jan. 5, 2006) ("Final Rule 2006"), under specified criteria, and with an independent review schedule.

Contrary to MDE's assumption, that review does not await the decisions of other federal and state agencies regarding the Project. In fact, the statutory scheme contemplates that the Secretary's decision will precede those of the federal permitting agencies. *See, e.g.*, 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. 930.130(e)(1).

In any event, the record here contains sufficient information for the Secretary now to determine, by a preponderance of the evidence, that the national interest furthered by the Project outweighs any adverse impacts, whether considered individually or cumulatively ("Element 2"). MDE does not contest the correctness of the Resource Reports (which were prepared with substantial federal and state agency input and were revised to respond to federal and state agency review and comments) or other factual data and studies submitted during the Project review process, including to MDE. Therefore, the record supporting the Project remains unimpeached.

Significantly, MDE does not identify *any* adverse coastal impacts posed by the Project, let alone any adverse impacts that outweigh the national interest furthered by the Project. Instead, MDE claims that it did not have sufficient information or time to consider three issues: (1) the re-suspension of contaminated sediment in the water column; (2) the acceptability of processed dredge material ("PDM"); and (3) impacts from the pipeline crossing wetlands and waterbodies. *See* MDE Br. at 15-16. Yet, there is ample information in the record addressing these issues, and this information is sufficient to allow the Secretary to determine that the impacts associated with dredging, PDM and the pipeline route do not outweigh the demonstrated national interest furthered by the Project such that Element 2 is satisfied.

1. Re-Suspension of Contaminated Sediments

MDE acknowledges that removal of contaminated sediments via dredging can be an environmental benefit, but postulates that dredging can also re-suspend and spread dormant

contamination in areas not previously dredged. *Id.* at 15. But MDE fails to address the substantial scientific evidence provided on potential water quality impacts associated with the Project.¹ The record here demonstrates that potential water quality impacts from dredging will be limited to the immediate vicinity of the dredging activities and temporary in nature. Data from sampling conducted by AES shows that the potential for possible water quality impacts associated with suspended sediment from dredging will diminish with distance from the dredge activity and that there will be *no negative sedimentation impacts* in areas located more than 1,200 feet from the dredge activities.² And even the potential for water quality impacts within the 1,200 foot radius will be temporary: Once dredging is completed in a particular area, suspended sediment resettles, limiting any remaining potential for release of contaminants.³

For the period of time that suspended sediments are exposed to river water, contaminants could leach to the water column from exposed dredge material.⁴ However, data from elutriate testing undertaken for the Project—analyses performed on samples of river water extracted from a mixture with contaminated sediment to determine the level of contaminant transfer into the water—indicate that leaching of compounds present in the material to be dredged will not exceed applicable water quality criteria in any manner to cause significant water

¹ See AES Response to MDE May 7, 2007 Data Request (May 30, 2007), at No. 18 (“May 30 Response”) (attached in the Supplemental Appendix at SA-1); AES Response to MDE August 15, 2007 Data Request (Aug. 30, 2007), at Nos. 2d & 8 (“August 30 Response”) (Attached at SA-2). See also AES Response to June 12, 2007 Minutes of Meeting on Dredging/Dredged Material Disposal with FERC, USACE, EPA and MDE (June 14, 2007) (Attached at SA-3).

² See May 30 Response at Nos. 16 & 18.

³ See August 30 Response at No. 8. See also AES Response to USACE July 3, 2007 Data Request (July 21, 2007), at No. 5 (“July 21 Response”) (Attached at SA-4).

⁴ See August 30 Response at No. 8. See also RR 2 § 2.4.3.2 (AES Br. Apx. at A-10); AES Response to USACE July 3, 2007 Sampling Request (Sept. 26, 2007) (“September 26 Response”) (Attached at SA-5); AES Addendum to September 26 Response (Oct. 12, 2007) (“October 12 Addendum”) (Attached at SA-6).

quality impacts.⁵ Further, AES has proposed the use of special equipment and techniques, including environmental dredge buckets, to contain re-suspended particles if such techniques are determined necessary to maintain water quality based on final agency approvals.⁶ As a result, in those limited instances in which contaminated sediments may be suspended in the water column as a result of dredge activities, water quality will remain within acceptable levels.

2. Processed Dredge Material

Because it is impossible to know at this time the specific end-users of PDM, AES has committed to ensuring that PDM will meet any applicable environmental standards prior to use and placement as fill material in upland locations.⁷ MDE nevertheless questions the sufficiency of information regarding the Project's proposal to recycle dredge material into PDM for beneficial applications. MDE Br. at 16-17, 24. Contrary to MDE's claims, the evidence in the record before the Secretary adequately addresses PDM.

MDE argues that PDM "presents its own environmental risk" because, as MDE asserts, it is unknown whether contaminants present in PDM could "leach out over time." *Id.* at 16. MDE's claim ignores the substantial record evidence that demonstrates that PDM to be generated by the Project does not pose an unacceptable environmental risk. While the PDM recycling process does not "remove" contaminants from the dredged material, record evidence

⁵See RR 2 §§ 2.4.3.2 & 2.4.8.4; see also September 26 Response. Much of the dredging footprint for the Project has been previously dredged. Most recently, this dredging took place in late 2006 pursuant to a permit approved by the USACE and MDE in May 2005. The water quality certification issued by MDE in May 2005 for dredging in the same area proposed to be dredged by AES concluded that dredging "will not violate Maryland's water quality standards." See Water Quality Certification for Wetland License 05-WL-0155. As to those areas of the Project dredge footprint that extend beyond the areas subject to that water quality certification, recent sampling results confirmed the conclusions in AES's other submittals that sediment quality in this area is consistent with sediment quality in other areas of the Port of Baltimore, see September 26 Response at 6, such that water quality impacts are expected to be similar to those found acceptable by MDE for the approved dredging that took place in late 2006.

⁶ See August 30 Response at No. 8; RR 2 § 2.4.8.4; October 12 Addendum at 1.

⁷ See, e.g., May 30 Response at No. 10 & Att. 9; August 30 Response at Nos. 4 & 5; September 26 Response; October 12 Addendum.

shows that any contaminants present in PDM would be chemically bound to the major components of the PDM, eliminating the leachability of contaminants at levels that would exceed applicable regulatory criteria.⁸ Further, the sediment sampling data for the dredge area indicates that the level of contaminants present in PDM will not preclude its re-use for any of the purposes described in AES's submittals to FERC, the USACE and MDE.⁹ AES has also provided detailed information regarding the safe use of PDM, including projects where similarly contaminated material from the New York/New Jersey harbors has been processed and recycled.¹⁰ Finally, Maryland has evaluated dredge material recycling and found it to be a desirable method of dredge materials management throughout the State and for the Port of Baltimore.¹¹

MDE also claims that it cannot properly evaluate the environmental impact of PDM because it does not know the "names of any specific end-users . . . or the locations of any such end-uses." MDE Br. at 16. The Secretary, however, has sufficient evidence in the record to determine that the proposed end-uses for PDM will be environmentally acceptable regardless of

⁸ See May 30 Response at No. 10 & Att. 9; August 30 Response at No. 5. See also RR 2 § 2.4.8.4; August 30 Response at Nos. 2a-2g & 4a-4b (discussing dredged sediment characteristics and how those sediments will be processed into PDM).

⁹ See May 30 Response at Att. 9 (matrix); RR 1 § 1.5.1.2.A (AES Br. Apx. at A-5); RR 2 §§ 2.4.3.2 & 2.4.8.4; September 26 Response; October 12 Addendum (together, demonstrating that the dredge materials would meet the categorical standards set out in the matrix applicable to the proposed PDM re-uses). See also May 30 Response at No. 10 (discussing additional testing of PDM). As a precaution, AES has investigated locations for dredge materials disposal, such as hazardous waste landfills, in the event some dredge materials do not meet the quality criteria for beneficial use. See May 30 Response at No. 10.

¹⁰ See April 5, 2007 Responses to FERC's March 16, 2007 Data Request, at ALT #4 ("April 5 Response") (Attached at SA-7); August 30 Response 30 at No. 4.b.

¹¹ See August 30 Response at No. 2.g (Both the Maryland Dredged Material Management Act of 2001 and the Maryland Dredged Material Disposal Alternatives Act of 2004 include goals for fostering beneficial re-use of dredged materials). While it did not adopt recycling because of cost, it is notable that the Maryland Port Administration ("MPA") disposes of *untreated and unprocessed* dredge materials from the Port of Baltimore of similar quality to the sediments tested for this Project at Hart-Miller Island, which is an unlined and uncapped disposal facility that is being used to create habitat for "scarce and significant" bird populations. See MDNR website at <http://www.dnr.state.md.us/naturalresource/summer2004/hartmiller.html>. Because AES will treat and process dredge materials, the resulting PDM will be more environmentally acceptable for a wider range of re-uses than the material MPA uses for habitat creation.

the specific end-users and their locations.¹² As discussed above, the sediment chemical testing data shows that the quality of the dredge materials generated by the Project will be environmentally acceptable for the end-uses proposed by AES.¹³ This conclusion is also supported by a matrix prepared by AES that identifies categories of potential uses and types of sites suitable for utilizing PDM based upon sediment testing data, applicable regulatory standards and physical characteristics of the dredge material.¹⁴ In preparing PDM for re-use, AES will comply with the applicable requirements for each end-use category. Moreover, both AES and end-users of PDM will be required to comply with applicable environmental laws pertaining to the use of PDM, assuring that PDM will not be used in environmentally unacceptable locations or applications.

3. Pipeline-Related Wetlands and Waterways Impacts

MDE claims it does not have enough information to evaluate the wetland and waterway impacts associated with the construction of the pipeline, *see* MDE Br. at 3-4, 11 & 15, and that sufficient information cannot be obtained “until AES has easement agreements with the affected landowners and FERC has approved the project.”¹⁵ The Secretary, however, has enough information to evaluate pipeline crossing impacts for purposes of this appeal, which information demonstrates that such impacts will be minimal and will not outweigh the national interest. AES

¹² *See* April 5 Response at ALT #4. *See also* August 30 Response at Nos. 2-5; May 30 Response at Nos. 9-12, Atts. 9 & 12.

¹³ *See* RR 2 §§ 2.4.3.2; September 26 Response; October 12 Addendum.

¹⁴ *See* May 30 Response at Att. 9 (matrix); RR 1 § 1.5.1.2.A; RR 2 §§ 2.4.3.2 & 2.4.8.4; September 26 Response; October 12 Addendum.

¹⁵ MDE Br. at 15. As noted above, the Secretary’s decision is a prerequisite to the FERC decision, not the other way around. And, FERC often issues certificate orders for pipelines without the precise route having been finalized. *See, e.g., Questar Overthrust Pipeline Co.*, 116 FERC ¶ 61,225, Apx., Env’tl Conditions 4 & 5 (2006); *Southern Star Central Gas Pipeline, Inc.*, 102 FERC ¶ 62,165, Apx., Env’tl Conditions 4 & 5 (2003) (Attached together at SA-8).

has presented information on potential impacts to wetlands and waterways and related mitigation measures for both the construction and operation of the pipeline,¹⁶ as well as additional clarification relative to wetland impacts in its responses to MDE's data request.¹⁷ In preparing the data, AES performed field surveys accounting for approximately 81% of the pipeline route and used appropriate remote resources (e.g., aerial photography and Geographic Information System databases) to evaluate the remaining segments.¹⁸ This method of analysis of wetlands and waterbody crossings provides adequate precision to determine impacts for review of proposed linear infrastructure and allows for refinement at a later stage of the Project (e.g., after FERC approval and finalization of easements), so that any incremental impacts can (and will) be addressed through mitigation measures subject to FERC review.

C. Element 3: There Are No Reasonable Alternatives To The Project

MDE errs when it asserts that, for purposes of this appeal, AES bears the burden of demonstrating that there are no alternatives available to the proposed Project. MDE Br. at 20. To the contrary, as to this third element of the Secretary's review ("Element 3"), it is MDE that "bears the burden of identifying, with sufficient specificity, an alternative that is consistent with its coastal management program." *Islander East* at 35. If MDE "meets that burden, the burden *then* shifts to [the project proponent] to show that the alternative is either unavailable or unreasonable."¹⁹ MDE has not met its burden and therefore cannot prevail on Element 3.

¹⁶ See RR 2 §§ 2.4.1, 2.4.8, 2.4.9, 2.5.1-2.5.4 & Tables 2.4-1 & 2.5-1 (Tables attached at SA-9).

¹⁷ See August 30 Response at Nos. 14-19.

¹⁸ See July 21 Response at No. 25 (describing remote resources used to estimate impacts conservatively).

¹⁹ *Islander East* at 35 (emphasis added). Because MDE has failed to meet its burden of proposing an alternative that is consistent with its coastal management program, there is no proposal for AES to evaluate to determine whether it is "available" or "reasonable" for purposes of Element 3. See *id.* Nonetheless, as AES has consistently maintained, see, e.g., AES Br. at 6, there is *no* reasonable alternative available to the Project. See generally RR 10.

The “Secretary shall not consider an alternative unless the State agency submits a statement, in a brief or other supporting material, to the Secretary that the alternative 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(c). The only “alternative” that has been proposed by MDE is “allowing the permit process to proceed to its conclusion.” MDE Br. at 27. This is not an “alternative” under NOAA’s regulations: “As contemplated by NOAA’s regulations, an alternative consists of one or more *changes* to the project that would allow the project, albeit in a somewhat different form, to achieve its primary purpose in a manner consistent with the state’s coastal management program.” *Decision and Findings in the Consistency Appeal of Millennium Pipeline Co.* (Dec. 12, 2003), at 21 (emphasis added). MDE’s “alternative” does not specify changes allowing the Project to proceed “in a somewhat different form” and thereby be “consistent with the [MCMP].” *Id.*

MDE misapprehends the purpose of the alternatives analysis for Element 3. MDE is charged on appeal with providing an alternative consistent with the MCMP in order “to bring finality to the CZMA process for that project.” Final Rule 2006 at 820. If the State identifies an alternative that would be consistent with its coastal management program, then the “applicant could adopt the alternative and proceed with that alternative without further State CZMA review.” *Id.* MDE merely proposes to continue the State’s CZMA review offering no less than three different “milestones” for its possible completion.²⁰ MDE, therefore, has not proposed a project change that MDE has found consistent with the MCMP and which, if adopted, would permit the Project to proceed without further State CZMA review. As NOAA has explained, “[i]f a State cannot make a finding of consistency for an alternative on appeal, then the State

²⁰ MDE Br. at 11, 15, 27.

would not prevail on [] element [3].” Final Rule 2006 at 820. *See also VEPCO* at 38.

Accordingly, MDE cannot prevail on Element 3.

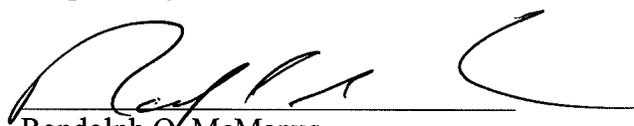
IV. AES HAS DEMONSTRATED THAT THE PROJECT IS NECESSARY IN THE INTEREST OF NATIONAL SECURITY

MDE relies on *Advanced Energy Initiative* in arguing that the Project is not necessary to the interest of national security. MDE Br. at 27-28. However, that document states that “[a]t the President’s direction, Federal agencies are working to expedite permitting processes and accelerate development and expansion of U.S. *liquefied natural gas (LNG) terminals*, which should improve natural gas availability and reduce prices.” Nat’l Econ. Council, *Advanced Energy Initiative* (Feb. 2006), at 9 (emphasis added). It therefore provides additional support that the Project is necessary in the interest of national security because it will improve and insure natural gas availability through supply and geographic diversity.

CONCLUSION

For the foregoing reasons and those stated in its Principal Brief, AES respectfully requests that the Secretary override MDE’s Objection.

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