

DECISION AND FINDINGS
BY THE
U.S. SECRETARY OF COMMERCE
IN THE
CONSISTENCY APPEAL OF
AES SPARROWS POINT LNG, LLC AND MID-ATLANTIC EXPRESS, L.L.C.
FROM AN OBJECTION BY THE
STATE OF MARYLAND
JUNE 26, 2008

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I. INTRODUCTION

AES Sparrows Point LNG, LLC and Mid-Atlantic Express, L.L.C. (collectively, AES) seek permits and authorizations from the Federal Energy Regulatory Commission (FERC) and the U.S. Army Corps of Engineers (Corps)¹ necessary to construct and operate a \$650 million liquefied natural gas (LNG) import, storage, and regasification terminal and associated 88-mile natural gas pipeline (together, the Project).² The 80-acre LNG terminal site would be located in the footprint of a former steel manufacturing and shipbuilding facility in the Sparrows Point Industrial Complex, a heavily industrialized area adjacent to Interstate 695 east of the Port of Baltimore.³ LNG would be delivered by LNG tanker vessels to the terminal along well-established routes for commercial vessels.⁴ At the terminal, the LNG would be offloaded, regasified, and transported by pipeline to interstate natural gas pipeline connections located in Eagle, Pennsylvania.⁵

The Project would help meet a growing demand for natural gas in the Mid-Atlantic region. Regional energy consumption is estimated to rise substantially through 2020.⁶ Against this rising demand, it is expected that traditional sources of natural gas for this region, primarily from the Gulf Coast and Canada, will decline considerably in both absolute and relative terms.⁷ The Project would help address projected regional natural gas demand by providing significant additional capacity.⁸ It is projected that by 2020, regional demand will not only necessitate the

¹ AES seeks several Federal authorizations necessary for the construction and operation of the terminal and pipeline: authorization from the Corps under section 10 of the Rivers and Harbors Act and section 404 of the Clean Water Act, and authorization from FERC under sections 3 and 7 of the Natural Gas Act. See Revised Joint Application for U.S. Army Corps of Engineers Section 404/10 Permit for the States of Maryland and Pennsylvania (Apr. 13, 2007); Application Under Section 3 of the Natural Gas Act for Authorization to Site, Construct, and Operate Liquefied Natural Gas Import Facilities (Jan. 8, 2007); and Application Under Section 7 of the Natural Gas Act for Certificates of Public Convenience and Necessity (Jan. 8, 2007).

² AES Resource Report (RR) 1, Section 1.1 Introduction; AES Initial Brief, at 17.

³ RR 1, Section 1.3 Proposed Facilities Location and Description and Figure 1.3-1; AES Initial Brief, at 23.

⁴ RR 1, Section 1.1 Introduction; App. 1C.

⁵ RR 1, Section 1.1 Introduction.

⁶ RR 10, Appendix A (Concentric Energy Advisors, Demand and Supply Analysis of the Mid-Atlantic Natural Gas Markets, 2005-2030 (July 2006)); RR 1, Section 1.2 Purpose and Need (citing U.S. Energy Information Administration, Annual Energy Outlook 2006 (Feb. 2006)).

⁷ RR 10, Appendix A (Concentric Energy Advisors, Demand and Supply Analysis of the Mid-Atlantic Natural Gas Markets, 2005-2030 (July 2006)). The Gulf Coast currently supplies 23% of the Nation's gas supply but that percentage is projected to decrease to 17% by 2030. Similarly, Canada currently supplies 15% of the Nation's gas supply, but that percentage is projected to drop to 1.8% by 2030.

⁸ RR 1, Section 1.1 Introduction; AES Initial Brief, at 17.

1.5 billion cubic feet per day from the Project, but will also require an additional 3.5 billion cubic feet per day.⁹

The State of Maryland (Maryland) reviewed the Project pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA), and implementing regulations of the Department of Commerce (Department) set forth at 15 C.F.R. Part 930, Subpart D. Maryland objected to the Project, finding in the alternative that: (a) the information provided by AES is insufficient to determine whether the Project is consistent with the enforceable policies of Maryland's Coastal Management Program (Program); and (b) the Project is inconsistent with Maryland's Program.¹⁰ Maryland also noted that a recent amendment to the Baltimore County zoning regulations, an amendment that was the subject of litigation at the time of the objection, effectively prohibited the Project, and thus, unless struck down in the litigation, would constitute an independent ground for objection.¹¹ AES filed a timely notice of appeal, requesting an override of Maryland's objection as provided in the CZMA.

Opposing that request, Maryland argues that there is insufficient information to identify the adverse coastal effects of the Project and identifies specifically three areas of concern: (1) adverse coastal effects on water quality from the re-suspension of contaminated sediments during dredging; (2) adverse coastal effects of the disposal of processed dredged material; and (3) adverse coastal effects on wetlands and waterbodies from pipeline crossings.¹² Maryland argues that absent sufficient information, it is not possible to balance these adverse coastal effects against any national interest furthered by the Project.

Maryland's objection is overridden. This decision is based on the existing record, and, for the reasons set forth below, it is clear that there is sufficient information on the Project within the decision record to rule on the appeal. As explained more fully below, the record establishes that overriding Maryland's objection is appropriate because the Project is consistent with the objectives of the CZMA: it furthers the national interest in a significant and substantial manner; the national interest furthered by the Project outweighs the Project's adverse coastal effects; and there is no reasonable alternative available for the Project.

Recent amendments to the CZMA, enacted as part of the Energy Policy Act of 2005, apply to this decision. These amendments set forth the requirements for the initial decision record and supplementation of that record with additional information, as well as the timelines for closure of the record and issuance of the decision.¹³

⁹ RR 10, Appendix A (Concentric Energy Advisors, Demand and Supply Analysis of the Mid-Atlantic Natural Gas Markets, 2005-2030 (July 2006)).

¹⁰ See Letter from Elder Ghigiarelli, Maryland Department of the Environment (MDE), to Christopher Diez, AES (July 9, 2007).

¹¹ *Id.*

¹² *Id.*; Maryland Brief, at 2-4, 15-18.

¹³ 16 U.S.C. §§ 1465(b), 1466; 15 U.S.C. § 717n(d)(1).

Given this decision, Maryland's objection to the Project no longer operates as a bar under the CZMA to Federal agencies issuing, in accordance with all applicable law, licenses or permits necessary for construction and operation of the Project. This decision to override Maryland's objection does not supplant other state and Federal license and permit requirements and review processes, including environmental license and permit requirements and review processes. AES still will be required to obtain all necessary state and Federal licenses and permits, and all necessary review processes will need to be completed. Whether the state and Federal licensing and permitting agencies ultimately grant the required authorizations will depend on the record evidence then available to them and compliance with applicable law for the issuance of such authorizations.

II. STATUTORY FRAMEWORK

The CZMA provides states with federally approved coastal management programs the opportunity to review a proposed project requiring Federal licenses or permits if the project will affect any land or water use or natural resource of the state's coastal zone. A timely objection raised by a state precludes Federal agencies from issuing licenses or permits for the project, unless the Secretary of Commerce finds that the activity is either:

- "consistent with the objectives of [the CZMA];" or
- "necessary in the interest of national security."¹⁴

A finding that a project satisfies either ground results in an override of a state's objection. A license or permit applicant may appeal a state's objection and request that the objection be overridden.

III. THRESHOLD ISSUES

Several challenges by AES to the sufficiency of Maryland's objection must be addressed before the merits of the appeal are considered. AES argues that Maryland's objection should be dismissed because it is not in compliance with section 307 of the CZMA. Specifically, AES asserts that Maryland's objection: (a) fails to adequately identify the enforceable policies of Maryland's Program with which the Project is inconsistent; (b) is improperly based on the alternative ground of insufficient information to determine consistency with Maryland's Program, particularly because Maryland failed to properly identify the information necessary to

¹⁴ 16 U.S.C. § 1456(c)(3)(A) ("No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.").

determine consistency; and (c) is predicated in part on a state policy that is preempted by Federal law and is therefore unenforceable.¹⁵

For the reasons set forth below, Maryland's objection is sufficient to withstand dismissal on procedural grounds.

A. Maryland Adequately Identified Applicable Enforceable Policies of Its Program with which the Project Is Inconsistent.

AES asserts that Maryland's objection is procedurally deficient because it does not specify the enforceable policies of the Maryland Program that the Project fails to satisfy.¹⁶ The Department's regulations implementing the CZMA require that a state agency describe in its objection how a proposed activity is inconsistent with "specific" enforceable policies of the state's management program.¹⁷ AES argues that Maryland failed to meet this requirement because its objection merely recites a list of state statutes that are applicable to its consistency determination and that require AES to obtain various state permits. AES argues that the list is silent as to the enforceable policies implemented by the statutes and why the Project is inconsistent with those policies.¹⁸

Under the CZMA, the term "enforceable policy" is specifically defined to include those state policies that are legally binding through laws and regulations by which a state exerts control over land and water uses in the coastal zone.¹⁹ As applied, enforceable policies may be reflected within relevant state laws, so that state laws and regulations are effectively the state's enforceable policies.

Maryland's federally approved Program is a network of state laws and policies. These laws and policies are the "enforceable policies" of Maryland's Program and require, in part, the issuance of state permits to engage in certain activities within the coastal zone.

In its objection, Maryland indicates clearly that Maryland's concurrence with a consistency certification is expressed through the issuance of permits required under state law.²⁰ Maryland

¹⁵ AES Initial Brief, at 6-14.

¹⁶ AES Appeal, at 7 (Aug. 8, 2007).

¹⁷ 15 C.F.R. § 930.63(b).

¹⁸ AES Initial Brief, at 8.

¹⁹ 16 U.S.C. § 1453(6a).

²⁰ See A Guide to Maryland's Coastal Zone Management Program Federal Consistency Process, at 4, available at http://www.dnr.state.md.us/bay/czm/fed_consistency_guide.pdf (last visited May 22, 2008). NOAA has previously indicated that states may require the issuance of a state permit in order to find a proposed activity consistent with the state's coastal management program. 71 Fed. Reg. 788, 813 (Jan. 5, 2006).

then lists several state laws that specify the need for a state permit and goes on to note that while AES has submitted applications for authorizations under each of these laws, “it has not yet obtained the permits necessary for the State to concur with AES’s consistency certification.”²¹ This language was sufficient to put AES on notice of the enforceable policies of Maryland’s Program that the Project failed to satisfy. Therefore, Maryland properly objected on the basis of inconsistency with Maryland’s Program.

B. Maryland Objected Properly on the Alternative Basis of Insufficient Information and Identified the Information Necessary to Determine Consistency.

AES also argues that Maryland’s objection is deficient because Maryland based its objection, in part, on the alternative ground that it lacked sufficient information to find the Project consistent with its Program. Further, AES argues that Maryland failed to provide a timely request for information “claimed to be related to the consistency certification” and describe the necessity of the information to its certification.²²

As an initial matter, under the Department’s regulations implementing the CZMA, a state may object on alternative bases.²³ A permissible basis is an objection that the applicant has failed, following a written request, to supply information necessary for the state to determine consistency.²⁴ To object properly on this basis, the state must describe in its objection the nature of the information requested and the necessity of the information to determine consistency.²⁵

The record shows that on May 7, 2007, and July 5, 2007, Maryland made written requests to AES for additional information with regard to the adverse coastal effects of the Project, particularly the effects on water quality from the re-suspension of contaminated sediments during dredging, the effects of the disposal of processed dredged material, and the effects on wetlands and waterbodies from pipeline crossings.²⁶ AES provided information in response to those requests on May 30, 2007, and July 6, 2007.²⁷ Nevertheless, and because the six-month deadline for review of the Project was rapidly approaching, Maryland objected on July 9, 2007, in part based on a determination that it still lacked sufficient information to determine consistency with

²¹ See Letter from Elder Ghigiarelli, MDE, to Christopher Diez, AES (July 9, 2007).

²² AES Initial Brief, at 9-10.

²³ 15 C.F.R. § 930.63(a).

²⁴ 15 C.F.R. § 930.63(c).

²⁵ *Id.*

²⁶ See Letter from Elder Ghigiarelli, MDE, to Christopher Diez, AES (May 7, 2007); Letter from Elder Ghigiarelli, MDE, to Christopher Diez, AES (July 5, 2007).

²⁷ See Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE (May 30, 2007); Letter from Kent Morton, AES, to Elder Ghigiarelli, MDE (July 6, 2007).

its Program.²⁸ Maryland explained in its objection that (1) under its regulations, a consistency certification is deemed incomplete in the absence of the state's having issued necessary state permits for the project, which had not yet occurred; and (2) in any event, even with AES's July 6, 2007 submission, additional information and clarification, particularly regarding proposed means for disposing of dredged material, was still required for purposes of its consistency review.²⁹

In determining whether Maryland's objection on this basis is valid, it is not necessary to review the merits of Maryland's determination that the information provided was sufficient. Instead, the inquiry is limited to whether Maryland followed the proper procedures for making an objection on the basis of insufficient information to determine consistency with its Program.³⁰ In its objection dated July 9, 2007, Maryland describes the nature of the information requested (information necessary to issue final state permits, particularly information on dredged material disposal) and the reasons why it deems that information necessary to determine consistency with its Program.³¹ While AES complains that Maryland's July 5, 2007, letter requesting additional information was received only one business day before Maryland objected,³² the Department's CZMA regulations do not require a state to provide its written requests for information within a certain time period before objecting to a consistency certification.³³ Therefore, Maryland properly objected in the alternative on the basis that it lacked sufficient information to determine consistency with Maryland's Program.

Importantly, the determination here is focused solely on whether Maryland has complied with the procedural requirements for making an objection established by the CZMA and the Department's implementing regulations.³⁴ By contrast, and as discussed further in Section IV(B)(1) *infra*, the inquiry into the sufficiency of the record to identify the adverse coastal effects of the Project is a substantive one based on the existing record that was developed over the past 10 months during the pendency of this appeal—a record that is distinct from that which was before Maryland, which resulted in Maryland's determination of insufficiency for purposes of its consistency review.³⁵

²⁸ Letter from Elder Ghigiarelli, MDE, to Christopher Diez, AES (July 9, 2007).

²⁹ *Id.*

³⁰ See Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc., at 6-7 (Oct. 29, 1990) (hereinafter Chevron); 65 Fed. Reg. 77,124, 77,149 (Dec. 8, 2000).

³¹ See Letter from Elder Ghigiarelli, MDE, to Christopher Diez, AES (July 9, 2007).

³² AES Initial Brief, at 9.

³³ 15 C.F.R. § 930.63(c).

³⁴ See Chevron at 6-7; 65 Fed. Reg. 77,124, 77,149 (Dec. 8, 2000).

³⁵ During this appeal AES submitted additional information on all three issues raised by Maryland in its May and July letters, including information on the means for disposal of dredged material.

C. Maryland's Objection on the Basis of Section 105 of the Baltimore County Zoning Regulations Is Improper.

AES also challenges the validity of Maryland's objection to the extent it is predicated on the Project's inconsistency with a recently enacted amendment to section 105 of the Baltimore County Zoning Regulations.³⁶ This zoning amendment adds LNG terminals to the list of prohibited uses within Chesapeake Bay Critical Areas.³⁷ Maryland asserts that this zoning amendment is now part of Maryland's Program. Because the Sparrows Point Industrial Complex is within a Chesapeake Bay Critical Area, Maryland argues that the siting of the Project is in violation of Maryland's Program and is a separate basis upon which to object to the Project.³⁸

AES responds that Baltimore County's zoning amendment cannot serve as a basis for objecting to the Project because the amendment is preempted by section 3 of the Natural Gas Act. AES argues that because the amendment is preempted, it is not an "enforceable policy" upon which the state can base an objection under the CZMA.

Maryland's objection on the basis of Baltimore County's zoning amendment is improper. The Secretary of Commerce, through the National Oceanic and Atmospheric Administration (NOAA), must approve all changes to a state's coastal management program.³⁹ Maryland, however, has not submitted the Baltimore County zoning amendment to NOAA for approval, and NOAA has not approved the incorporation of the zoning amendment into the Maryland Program. Consequently, the zoning amendment is not an enforceable policy of the Maryland Program and cannot be a basis for objection under the CZMA.⁴⁰ Given this finding, it is unnecessary to

³⁶ Baltimore County Zoning Regulations § 105 (Md. 2007).

³⁷ Id.

³⁸ Maryland Brief, at 19-20.

³⁹ 16 U.S.C. § 1455(e)(3)(A) ("a coastal state may not implement any amendment, modification, or other change as part of its approved management program unless the amendment, modification, or other change is approved by the Secretary") (emphasis added); 15 C.F.R. § 930.11(h) ("The term "enforceable policy" means State policies that are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone," 16 USC § 1453(6a), and which are incorporated in a management program as approved by [NOAA] either as part of program approval or as a program change under 15 CFR part 923, subpart H.") (emphasis added); 15 C.F.R. § 923.84(b)(4)(ii) ("Federal consistency shall not be required until this notice [of NOAA approval of a routine program change] has been provided.").

⁴⁰ 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.63(b). Separate from this appeal, the validity of this zoning amendment has been the subject of litigation. AES initially filed suit in the U.S. District Court for the District of Maryland, challenging the validity of Baltimore County's zoning amendment. AES asserted that the amendment is preempted by section 3 of the Natural Gas Act, which vests FERC with "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." 15 U.S.C. § 717b(e)(1). In June 2007, the court upheld the zoning amendment, holding that the zoning amendment was part of Maryland's Program and therefore fell within the Natural Gas Act's savings clause, which provides that "nothing in the [Natural Gas Act] affects the rights of States under" the CZMA and two other Federal statutes (the Clean Air Act and the Clean Water Act). AES Sparrows Point LNG, LLC v. Smith, 539 F.Supp. 2d 788 (D. Md. 2007). Recently,

determine whether the zoning amendment is preempted by the Natural Gas Act.⁴¹

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

Pursuant to the CZMA, a state's objection must be sustained unless the activity at issue is consistent with the objectives of the CZMA or otherwise necessary in the interest of national security.⁴² These grounds are independent and an affirmative finding on either is sufficient to override. For the reasons set forth below, the record establishes that the Project is consistent with the objectives of the CZMA. Maryland's objection is therefore overridden.

The Project is consistent with the objectives of the CZMA if it satisfies all three regulatory elements required for such a finding: (1) the activity furthers the national interest, as set forth in CZMA sections 302 or 303, in a significant or substantial manner (Element 1); (2) the national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively (Element 2); and (3) there is no reasonable alternative that would permit the activity to be conducted in a manner consistent with the enforceable policies of the state's coastal management program (Element 3).⁴³ Each element is discussed in detail below.

As stated previously, the decision to override Maryland's objection does not supplant other state and Federal license and permit requirements and review processes, including environmental

however, the U.S. Court of Appeals for the Fourth Circuit reversed the judgment of the district court, holding that, because the zoning amendment had not been submitted to NOAA for approval, it was not part of the Maryland Program and therefore could not be saved from preemption by operation of the savings clause. AES Sparrow Point LNG, LLC v. Smith, No. 07-1615, 2008 WL 2082148 (4th Cir. May 19, 2008). The Fourth Circuit declined to reach the question of whether the zoning amendment would fall within the savings clause if it had been approved by NOAA and incorporated into Maryland's Program. Id. The finding on this threshold issue is consistent with the Fourth Circuit's decision.

⁴¹ NOAA, however, previously has considered whether 15 U.S.C. § 717b(e)(1) of the Natural Gas Act preempts state laws that seek to regulate the siting, construction, or operation of LNG terminals. In 2006, NOAA informed the state of New Jersey that it could not approve, for inclusion in the state's coastal management program, amendments to a state regulation that effectively restricted the siting of LNG terminals within New Jersey's coastal zone. See Letter from David Kennedy, NOAA, to Ruth Ehinger (Oct. 4, 2006). In denying New Jersey's request, NOAA stated that 15 U.S.C. § 717b(e)(1) of the Natural Gas Act preempts state laws that seek to regulate the siting, construction or operation of LNG facilities. The letter also noted that the savings clause set forth at 15 U.S.C. § 717b(d) does not diminish FERC's role in siting LNG facilities. This savings clause provides that, "[e]xcept as specifically provided in this chapter, nothing in this Chapter affects the rights of States under...the Coastal Zone Management Act of 1972." The letter states that because 15 U.S.C. 717b(e)(1) of the Natural Gas Act provides FERC with exclusive jurisdiction over the siting and operation of LNG facilities, states may not do the same under the authority of the CZMA. In addition, in a concurring opinion in the zoning amendment litigation, see discussion supra note 41, Chief Judge Williams of the Fourth Circuit concluded that Baltimore County's zoning amendment is expressly preempted by the Natural Gas Act, and that the zoning amendment could not be "saved" by NOAA approval. AES Sparrow Point LNG, LLC v. Smith, No. 07-1615, 2008 WL 2082148 (4th Cir. May 19, 2008) (Williams, C.J., concurring).

⁴² 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.120.

⁴³ 15 C.F.R. § 930.121(a)-(c).

license and permit requirements and review processes. AES still will be required to obtain all necessary state and Federal licenses and permits, and all necessary review processes will need to be completed. Whether the state and Federal licensing and permitting agencies ultimately grant the required authorizations will depend on the record evidence then available to them and compliance with applicable law for the issuance of such authorizations.

A. Element 1: The Project Furthers the National Interest, as Set Forth in Sections 302 or 303 of the CZMA, in a Significant or Substantial Manner.

To satisfy Element 1, AES must demonstrate that the Project furthers the national interest, as defined in sections 302 or 303 of the CZMA, in a significant or substantial manner.⁴⁴ AES asserts that the Project will promote at least two national interests set forth in CZMA sections 302 or 303 in a significant and substantial manner,⁴⁵ specifically:

1. “priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to...energy...and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists;”⁴⁶ and
2. “preserv[ing], protect[ing], develop[ing], and, where possible...restor[ing] or enhanc[ing] the resources of the Nation’s coastal zone for this and succeeding generations.”⁴⁷

Stated broadly, Congress has defined the national interest in coastal zone management to include both protection and development of coastal resources.⁴⁸ A wide variety of activities has been found to meet the competing goals of resource protection and development, and past decisions have held that the siting of coastal-dependent energy facilities furthers the national interest sufficiently for CZMA purposes.⁴⁹ Additionally, in interpretive guidance in the preamble to the Department’s 2000 CZMA regulatory amendments, NOAA identified the siting of coastal-dependent energy facilities as an example of an activity that furthers the national interest in a significant or substantial manner.⁵⁰

⁴⁴ 15 C.F.R. § 930.121(a).

⁴⁵ AES Initial Brief, at 15-21; AES Reply Brief, at 4-6.

⁴⁶ CZMA § 303(2)(D), 16 U.S.C. §1452(2)(D).

⁴⁷ CZMA § 303(1), 16 U.S.C. § 1452(1).

⁴⁸ Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company, at 19 (May 19, 1994) (hereinafter VEPCO).

⁴⁹ Id. at 19-21; Decision and Findings in the Consistency Appeal of Islander East Pipeline Company, L.L.C., at 8-10 (May 5, 2004) (hereinafter Islander East) (remanded on other grounds, Connecticut v. Dep’t of Commerce, No. 3:04 -CV-1271 (SRU), 2007 WL 2349894 (D. Conn. Aug. 15, 2007)); Decision and Findings in the Consistency Appeal of Mobil Oil Exploration and Producing U.S. Inc., at 11-12 (June 20, 1995).

⁵⁰ See 65 Fed. Reg. 77,123, 77,150 (Dec. 8, 2000). See also Connecticut v. Dep’t of Commerce, 2007 WL 2349894

In light of precedent and the Project-specific findings below, the record establishes that the AES Project would further the national interests set forth in sections 302 or 303 of the CZMA in a significant and substantial manner.

1. The Project is a major coastal-dependent energy facility sited in an existing industrial area.

The Project would constitute a major coastal-dependent energy facility that would be sited in an area where similar industrial activities currently exist.

First, this Project is “major” in scope.⁵¹ AES estimates that the \$650 million Project would provide substantial volumes of natural gas to the Mid-Atlantic region, with a delivery capacity of 1.5 billion cubic feet per day and expansion capacity to 2.25 billion. This is enough natural gas to heat about 3.5 million homes or to generate electricity for 7.5 million homes.⁵² Past decisions have found projects of significantly lesser magnitude to meet the national interest in the siting of major energy facilities.⁵³

Moreover, the Project is “coastal dependent” because it would require that LNG be delivered via tankers that will dock and unload at the terminal prior to LNG regasification and transport through the pipeline.⁵⁴ The pipeline must traverse the coastal zone from the terminal to regional pipeline connections.⁵⁵

The Project is also an “energy facility” under the Department’s regulations implementing the CZMA. Those regulations define “energy facility” as “any equipment or facility which is or will be used primarily: (A) in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of, any energy resource; or (B) the manufacture,

at *8 (“According to the NOAA regulations, the siting of coastal-dependent energy facilities inherently has economic consequences beyond the immediate locality where the facility is located, that is, involves a significant national interest.”). The 2006 Amendments to the CZMA regulations, 71 Fed. Reg. 788-831 (Jan. 5, 2006), do not alter this conclusion.

⁵¹ See, e.g., Islander East, at 4-9.

⁵² AES Initial Brief, at 17.

⁵³ See, e.g., Islander East. The Islander East project—a natural gas pipeline traversing Long Island Sound—was projected to cost \$180 million to build and would provide enough natural gas capacity to heat 600,000 homes. This project was found to further the national interest in a significant and substantial manner, and that finding was sustained on review. See Connecticut v. Dep’t of Commerce, 2007 WL 2349894 at *9.

⁵⁴ The inquiry into whether a project is “coastal dependent” has in past decisions focused on whether “location in or near the coastal zone is required to achieve the primary goal of the project in question.” Islander East, at 9.

⁵⁵ Id.

production, or assembly of equipment, machinery, products, or devices which are involved in any activity described in subparagraph (A).”⁵⁶

Finally, the Project would be sited in an area where similar industrial activities currently exist. The LNG terminal would be located on an 80-acre parcel within the Sparrows Point Industrial Complex, an area adjacent to Interstate 695 and east of the Port of Baltimore that is zoned for heavy industrial use and classified as an Intensely Developed Area under Maryland law.⁵⁷ The terminal site is part of a larger maritime heavy industrial area and was previously owned by Bethlehem Steel Corporation as part of a steel manufacturing and shipbuilding facility.⁵⁸ Similarly, 91% of the Project’s proposed pipeline would follow existing rights-of-way set aside for commercial purposes.⁵⁹

Maryland does not dispute that the Project would constitute a major coastal-dependent energy facility. Rather, Maryland argues that the national interest articulated in the CZMA is simply to encourage and assist states in implementing policies that give “expedited consideration” to energy projects. Maryland argues further that its one-stop, unified, umbrella permit for energy projects issued under the Maryland Coastal Facilities Review Act effectuates that interest.⁶⁰ However, the national interest set forth in the CZMA to give “priority consideration” to “orderly processes” for the siting of major coastal-dependent energy facilities has been interpreted in past decisions to encompass the actual siting of major energy projects rather than mere expedited processing.⁶¹

2. The Project would develop the resources of the coastal zone.

The Project would develop the coastal zone by making possible the importation of additional natural gas via LNG tankers to meet growing regional demand. Development, as articulated in the national policies of the CZMA, has been understood in past decisions to encompass a wide variety of activities, such as construction of a national gas pipeline, construction of a pipeline to transport drinking water, commercial construction, and oil and gas exploration, development, and

⁵⁶ 16 U.S.C. § 1453(6).

⁵⁷ RR 1, Section 1.3 and Figure 1.3-1 Project Overview—Sparrows Point LNG Terminal and Mid-Atlantic Express Pipeline; AES Initial Brief, at 23.

⁵⁸ RR 1, Section 13 and Figure 1.3.-1 Project Overview—Sparrows Point LNG Terminal and Mid-Atlantic Express Pipeline.

⁵⁹ RR 8, Section 8.3.2.

⁶⁰ Maryland Brief, at 22.

⁶¹ See, e.g., Islander East, at 4-9 (siting of a natural gas pipeline); Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc., at 12-13 (Jan. 7, 1993) (oil and gas exploration, development, and production activities); Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing Southeast, U.S. Inc., at 11-12 (June 20, 1995) (same).

production activities.⁶² In this instance, constructing the terminal, dredging adjacent waters to accommodate tanker traffic, and constructing a natural gas pipeline all constitute activities that would develop the coastal zone to facilitate the importation of natural gas to meet anticipated regional energy needs.

Maryland argues that the Project does not allow for use of the coastal zone “for a particular purpose that was not previously available,” because LNG is already available through the Dominion Cove Point facility in Calvert County, Maryland. That facility is undergoing an expansion that will increase its LNG storage from 7.8 billion cubic feet to 14.5 billion, and its send-out capacity from 1.0 billion cubic feet per day to 1.8 billion.⁶³ Past decisions, however, have interpreted the CZMA policy of coastal zone development to include further development as well as new development.⁶⁴ Given the Project’s potential to provide to the Mid-Atlantic region much-needed natural gas, nearby LNG facilities do not reduce the national interest in developing the coastal zone of the proposed Project.

Maryland also argues that the Project, particularly the dredging that would deepen Baltimore Harbor to previously unmaintained depths to accommodate LNG tanker traffic, does not provide for a new use because the need for such dredging is driven solely by the Project.⁶⁵ As stated above, past decisions establish that the national policy of coastal zone development includes further development as well as new development. In addition, the inquiry into whether development of the coastal zone furthers the national interest in a significant or substantial manner takes into account the entire Project, not just a particular portion.⁶⁶ Thus, the national

⁶² See, e.g., VEPCO (The proposed water pipeline would provide a source of drinking water for Virginia Beach, Virginia.); Islander East (The natural gas pipeline modified the Sound’s bottom to allow its use for a particular purpose that was not previously available. The changed use of a portion of Long Island Sound is a development of the coastal zone.); Decision and Findings in the Consistency Appeal of Jesse W. Taylor (Dec. 30, 1997) (A project to fill 0.6 acres of wetlands for commercial development minimally contributed to the national interest in developing the coastal zone.); Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc. (Jan. 7, 1993) (Oil and gas exploration, development, and production activities further the national interest of developing the coastal zone.); Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc. (June 20, 1995) (same).

⁶³ Maryland Brief, at 22.

⁶⁴ See, e.g., VEPCO (The proposed water pipeline would provide a source of drinking water for Virginia Beach. While not stated specifically in the decision, Virginia Beach presumably had other sources of water supply at that time.); Islander East (The proposed pipeline would originate from an interconnection with the pipeline system of Algonquin Gas Transmission Company, which indicates that other sources of natural gas were available in the area.).

⁶⁵ Maryland Brief, at 23.

⁶⁶ See, e.g., Decision and Findings in the Consistency Appeal of Southern Pacific Transportation Company (Sept. 24, 1985) (The proposed bridge rehabilitation project would include constructing a new northern abutment, excavating the northern embankment, and extending the southern abutment, as well as dredging a pilot channel under the center of the bridge. The entire project is found to contribute to the national interest of development of the coastal zone and the siting of transportation facilities.); see also Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S. Inc. (June 20, 1995); Decision and Findings in the Consistency Appeal of Amoco Production Company (July 20, 1990) (hereinafter Amoco) (The proposed projects included drilling seven and up to fourteen exploratory wells, respectively; discussion of national interest considered the national interest in the entire

interest inquiry does not focus simply on the Project dredging necessary to accommodate LNG tankers. The determination of the national interest in the Project also includes the terminal and associated natural gas pipeline that would transport natural gas to consumers.

3. The Project furthers these national policies in a significant and substantial manner.

Not only must the Project further the national interest as articulated in sections 302 or 303 of the CZMA, it must do so in a significant or substantial manner. In the preamble to the Department's 2000 CZMA regulatory amendments, the word "significant" is interpreted to encompass projects that provide a valuable or important contribution to a national interest, without necessarily being large in scale or having a large impact on the national economy. The word "substantial" is interpreted to encompass projects that contribute to a CZMA objective to a degree that has a value or impact on a national scale.⁶⁷ Together, these terms encompass both the import and scale of a proposed activity. The regulations provide examples of activities that significantly or substantially further the national interest, such as the siting of energy facilities or oil and gas development on the outer continental shelf.⁶⁸ Such activities have economic implications beyond the immediate locality where they are located. Other activities, such as a marina, may contribute to the economy of the coastal municipality or state, but may not provide significant or substantial economic contributions to the national interest furthered by the objectives in sections 302 or 303 of the CZMA. Whether a project significantly or substantially furthers the national interest in the objectives of sections 302 or 303 will depend on the evidence in the decision record.⁶⁹ Here, the Project is both significant and substantial for the reasons set forth below.

The Project is significant because it provides an important contribution to the Nation's interest in siting LNG facilities to meet future energy requirements. The Nation's interest in developing LNG facilities was recently articulated in the White House National Economic Council's Advanced Energy Initiative.⁷⁰ This document stated that, at the President's direction, Federal agencies are working to accelerate the development and expansion of LNG terminals to improve natural gas availability and supply.⁷¹

exploration activity, not just one well or another.)

⁶⁷ 65 Fed. Reg. 77,124, 77,149-50 (Dec. 8, 2000); see also Islander East, at n.26. The definitions articulated in the preamble apply to the terms "significant" and "substantial" only for purposes of the Element 1 discussion. When used in the discussion of Element 2, infra, these terms are intended to convey their ordinary meaning.

⁶⁸ 65 Fed. Reg. 77124, 77,150 (Dec. 8, 2000).

⁶⁹ Id.

⁷⁰ AES Initial Brief, at 15 (citing White House National Economic Council, Advanced Energy Initiative (Feb. 2006) (hereinafter AEI)).

⁷¹ Id. Maryland also cited to the AEI in its brief, for the proposition that it is in the Nation's interest to reduce the Nation's reliance on natural gas. However, the section quoted by Maryland discusses the steps the Administration has taken not only to develop alternatives to natural gas, but also to "increase the supply of natural gas [and] improve efficiency." Maryland Brief, at 27.

The Project is substantial given its anticipated contribution to future regional natural gas supplies. Regional demand for natural gas is projected to require significant additional supplies of natural gas by 2020.⁷² Natural gas demand in the Mid-Atlantic region, the area most directly served by the Project, is projected to increase from 2.4 trillion cubic feet in 2005 to 2.9 trillion cubic feet in 2020.⁷³

Against this substantial rising demand, it is expected that traditional sources of natural gas for the region, primarily supply from the Gulf Coast and Canada, will decline in both absolute and relative terms.⁷⁴ The Gulf Coast currently supplies 23% of the Nation's gas supply but that percentage is projected to decrease to 17% by 2030.⁷⁵ Similarly, Canada currently supplies 15% of the Nation's gas supply, but that percentage is projected to drop to 1.8% by 2030.⁷⁶ The Project, with a delivery capacity of 1.5 billion cubic feet per day and expansion capacity to 2.25 billion, would address regional demand by providing significant volumes of natural gas to the Mid-Atlantic region.⁷⁷ This is enough natural gas to heat about 3.5 million homes or to generate electricity for about 7.5 million homes.⁷⁸ It is projected that by 2020, regional demand will not only necessitate the 1.5 billion cubic feet per day from the Project, but will also require an additional 3.5 billion cubic feet per day.⁷⁹ Beyond its regional impact, the Project will help serve a broader goal of stabilizing (and perhaps decreasing) the price of natural gas on a national level.⁸⁰

Maryland does not dispute these projections. Rather it discounts the importance of the Project by noting ongoing expansion efforts at existing or approved LNG terminals, including the nearby

⁷² RR 10, Appendix A (Concentric Energy Advisors, Demand and Supply Analysis of the Mid-Atlantic Natural Gas Markets, 2005-2030 (July 2006)).

⁷³ RR 1, Section 1.2 Purpose and Need (citing U.S. Energy Information Administration, Annual Energy Outlook 2006 (Feb. 2006)).

⁷⁴ RR 10, Appendix A (Concentric Energy Advisors, Demand and Supply Analysis of the Mid-Atlantic Natural Gas Markets, 2005-2030 (July 2006)).

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ RR 1, Section 1.1 Introduction; AES Initial Brief, at 17.

⁷⁸ AES Initial Brief, at 17.

⁷⁹ RR 10, Appendix A (Concentric Energy Advisors, Demand and Supply Analysis of the Mid-Atlantic Natural Gas Markets, 2005-2030 (July 2006)).

⁸⁰ “[T]he Energy Information Agency . . . within the Department of Energy . . . has forecasted that increased LNG imports can lower natural gas prices.” See Application Under Section 3 of the Natural Gas Act for Authorization to Site, Construct, and Operate Liquefied Natural Gas Import Facilities (Jan. 8, 2007) (citing Annual Energy Outlook 2006 (Feb. 2006)).

Dominion Cove Point facility and the proposed Crown Landing LNG facility in New Jersey, which together could supply approximately 2.0 billion cubic feet per day to the region. However, as stated above, projections indicate that the forecasted regional demand will require 3.5 billion cubic feet per day in addition to that supplied by the Project.⁸¹

In light of the foregoing record, it is clear that the Project will further the national interest both in siting major coastal-dependent energy facilities—particularly because the Project would be sited in an area where such development already exists—and in developing the resources of the coastal zone. The record also establishes that the Project will further these national interests in a significant and substantial manner.⁸²

B. Element 2: The National Interest Furthered by the Project Outweighs any Adverse Coastal Effects Caused by the Project.

For AES to succeed on Element 2, the national interest in the Project must outweigh its adverse coastal effects, when those effects are considered separately or cumulatively.⁸³ This determination is made by a preponderance of the evidence in the record.⁸⁴ Based on the considerations set forth below, the record establishes that the Project satisfies Element 2.

1. Sufficiency of information to identify adverse coastal effects.

Before the national interest in the Project can be balanced against its adverse coastal effects, there must exist sufficient information to adequately identify the Project's adverse coastal effects.⁸⁵

Maryland argues that there is insufficient information on the Project's potential adverse coastal effects because the Project remains in the early stages, and necessary state and Federal environmental reviews have not yet been completed. Specifically, Maryland notes that FERC had not yet prepared an Environmental Impact Statement under the National Environmental Policy Act (NEPA), an assessment that other reviewing agencies ordinarily rely upon.⁸⁶ Until

⁸¹ Id.

⁸² AES asserts that the Project furthers national interests in addition to those discussed above. AES Initial Brief, at 22-24; AES Reply Brief, at 6. Maryland disagrees and proffers additional national interests with which it believes the Project is inconsistent. Maryland Brief, at 23-25. Given that the proposed Project furthers at least one of the policies or objectives articulated in the CZMA, it is not necessary to address these competing arguments. 16 U.S.C. § 1456; see also VEPCO, at 21; Amoco, at 15.

⁸³ 15 C.F.R. § 930.121(b).

⁸⁴ See Islander East, at 35; Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc., at 41 (June 20, 1995).

⁸⁵ Decision and Findings in the Drilling Discharge Consistency Appeal of Mobil Oil Exploration and Production Southeast, Inc., at 12 (Sept. 2, 1994).

⁸⁶ Maryland Brief, at 25-26.

the various state and Federal permitting processes have run their course and the full environmental impact of the Project is ascertained, Maryland maintains that it is not possible to conclude, by a preponderance of the evidence, that any national interest furthered by the Project outweighs the Project's adverse coastal effects.⁸⁷

a. Criteria for sufficiency review.

In determining whether sufficient information exists to adequately identify adverse coastal effects, both the completeness and scientific quality of the information in the record are considered.⁸⁸ AES bears both the burden of proof and the burden of persuasion.⁸⁹ If the record lacks sufficient information as to the Project's adverse coastal effects, the balancing required to support a finding for AES on Element 2 cannot occur and the state's objection must be sustained.⁹⁰

An examination into sufficiency of the information available is confined to the evidence in the record, as developed during the appeal. Recent amendments to the CZMA enacted as part of the Energy Policy Act of 2005 require that the initial record for an appeal is the consolidated record maintained by the lead Federal permitting agency for the project—in this instance, FERC.⁹¹ This record may be supplemented with: (a) information specifically requested to complete a consistency review; or (b) information that clarifies other evidence within the consolidated record.⁹²

Additionally, Congress has established new limitations on the time available to develop the decision record. Under recent amendments to the CZMA, the decision record must close within 190 days of receipt of a notice of the appeal.⁹³ This deadline may be extended for no more than 60 days, and only if needed to gather information to supplement the record as set forth above.⁹⁴

It is important to note that the sufficiency determination on appeal is different from Maryland's sufficiency determination, which led to Maryland's objection and the instant appeal. On appeal, the question is whether the record contains sufficient information on a project's adverse coastal

⁸⁷ Id.

⁸⁸ Decision and Findings in the Drilling Discharge Consistency Appeal of Mobil Oil Exploration and Producing Southeast, Inc., at 9 (Sept. 2, 1994).

⁸⁹ Id. at 8.

⁹⁰ Id.

⁹¹ 15 U.S.C. § 717n(d)(1).

⁹² Id.; 16 U.S.C. § 1465(b)(3)(A).

⁹³ 16 U.S.C. § 1465(b)(1).

⁹⁴ 16 U.S.C. § 1465(b)(3).

effects to permit a balancing of those effects against any national interest furthered by a project. This inquiry differs from that conducted by a state in examining the sufficiency of information necessary to determine whether a project is consistent with its coastal management program. Indeed, the CZMA and the Department's implementing regulations provide for an override, with the requisite finding of record sufficiency to identify adverse coastal effects, of a state objection based on insufficient information.⁹⁵ In addition, past decisions have found the record sufficient to identify adverse coastal effects despite a valid state objection on the basis of insufficient information.⁹⁶

Maryland's contention that the record cannot contain sufficient information on a project's adverse coastal effects until all state and Federal licensing and permitting processes have run their course is without merit. Under the newly established deadlines for processing consistency appeals set forth above, it is quite possible that several required environmental reviews will not be completed prior to the deadline for ruling on any consistency appeal involving a major energy project.⁹⁷ Maryland's argument, extended to its logical conclusion, suggests that the decision record would often not contain sufficient information on a major energy project's adverse coastal effects, thereby requiring that a state's objection be sustained. While enactment of new decision deadlines reflects Congressional desire to more expeditiously process and decide consistency appeals, it is unlikely that these new deadlines are intended to make it impossible for an applicant to meet its burden of proof if information from required environmental reviews is not yet available.

More specifically, the CZMA does not require that NEPA compliance, consultation under the Endangered Species Act (ESA), or any of the numerous other review processes, including the Federal and state licensing and permitting processes, be completed prior to issuance of a decision

⁹⁵ See 16 U.S.C. §1456(c)(3)(A); 15 C.F.R. § 930.121(b).

⁹⁶ See Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc. (Jan. 7, 1993) (Florida objected on the basis that Mobil had failed to provide sufficient information and analyses to show that its proposed activity was consistent with Florida's coastal management program. Florida's objection was sustained, but only after the adverse coastal effects of the proposed activity were identified and determined to outweigh the national interest.). See also Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S. Inc., at 5, 13-17 (June 20, 1995) (Florida objected based on inconsistency with its coastal management program but also stated in its objection that a primary reason for the objection was a lack of information necessary for concurrence. Florida's objection was overridden because sufficient information existed to identify the adverse coastal effects of the proposed activity and because the national interest in the activity outweighed these effects.).

⁹⁷ Under the CZMA, a Project applicant must provide the state with a consistency certification within its application for a Federal license or permit. 16 U.S.C. § 1456(c)(3)(A). At the same time the applicant includes the consistency certification in its application, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Id. Once the consistency certification and necessary data and information are received by a state, a state then has six months in which to review the Project for consistency with its coastal management program. Id. Should the state object, an applicant has 30 days in which to appeal that objection to the Secretary. 15 C.F.R. § 930.125(a). A decision on that appeal is due no later than 325 days from service on the Secretary. See 16 U.S.C. § 1465. Collectively, these deadlines envision a final determination by the Secretary on a major energy project as early as 18 months after the license application for the Project, a time frame that may run prior to the completion of environmental reviews required under Federal and state law.

under the CZMA.⁹⁸ Thus, information that is insufficient for purposes of these requirements may still be sufficient for purposes of a CZMA analysis.⁹⁹ This approach is appropriate because all of the required analyses, consultations, and permit decisions must still be completed prior to actual commencement of a project. Because an appeal determination under the CZMA is but one step in the process for authorizing the Project, and in this case one of the earliest steps, the CZMA does not require that the decision record contain all information resulting from these review processes, but rather that it contain sufficient information to identify the Project's adverse coastal effects for purposes of the balancing required by Element 2.

b. Sufficiency of the record.

As required by the Department's regulations implementing the CZMA, AES submitted a copy of the consolidated record maintained by FERC with its notice of appeal.¹⁰⁰ Maryland was provided the opportunity to review the consolidated record and did not object that any documents were missing or inappropriately included.¹⁰¹ Maryland asserted generally that the record was insufficient to identify the adverse coastal effects of the Project, but specifically identified only three particular adverse coastal effects that were not sufficiently identified: (a) adverse coastal effects on water quality from the re-suspension of contaminated sediments during dredging; (b) adverse coastal effects of the disposal of processed dredged material; and (c) adverse coastal effects on wetlands and waterways from pipeline crossings.¹⁰²

Consistent with the CZMA, the parties were afforded multiple opportunities to supplement the decision record with additional information concerning the Project's adverse coastal impacts.¹⁰³ Moreover, comments were solicited from both FERC and the Corps—the Federal permitting

⁹⁸ See 16 U.S.C. § 1456(c)(3)(A).

⁹⁹ See VEPCO, at n.139 (Several Federal and state agencies characterized FERC's NEPA compliance as inadequate and the Corps's NEPA compliance as inadequate and outdated. The information was nonetheless adequate to assess the effects of the activity on coastal resources and uses based on information submitted since completion of the NEPA documents.).

¹⁰⁰ 15 C.F.R. § 930.127(i)(2); Letter from Randolph McManus, Baker Botts, on behalf of AES, to Secretary Gutierrez (Aug. 8, 2007).

¹⁰¹ See Briefing Order (Aug. 8, 2007). Maryland made no such objection.

¹⁰² Maryland Brief, at 14-16.

¹⁰³ In January and April 2008, the parties were provided with opportunities to request that additional information be included within the decision record and to respond to any additional information offered by the other party. See Letter Order (Jan. 10, 2008); Letter Order (Apr. 11, 2008). Both parties took advantage of this opportunity and submitted additional materials. See Letter from Randolph McManus, Baker Botts, on behalf of AES, to Joel La Bissonniere, NOAA (Jan. 25, 2008); Letter from Randolph McManus, Baker Botts, on behalf of AES, to Joel La Bissonniere, NOAA (Feb. 6, 2008); Letter from Randolph McManus, Baker Botts, on behalf of AES, to Joel La Bissonniere, NOAA (Apr. 12, 2008); Letter from Judah Prero, Maryland, on behalf of MDE, to Joel La Bissonniere, NOAA (Jan. 25, 2008). These materials have been included in the decision record. See Letter Order (Mar. 14, 2008); Letter Order (May 8, 2008).

agencies for the Project—and from other interested Federal agencies.¹⁰⁴ Supplementation of the record and comments were solicited specifically on the three adverse coastal effects that Maryland asserts are not sufficiently identified in the record. Closure of the decision record was stayed for 60 days—the maximum stay authorized under the CZMA—to obtain supplemental information from these various sources.¹⁰⁵

A review of the evidence in the record shows that sufficient information exists as to the Project's likely adverse coastal effects. The subsequent discussion of the Project's adverse coastal effects will address in greater detail why sufficient information exists on the three adverse coastal effects that Maryland argues are not sufficiently identified in the record. In general, however, the assessment is predicated on the findings set forth below.

The information contained in this record is both complete and scientifically reliable as those terms are applied in CZMA appeals. The majority of this information is contained in thirteen Resource Reports that AES submitted during FERC's pre-filing environmental review process.¹⁰⁶ These Resource Reports were the product of numerous and extensive studies, public meetings and wide-ranging public outreach, and scores of discussions with interested Federal, state, and local agencies.¹⁰⁷ These Reports, as augmented with additional information provided by AES,

¹⁰⁴ On October 11, 2007, comments were sought from the Federal permitting agencies: FERC and the Corps. FERC (J. Mark Robinson) responded via letter on November 7, 2007, indicating that FERC had no comment at that time. The Corps did not respond. On February 15, 2008, comments were sought from the Baltimore District of the Corps and Region III of the EPA, other Federal agencies involved in review of the Project, as well as EPA's Chesapeake Bay Program Office. The comment letters included information provided by the parties relevant to the issues presented in this appeal. Responses received from these agencies were added into the decision record and the parties were afforded the opportunity to respond to this input. See Letter from Vance Hobbs, Corps, Baltimore District, to Joel La Bissonniere, NOAA (Apr. 2, 2008); Letter from Donald Welsh, EPA, Region 3, to Joel La Bissonniere, NOAA (Mar. 13, 2008). EPA's Chesapeake Bay Program Office did not respond.

¹⁰⁵ On February 7, 2008, FERC indicated that it intended to issue a draft environmental impact statement (DEIS) for the Project on April 11, 2008. The parties were notified that the DEIS would be included in the decision record if it became available prior to the close of the record. See Letter Order (Apr. 11, 2008). However, FERC ultimately did not issue the DEIS prior to April 14, 2008, the mandatory closure date for the record in this appeal. As a result, the DEIS was not considered in rendering this decision.

¹⁰⁶ These Resource Reports discuss the following: General Project Description; Water Use and Quality; Fish, Vegetation and Wildlife; Cultural Resources; Socioeconomics; Geologic Resources; Soils; Land Use, Recreation and Aesthetics; Air Quality and Noise; Alternatives; Reliability and Safety; PCB Contamination; and Engineering and Design Material. Contractors with relevant expertise, including Concentric Energy Advisors and Northern Ecological Associates, Inc., prepared a number of the supporting studies. The names of the specific contractors and qualified contractor employees who prepared studies in support of these Resource Reports are provided in the discussion of specific adverse coastal effects in Section IV(B)(2).

¹⁰⁷ See, e.g., RR 1-13; RR 5, Section 5.5.3 Community Involvement; Table 1.8-1 (summary of major permits, approvals and consultations for the Project and Federal, state and local agencies involved); Table 1.8-2 (stakeholder contacts—Federal agencies, Maryland and Pennsylvania state and local agencies; residential community organizations, commercial/recreational waterway associations, environmental organizations, Port of Baltimore businesses, and elected officials in Maryland and Pennsylvania); AES Initial Brief, at 4, 8. Further details on the studies, public meetings, and discussions with interested Federal, state, and local agencies are provided in the discussion of specific adverse coastal effects in Section IV(B)(2).

are complete in that they identify and discuss in detail the likely adverse coastal effects associated with the Project, including those effects that Maryland argued were not sufficiently identified. In light of the thorough process AES used to develop the Resource Reports, it is also clear that the reports discuss likely adverse coastal impacts with a level of scientific rigor that makes their conclusions reliable. It is important to note that Maryland has not contested the scientific validity of the Resource Reports or the additional information submitted by AES on Project impacts.¹⁰⁸

Again, the decision to override Maryland's objection does not supplant other state and Federal license and permit requirements and review processes, including environmental license and permit requirements and review processes. AES still will be required to obtain all necessary state and Federal licenses and permits, and all necessary review processes will need to be completed. Whether the state and Federal licensing and permitting agencies ultimately grant the required authorizations will depend on the record evidence then available to them and compliance with all applicable law for the issuance of such authorizations.

For the reasons set forth above and discussed in more detail below, the decision record includes information on the Project's adverse coastal effects that is sufficient to make the finding on Element 2 required by the CZMA.

2. Adverse coastal effects.

The Project's adverse coastal effects on the uses and resources of Maryland's coastal zone arise primarily from dredging activities and pipeline construction. Maryland has identified three adverse coastal effects of major concern: (a) adverse coastal effects on water quality from the re-suspension of contaminated sediments during dredging; (b) adverse coastal effects of the disposal of processed dredged material; and (c) adverse coastal effects on wetlands and waterways from pipeline crossings. In reaching this decision, all adverse coastal effects associated with the Project, both the separate direct and indirect effects and the cumulative effects, have been considered. The discussion that follows examines the coastal effects of specific concern to Maryland, as well as other adverse coastal effects that the parties did not raise in their arguments on appeal: (a) adverse coastal effects on endangered and threatened species; (b) adverse coastal effects on fish and aquatic vegetation; (c) adverse coastal effects on the Chesapeake Bay; and (d) adverse coastal effects on vessel traffic.

¹⁰⁸ Previous decisions have relied upon Resource Reports prepared by an applicant to identify the adverse coastal effects of a proposed project. *See, e.g., Chevron*, at 24, 40-42, 49-52.

a. *Direct and indirect adverse coastal effects.*

- i. Adverse coastal effects on water quality from the re-suspension of contaminated sediments during dredging.

Dredging may have adverse effects on water quality in the Project area due to the re-suspension of contaminated sediments. Maryland argues that “[t]he nature and extent of contamination of [the Project’s] dredged material could pose a significant hurdle to the environmental acceptability of this Project” and that the record is insufficient to identify the extent of these adverse coastal effects.¹⁰⁹

The Project’s dredging footprint for vessel access will total approximately 120 acres.¹¹⁰ The dredged channel is 440 feet wide and approximately one mile long, and the turning basin radius is 820 feet.¹¹¹ While the channel and turning basin are currently dredged to a depth of 39 feet, the proposed dredging would deepen these areas to 45 feet.¹¹²

AES reviewed various Federal, state, and local environmental databases to characterize sediment contamination in Baltimore Harbor.¹¹³ AES also conducted sediment sampling and associated elutriate testing¹¹⁴ in June 2006 and August and October 2007 to determine whether and what impacts to the water column would result from exposure to the dredged material during dredging. The results of this testing provide information on sediment contamination specific to the areas that would likely be subject to Project dredging.¹¹⁵

The data reviews indicated persistent levels of chlordane throughout Baltimore Harbor, as well as hotspots of other contaminants, including polychlorinated biphenyls, polyaromatic hydrocarbons, and metals, such as zinc, chromium, nickel, mercury, and copper.¹¹⁶ The June 2006 sediment sampling detected polyaromatic hydrocarbons and elevated levels of several metals;

¹⁰⁹ Maryland Brief, at 15-16, 18.

¹¹⁰ RR 2, Table 2.4-5.

¹¹¹ RR 1, Section 1.3.3.1; RR 11, App. 11D.

¹¹² *Id.*

¹¹³ RR 2, Sections 2.4.2 Offshore Water Resources and 2.4.3 Contaminated Sediments.

¹¹⁴ An “elutriate test” is used to predict the concentration of contaminants in the water column at the point of dredging or in effluent from a disposal facility. See <http://www.stormingmedia.us/45/4539/A453992.html> (last visited June 3, 2008). Elutriate tests are designed to simulate and predict water quality impacts from dredging or dredged material disposal. See <http://www.calscience.com/marine.asp> (last visited June 3, 2008).

¹¹⁵ RR 2, Section 2.4.3.2 Sparrows Point Project Sediment Sampling and Results. The June 2006 sediment sampling results are discussed in RR 2. The August and October 2007 sampling results were provided in response to a July 3, 2007, data request from the Corps. These results were provided to MDE.

¹¹⁶ RR 2, Section 2.4.3 Contaminated Sediments.

concentrations were generally in the part-per-billion to part-per-million range (polyaromatic hydrocarbons) and part-per-million range (metals), respectively. Contaminant levels decreased with the depth of the sample such that removal of the upper layers of sediment would remove the more contaminated sediments, exposing less contaminated sediment to the marine environment. Low concentrations of dioxins (in the part-per-trillion range) were also detected, though the results did not reveal the presence of pesticides or polychlorinated biphenyls.¹¹⁷ The sampling results were compared with results from other studies conducted in Baltimore Harbor and in the area offshore of the terminal site. The comparison indicated that the contaminant concentrations are “generally similar to concentrations in sediments within other portions of the Baltimore Harbor/Patapsco River/Back River System.”¹¹⁸ The August and October 2007 sediment sampling confirmed that sediment quality in the areas proposed for dredging was consistent with the sediment quality in Baltimore Harbor.¹¹⁹

AES acknowledges that for the period of time that sediments are suspended, contaminants could leach into the water column.¹²⁰ Dredging impacts will be mitigated through a number of proposed measures, including the use of a closed (“environmental”) clamshell bucket dredge and silt curtains to lessen sediment suspension during dredging.¹²¹ Any water quality impacts from re-suspended sediments will diminish with distance from active dredging operations, and no negative sedimentation impacts will occur in areas greater than 1,200 feet from these operations.¹²² Impacts within the 1,200 foot radius are further limited given that sediment resettles after dredging is completed in a particular portion of the proposed area.¹²³ AES’s elutriate testing data indicate that leaching of compounds from the dredged material would not cause significant adverse effects to water quality.¹²⁴ In its October 9, 2007, brief on appeal,

¹¹⁷ RR 2, Section 2.4.3.2 Sparrows Point Project Sediment Sampling and Results. The methodology for the sampling is set forth in this section. AES collected samples from a floating barge at three different depths: shallow (zero-two feet below the sediment surface); intermediate (two-ten feet); and deep (greater than ten feet and targeted at 45 feet). The shallow and intermediate depths are representative of the sediment that would be disturbed during dredging, while the deep samples represent the sediment surface that would be exposed after dredging was completed. AES had 15 locations cored and 16 samples collected for analysis: nine shallow, three intermediate, and four deep. Samples were transported under chain of custody procedures to a Maryland-certified environmental laboratory for analysis using appropriate EPA analytical procedures. See also Tables 2.4-2(a) – (c).

¹¹⁸ Id.

¹¹⁹ See Letter from Christopher Diez, AES, to Joseph DaVia, Corps (Sept. 26, 2007); Letter Addendum from Christopher Diez, AES, to Joseph DaVia, Corps (Oct. 12, 2007).

¹²⁰ AES Reply Brief, at 9-10.

¹²¹ RR 2, Section 2.4.8.4 Marine Dredging and RR 3, Section 3.3.3 Construction and Operation Impacts and Mitigation.

¹²² See Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Numbers 16, 18 (May 30, 2007).

¹²³ See Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Number 8 (Aug. 30, 2007). See also Letter from Christopher Diez, AES, to Joseph DaVia, Corps, at Number 5 (July 21, 2007).

¹²⁴ See RR 2 and September 26, 2007, and October 12, 2007, sediment sampling data.

Maryland noted that, at the time of its objection, it had not had enough time to evaluate these data.¹²⁵ In the opportunities to supplement the record since that time, however, Maryland has not provided any information contradicting the results of the elutriate testing.

It is notable that Project dredging will occur in waters previously subject to dredging. Most recently, in late 2006 BWI Sparrows Point, LLC (BWI) performed dredging of approximately 2.6 million cubic yards of sediment from the Patapsco River at Sparrows Point in Baltimore County, as authorized by the Maryland Board of Public Works. The dredged area for the BWI project overlaps significantly with the area proposed for dredging by AES.¹²⁶ Significantly, the water quality certification stated that the Maryland Department of the Environment (MDE) had reviewed the plans and determined that the BWI project, together with associated permit conditions, would not violate Maryland's water quality standards.¹²⁷ Given the overlap in dredging area for the BWI project and the Project, it seems likely that Maryland's water quality standards also would not be violated by the Project.

While Maryland argued that the information AES provided was insufficient to assess fully the adverse coastal effects of the Project on this point, it did not contest the accuracy of AES's data on and analyses of the adverse coastal effects on water quality from the re-suspension of contaminated sediments during dredging.

Comments on the adverse coastal effects on water quality from the re-suspension of contaminated sediments during dredging were specifically requested from other Federal agencies involved in ongoing reviews of the Project, including Region III of the EPA and the Baltimore District of the Corps, as well as from EPA's Chesapeake Bay Program Office.¹²⁸ These agencies provided no negative comments regarding these adverse coastal effects.¹²⁹

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects on water quality from the re-suspension of contaminated sediments during dredging. Additionally, with respect to these adverse coastal effects, the record establishes that they will not be significant and will occur in areas previously subject to dredging. Impacts will be temporary, limited in scope, and mitigated with environmentally sensitive dredging techniques. In particular, dredging impacts will not occur beyond 1,200 feet of dredging. While dredging may cause contaminants to become re-suspended in the water column during dredging, no

¹²⁵ Maryland Brief, at 17.

¹²⁶ See Tidal Wetlands License #05-0155, dated July 6, 2005, and related documents, Documents #11-17 in AES's Request to Supplement the Record dated January 25, 2008.

¹²⁷ Id.

¹²⁸ See Letters from Joel La Bissonniere, NOAA, to Vance Hobbs, Corps, Baltimore District, William Muir, EPA, Region 3, Donald Welsh, EPA, Region 3, and Jeffrey Lape, EPA, Chesapeake Bay Program Office (Feb. 15, 2008).

¹²⁹ See Letter from Vance Hobbs, Corps, Baltimore District, to Joel La Bissonniere, NOAA (Apr. 2, 2008); Letter from Donald Welsh, EPA, Region 3, to Joel La Bissonniere, NOAA (Mar. 13, 2008).

significant adverse coastal effects on water quality would persist. Dredging will also likely improve the overall quality of the area because the sediment removal will eliminate the relatively higher levels of contaminants in the upper layers of sediment and leave less contaminated sediments exposed to the marine environment.

ii. Adverse coastal effects from the disposal of processed dredged material.

Adverse coastal effects may result from the disposal of contaminated dredged materials. The Project will generate a substantial volume of dredged material. The total volume resulting from Project activities (including terminal construction and channel and turn-basin deepening) is estimated to be up to 4.5 million cubic yards.¹³⁰ Maryland argued that there was insufficient information addressing: (a) whether contaminants may leach from the processed dredged material; and (b) the identity of specific end-users for the processed dredged material.¹³¹ Maryland argues that AES has not provided any data to support the claim that the processed dredged material will not leach contaminants.¹³² Maryland also argues that the processed dredged material may be acceptable for some uses but not others and that, until AES can provide the names and locations of specific end-users, the information provided about the use of processed dredged material is inadequate.¹³³ In addition, Maryland argues that, if the processed dredged material cannot be utilized for beneficial re-use, AES's proposal to dispose of the processed dredged material is problematic because existing disposal sites are at, or near, capacity; development and permitting of new disposal sites is difficult; and ocean dumping would require additional analysis and approval by the Corps and EPA.¹³⁴

Information provided by AES and included in the record addresses the issues of both leaching and specific end-users. Since filing the consolidated record, AES has provided substantial additional evidence further addressing issues associated with the disposition of the dredged material.

For example, AES has proposed a re-use processing facility to recycle dredged material into material for beneficial applications, such as construction or restoration fill.¹³⁵ Additionally, AES proposes to construct a dredged material recycling facility adjacent to the waterway at the Project site.¹³⁶ The dredged material recycling facility would process up to 10,000 cubic yards per day of

¹³⁰ RR 1, App. 1C, Dredging Management Plan, at 1.

¹³¹ Maryland Brief, at 16-17.

¹³² Id. at 16.

¹³³ Id. at 16-17.

¹³⁴ Id. at 17 n.2.

¹³⁵ RR 1, Section 1.5.1.2; RR 2, Sections 2.4.1, 2.4.8, 2.4.8.4, 2.4.9, 2.5.1-2.5.4, and Tables 2.4-1 and 2.5-1; RR 8, Section 8.3.2; RR 10, Section 10.6.2; Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Numbers 14-19 (Aug. 30, 2007).

¹³⁶ RR 1, Section 1.5.1.2; see generally App. 1C.

material excavated from the water bottom into useful materials that would temporarily be stored until transferred to end-users of the recycled material.¹³⁷ Operation of the facility would occur during the LNG terminal construction phase, and would begin simultaneously with the commencement of dredging operations.¹³⁸

The initial step in the processing of dredged materials is the reduction of the water content of the dredged sediments.¹³⁹ Water removed from the dredged material would be passed through a settling tank system and filter, and would be tested for chemical and physical properties before discharge back into the harbor in compliance with regulatory limits to be established by Maryland, or, if contaminants are present in concentrations beyond regulatory limits, the removed water will be further treated before discharge or offsite disposal will be utilized.¹⁴⁰ Offsite disposal locations may include the local publicly owned treatment works, or a privately operated treatment, storage, and disposal facility.¹⁴¹ AES has identified three offsite facilities that could accept the water removed from the dredged material, if required.¹⁴²

After being dewatered, the dredged material would be chemically and physically stabilized by mixing with reagent admixtures.¹⁴³ The specific reagent admixtures used, such as Portland cement and pozzolanic¹⁴⁴ materials, would be determined based on chemical and physical analyses of the dredged material so that the processed dredged material meets the physical properties for intended beneficial uses and will not leach contaminants once processed.¹⁴⁵ Potential uses include abandoned mine land and quarry reclamation, brownfields redevelopment, landfill capping and closure, alternate grading materials, low permeability cap layer in lieu of geo-membrane systems, manufactured top soil, general structural and non-structural fill for commercial/industrial development, and bulk construction fill, including site grading material and highway embankments.¹⁴⁶ Alternatives to recycling identified by AES include off-site

¹³⁷ RR 1, Section 1.5.1.2.

¹³⁸ Id.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ Id.

¹⁴² Id. The potential sites include Clean Harbors Inc., Baltimore, Maryland; Veolia Environmental Services, York, Pennsylvania; and Waste Management Industrial Services, Crofton, Maryland.

¹⁴³ Id.; RR 1, Section 1.5.1.1.D; RR 2, Section 2.4.8.4.

¹⁴⁴ "Pozzolan" is "finely divided siliceous or siliceous and aluminous material that reacts chemically with slaked lime at ordinary temperature and in the presence of moisture to form a strong slow-hardening cement." See <http://www.merriam-webster.com/dictionary/pozzolanic> (last visited May 22, 2008).

¹⁴⁵ RR 1, Section 1.5.1.1.D; RR 2, Section 2.4.8.4.

¹⁴⁶ RR 1, Section 1.5.1.2.

disposal, open ocean disposal at approved off-shore locations, and upland fill sites.¹⁴⁷

With respect to contaminant leaching, the record shows that contaminants in the processed dredged material would be bound to the major components of the processed dredged material, eliminating leachability at levels that would exceed applicable regulatory criteria.¹⁴⁸ Sediment sampling data for the area to be dredged further indicate that the level of contaminants in the dredged material would not preclude its re-use for any of the purposes described in AES's submittals to FERC, the Corps, and MDE.¹⁴⁹ AES's chemical testing data shows that the processed dredged material will be environmentally acceptable for any of the end-uses proposed by AES.¹⁵⁰

With respect to end-use (besides that already discussed), AES also investigated alternate disposal sites for processed dredged material in the event that some dredged materials do not meet the criteria for beneficial re-use, and provided information on the safe use of processed dredged material, including projects in New York and New Jersey where dredged material has been processed and recycled.¹⁵¹ AES provided letters from two landfill operators, Waste Management and Allied Waste Services, indicating they can accommodate dredged material from the Project for disposal or beneficial re-use.¹⁵²

While Maryland argued that the information AES provided was insufficient to fully assess the adverse coastal effects of the Project on this point, it did not contest the accuracy of AES's data on and analyses of the adverse effects of processed dredged material disposal.

Comments on the adverse coastal effects of processed dredged material disposal were

¹⁴⁷ Id.; RR 10, Section 10.5.2.

¹⁴⁸ See Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Number 10 and Attachment 9 (May 30, 2007); Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Numbers 2a-2g, 4a-4b, 5 (Aug. 30, 2007); Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Number 4 (Feb. 5, 2008); RR 2, Section 2.4.8.4.

¹⁴⁹ See Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Attachment 9 (matrix) and Number 10 (Aug. 30, 2007); RR 1, Section 1.5.1.2.A; RR 2, Sections 2.4.3.2 and 2.4.8.4; Letter from Christopher Diez, AES, to Joseph DaVia, Corps (Sept. 26, 2007); Letter Addendum from Christopher Diez, AES, to Joseph DaVia, Corps (Oct. 12, 2007).

¹⁵⁰ See Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at ALT #4 (Apr. 5, 2007); Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Numbers 2-5 (Aug. 30, 2007); Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Numbers 9-12 and Attachments 9, 12 (May 30, 2007); RR 2, Sections 2.4.3.2 and 2.4.8.4; Letter from Christopher Diez, AES, to Joseph DaVia, Corps (Sept. 26, 2007); Letter Addendum from Christopher Diez, AES, to Joseph DaVia, Corps (Oct. 12, 2007).

¹⁵¹ See Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at ALT #4 (Apr. 5, 2007); Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Number 4.b (Aug. 30, 2007); Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Number 4 (Feb. 5, 2008).

¹⁵² AES Request to Supplement the Record, Document #10 (Jan. 25, 2008).

specifically requested from other Federal agencies involved in ongoing reviews of the Project, including the Baltimore District of the Corps, Region III of the EPA, and the EPA's Chesapeake Bay Program Office. These agencies provided no negative comments regarding these adverse coastal effects.¹⁵³

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects of the disposal of processed dredged material. Additionally, with respect to these adverse coastal effects, because AES has identified reasonable means of treating and disposing of dredged material, the record establishes that the adverse coastal effects of disposal should not be significant.

iii. Adverse coastal effects on wetlands and waterbodies resulting from pipeline crossings.

Pipeline crossings for the Project will impact coastal wetlands and waterways. Maryland argues that it is not possible to assess the impact of the pipeline at this time because the precise alignment and wetland and waterbody crossing locations will not be known until AES has easement agreements with all affected landowners and FERC has approved the Project.¹⁵⁴

Of the 88-mile Project pipeline, about 48 miles occur within Maryland's coastal zone.¹⁵⁵ Approximately 91% of the entire length of the pipeline runs along existing rights-of-way.¹⁵⁶ Adverse coastal effects may include effects on fish and other aquatic communities. In-stream and shoreline vegetation that provide cover to fish and other aquatic life may be altered or lost at crossing locations. Fish may also be temporarily displaced. AES, however, proposes crossing methods and mitigation measures to minimize these effects, as discussed in more detail below. Adverse coastal effects to wetlands may also result from the pipeline. AES estimates that 5.7 acres of wetlands will be affected temporarily and 13.44 acres will be affected permanently.¹⁵⁷ Permanent effects will occur along the existing rights-of-way, where wetlands will be changed from forested wetland types to emergent/scrub-shrub wetland types for the life of the Project.¹⁵⁸ AES proposes construction and mitigation measures to minimize these effects.¹⁵⁹ In developing the proposed route, AES held public meetings, contacted affected landowners, and received input from interested agencies that led to a number of changes from AES's conceptual

¹⁵³ See Letter from Vance Hobbs, Corps, Baltimore District, to Joel La Bissonniere, NOAA (Apr. 2, 2008); Letter from Donald Welsh, EPA, Region 3, to Joel La Bissonniere, NOAA (Mar. 13, 2008).

¹⁵⁴ Maryland Brief, at 14-15.

¹⁵⁵ Estimated from FERC Section 7 Application, Exhibit F—Location of Facilities (map).

¹⁵⁶ RR 8, Section 8.3.2 Pipeline Facilities.

¹⁵⁷ RR 2, Table 2.5.2-1.

¹⁵⁸ RR 2, Section 2.5.2 Wetland Construction and Mitigation Procedures; Table 2.5.2-1.

¹⁵⁹ RR 2, Section 2.5.2 Wetland Construction and Mitigation Procedures.

pipeline route.¹⁶⁰ AES provided field surveys for approximately 81% of the pipeline route and used other means to evaluate the remaining segments.¹⁶¹ AES determined that the pipeline will cross 111 perennial streams, 66 intermittent streams, and two open water/wetland complexes. Access roads will cross two perennial streams and one intermittent stream.¹⁶² AES categorized the 177 waterbody crossings as major, intermediate, or minor according to FERC's Wetland and Waterbody Construction and Mitigation Procedures. Of these, two were major (the Susquehanna and Back Rivers), 37 were intermediate, and 129 were minor.¹⁶³

AES proposes several different stream-crossing methods for the Project and commits to using the crossing method that minimizes overall impact for each particular crossing.¹⁶⁴ Environmental construction plans and best management practices for the stream crossings and subsequent restoration were developed by AES based on FERC requirements in its Wetland and Waterbody Construction and Mitigation Procedures.¹⁶⁵ All streams that exhibit flow at the time of construction will be crossed using "dry ditch" construction methods, including horizontal directional drilling where appropriate.¹⁶⁶

At the request of NOAA's National Marine Fisheries Service (NMFS), AES has evaluated a number of waterbodies for crossing using the horizontal direction drilling method. These

¹⁶⁰ See RR 10, Section 10.6.4 Route Variations.

¹⁶¹ RR 2, Appendix 2D, Wetland Delineation Report prepared by Northern Ecological Associates, Inc. (Dec. 2006).

¹⁶² RR 3, Section 3.3.1.2 Pipeline Facilities.

¹⁶³ See FERC, Wetland and Waterbody Construction and Mitigation Procedures, at 2 (Jan. 2003), available at <http://www.ferc.gov/industries/gas/enviro/wetland.pdf> (last visited May 8, 2008). "Major" waterbodies are defined to include all waterbodies greater than 100 feet wide at the water's edge at the time of crossing. "Intermediate" waterbodies include all waterbodies greater than ten feet but less than 100 feet wide at the water's edge at the time of crossing. "Minor" waterbodies include all waterbodies less than or equal to ten feet wide at the water's edge at the time of crossing. The classification of nine waterbodies was yet to be determined.

¹⁶⁴ RR 2, Section 2.4.1 Waterbody Crossings. Methods include: (1) flume, where flume pipe(s) transport the stream waters across the disturbed area (multiple flumes may be used where stream flow is too high to be accommodated by a single flume); (2) dam & pump, where small (sand bag or gravel) dams are constructed both upstream and downstream of the work area and stream flow is diverted using powered pumps and hoses; (3) horizontal-directional drilling, where a small diameter pilot hole is directionally drilled along a designed path, the hole is then enlarged to a diameter that will accommodate the pipeline, and the pipeline is pulled through the hole; and (4) conventional bore, which requires excavation of bore pits on each side of the stream and installation of a horizontal borehole from one bore pit to the other for the pipe to then be pulled through. See also FERC, Wetland and Waterbody Construction and Mitigation Procedures (Jan. 2003), available at <http://www.ferc.gov/industries/gas/enviro/wetland.pdf> (last visited May 8, 2008).

¹⁶⁵ RR 3, Section 3.3.3.2 Pipeline Facilities. See FERC, Wetland and Waterbody Construction and Mitigation Procedures (Jan. 2003), available at <http://www.ferc.gov/industries/gas/enviro/wetland.pdf> (last visited May 8, 2008).

¹⁶⁶ RR 3, Section 3.3.3.2 Pipeline Facilities. All methods discussed at note 163, supra, are dry-ditch methods.

waterbodies include the two major waterbodies, the Back and Susquehanna Rivers, as well as Gunpowder Falls, Deer Creek, and the Octorara River, all classified as intermediate waterbodies.¹⁶⁷ All of these, with the exception of the Back River, are known to support anadromous fish. The White Marsh Run, another waterbody to be crossed by the pipeline, is also known to support anadromous fish.¹⁶⁸ AES will use horizontal directional drilling to cross the Back and Susquehanna Rivers to avoid adverse effects to water quality and flow, as well as to surface features such as vegetation and stream banks.¹⁶⁹ AES provided detailed crossing plans and contingent measures for each of these crossings.¹⁷⁰ Consultation with NMFS on the appropriate crossing methods for Gunpowder Falls, Deer Creek, the Octorara River, and White Marsh is ongoing.¹⁷¹

In addition to selection of the appropriate crossing method, AES will perform stream crossings during the dry season to the extent reasonably practicable.¹⁷² Subsequent to the stream crossing, streambeds would be restored to a close approximation of their former elevations and grades. AES will use native stone during stream crossing restoration and stabilization to the extent possible, and native plants (except deep rooting trees) will be allowed to reestablish along the banks of the waterbodies.¹⁷³

AES proposes to mitigate wetland impacts of the pipeline using FERC's Wetland and Waterbody Construction and Mitigation Procedures.¹⁷⁴ Such mitigation measures include leaving existing root systems of removed vegetation intact and removing the cut vegetation from the wetlands for disposal; using sediment barriers at the edge of the wetland until revegetation is completed; and installing permanent trench breakers to help preserve the wetlands' hydrologic characteristics and control sediment discharges.¹⁷⁵ To further minimize impacts, wetland crossing methods will vary depending on whether the soil is saturated at the time of crossing.¹⁷⁶ As a result of these

¹⁶⁷ RR 2, Section 2.4.1.1, Horizontal Directional Drills.

¹⁶⁸ RR 3, Section 3.3.3, Pipeline Facilities.

¹⁶⁹ RR 2, Section 2.4.1.1, Horizontal Directional Drills.

¹⁷⁰ Id.; Appendix 2E, Horizontal Directional Drill Monitoring and Contingency Plan prepared by Mid-Atlantic Express, L.L.C.

¹⁷¹ RR 2, Section 2.4.1.1 Horizontal Directional Drills; RR 3, Section 3.3.2 Pipeline Facilities; Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Number 13 (Feb. 5, 2008).

¹⁷² RR 2, Section 2.4.1 Waterbody Crossings.

¹⁷³ Id.

¹⁷⁴ Id.

¹⁷⁵ RR 2, Section 2.5.2 Wetland Construction and Mitigation Procedures.

¹⁷⁶ Id.

mitigation measures, AES concludes that impacts from pipeline construction (e.g., increases in in-stream turbidity and downstream sediment deposition) would be minor and short-term.¹⁷⁷

While Maryland argued that the information AES provided was insufficient to fully assess the adverse coastal effects of the Project on this point, it did not contest the accuracy of AES's data on and analyses of effects of pipeline crossings on wetlands and waterbodies.

Comments on the adverse coastal effects of pipeline crossings on wetlands and waterbodies were specifically requested from other Federal agencies involved in ongoing reviews of the Project, including Region III of the EPA and the Baltimore District of the Corps, as well as from EPA's Chesapeake Bay Program Office and the Pennsylvania Field Office of the United States Fish and Wildlife Service (FWS).¹⁷⁸ These agencies provided no negative comments regarding these adverse coastal effects.¹⁷⁹

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects on wetlands and waterbodies resulting from pipeline crossings. Additionally, with respect to these adverse coastal effects, while permanent and temporary adverse coastal effects to wetlands and waterbodies will result from pipeline crossings, the record establishes that the adverse coastal effects on wetlands and waterbodies from pipeline crossings will be minimized and mitigated such that they will not be significant.

iv. Adverse coastal effects on endangered and threatened species.

Although not raised by Maryland, the adverse coastal effects of the Project on endangered and threatened species have also been considered. AES solicited information from NMFS and the FWS on listed (i.e., federally endangered or threatened) species that may be present in the Project area.¹⁸⁰ NMFS provided information indicating that an "[i]nitial review of the proposed project suggests that take of shortnose sturgeon and/or sea turtles may occur depending on the timing of dredging and the type of dredge plant to be used. Impacts to listed species from other aspects of the project may also be likely."¹⁸¹ AES discusses the probabilities that listed species would occur

¹⁷⁷ *Id.*

¹⁷⁸ See Letters from Joel La Bissonniere, NOAA, to Vance Hobbs, Corps, Baltimore District, William Muir, EPA, Region 3, Donald Welsh, EPA, Region 3, Jeffrey Lape, EPA, Chesapeake Bay Program Office, and David Densmore, FWS, Pennsylvania Field Office (Feb. 15, 2008).

¹⁷⁹ See Letter from Vance Hobbs, Corps, Baltimore District, to Joel La Bissonniere, NOAA (Apr. 2, 2008); Letter from Donald Welsh, EPA, Region 3, to Joel La Bissonniere, NOAA (Mar. 13, 2008). The FWS also provided a response dated April 30, 2008, after the closure of the decision record. That response could not be considered in this decision.

¹⁸⁰ RR 3, Appendix 3C (Letters from Matthew Stetter, Senior Scientist, Northern Ecological Associates, Inc., on behalf of AES, to Julie Crocker, NMFS Northeast Region, and Michael Schmaus, FWS, Pennsylvania Field Office (Apr. 7, 2006)).

¹⁸¹ RR 3, Section 3.6 Endangered Species. NMFS identified loggerhead, Kemp's Ridley, green, and leatherback sea turtles, shortnose and Atlantic sturgeon, and North Atlantic right, humpback, fin, and sperm whales as listed species

in the Project area or be affected by activities associated with the Project.¹⁸² The record shows that shortnose are rare species in the Chesapeake Bay and are not likely to be present in significant numbers in the Patapsco River, including where the dredging would occur.¹⁸³ AES also discusses the mitigation measures proposed to be implemented for the Project to avoid impacts to listed species, such as the use of turbidity curtains during pile-driving for near-shore construction of a bulkhead wall and the use of a closed clamshell bucket during dredge operations—both of which would provide protection for listed sea turtles.¹⁸⁴

The FWS provided information indicating that portions of the pipeline are within the known range of the listed bog turtle. The FWS recommended evaluation of those portions of the Project area.¹⁸⁵ AES assessed habitat suitability and completed a preliminary bog turtle survey that found several wetlands with suitable habitat.¹⁸⁶ AES proposes to avoid bog turtle habitat or conduct further surveys to determine the presence of bog turtles and to conduct further consultations if adverse effects cannot be avoided.¹⁸⁷ Appropriate sediment and erosion control measures, such as altering the pipeline route to avoid bog turtle habitat, or implementing sediment control measures, can be taken to eliminate or minimize impacts to wetlands near known turtle populations.¹⁸⁸

As a result of its analyses and proposed mitigation measures, AES concludes that impacts to threatened and endangered species are not likely to be significant.¹⁸⁹ In the event that FERC or the Corps determines that the Project may affect listed species, consultation with NMFS or the FWS, whichever is appropriate, will take place pursuant to section 7 of the Endangered Species Act.¹⁹⁰ Upon conclusion of any consultation, NMFS or the FWS will provide a written statement describing how the agency action (*i.e.*, issuance of the Federal license) will affect listed

in the Project area (including the transit path of the LNG vessels). *See* RR3, Appendix 3C (Letter from Mary Colligan, NMFS, to Matthew Stetter, Senior Scientist, Northern Ecological Associates, Inc., on behalf of AES (May 3, 2006)).

¹⁸² RR 3, Section 3.6.1.1 Federally Listed Species.

¹⁸³ RR 3, Section 3.6.2 Construction and Operation Impacts and Mitigation.

¹⁸⁴ RR 3, Section 3.6 Endangered and Threatened Species.

¹⁸⁵ RR 3, Appendix 3C (Letter from David Densmore, FWS, Pennsylvania Field Office, to Matthew Stetter, Senior Scientist, Northern Ecological Associates, Inc., on behalf of AES (May 31, 2006)). The Pennsylvania field office of the FWS was contacted, but did not respond until April 30, 2008, after the closure of the record. That response could not be considered in this decision.

¹⁸⁶ RR 3, Section 3.6 Endangered Species.

¹⁸⁷ RR 3, Section 3.6.2 Construction and Operation Impacts and Mitigation.

¹⁸⁸ *Id.*

¹⁸⁹ RR 3, Sections 3.5 Wildlife Resources and 3.6 Endangered Species.

¹⁹⁰ 16 U.S.C. § 1536(a)(2).

species.¹⁹¹ If NMFS or the FWS determines through consultation that the Project will jeopardize a listed species or adversely modify critical habitat, reasonable and prudent alternatives to avoid jeopardy or adverse modification will be provided. Measures necessary or appropriate to minimize the impact on listed species will also be specified, as will terms and conditions necessary to implement those measures.¹⁹²

Maryland neither argued that the information AES provided was insufficient to fully assess adverse coastal effects of the Project on this point, nor contested the accuracy of AES's data on and analyses of effects of the Project on endangered and threatened species.

Comments on the adverse coastal effects of the Project were specifically requested from other Federal agencies involved in ongoing reviews of the Project, including the Pennsylvania Field Office of the FWS, Region III of the EPA, and EPA's Chesapeake Bay Program Office.¹⁹³ These agencies provided no negative comments regarding adverse coastal effects of the Project on endangered and threatened species.¹⁹⁴

Based on the foregoing, and acknowledging that further consultation with the FWS and NMFS under the Endangered Species Act will occur prior to the issuance of any Federal license or permit for the Project if a licensing or permitting agency determines the Project may affect listed species,¹⁹⁵ it is clear that the record is adequate to identify the adverse coastal effects of the Project on endangered and threatened species. Additionally, with respect to these adverse coastal effects, there is no evidence in the record that they will be significant.

v. Adverse coastal effects on fish and aquatic vegetation.

Although not raised by Maryland, the adverse coastal effects of the Project on fish and aquatic vegetation have also been considered. AES provides an analysis of potential impacts of the proposed Project to finfish and benthic communities.¹⁹⁶ As part of this analysis, AES prepared

¹⁹¹ 16 U.S.C. § 1536(b)(3).

¹⁹² 16 U.S.C. § 1536(b)(4).

¹⁹³ See Letters from Joel La Bissonniere, NOAA, to Vance Hobbs, Corps, Baltimore District, William Muir, EPA, Region 3, Donald Welsh and Jeffrey Lape, EPA, and David Densmore, FWS, Pennsylvania Field Office (Feb. 15, 2008).

¹⁹⁴ See Letter from Vance Hobbs, Corps, Baltimore District, to Joel La Bissonniere, NOAA (Apr. 2, 2008); Letter from Donald Welsh, EPA, Region 3, to Joel La Bissonniere, NOAA (Mar. 13, 2008). The FWS also provided a response dated April 30, 2008, after the closure of the decision record. That response could not be considered in this decision.

¹⁹⁵ AES is currently consulting with NMFS on the use of horizontal directional drilling for pipeline crossings where appropriate. Consultation will likely not be concluded until after issuance of the NEPA documentation associated with the Project. See Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE (Feb. 6, 2008).

¹⁹⁶ RR 3, Section 3.3 Fisheries Resources. AES describes finfish and crustaceans that may occur in the waters adjacent to the terminal site and along the proposed LNG tanker route and provides information on benthic

an Essential Fish Habitat evaluation for the Project.¹⁹⁷ Results of this analysis indicate that potential adverse effects of the Project on finfish include temporary displacement during dredging activities, as well as gill abrasion, suffocation (mortality), and reduced visibility for sight feeders resulting from increased sedimentation and turbidity during dredging, construction, and demolition activities. Loss of habitat and removal of prey organisms may also occur.¹⁹⁸ Benthic communities may also be subject to mortality as a result of these activities.¹⁹⁹ Any effects, however, will be localized to 1,200 feet from the dredging activity and will be limited to the duration of the dredging, approximately 24 months.²⁰⁰ Adverse effects to finfish will be minimized as a result of their mobility. Adverse effects to benthic communities will be temporary because benthic organisms from nearby, undisturbed portions of the Patapsco River estuary will be recruited to and will recolonize the disturbed area.²⁰¹ Recolonization would occur shortly after dredging, and full recovery could occur within months of the dredging activities, as reported in other studies of dredged areas,²⁰² particularly given the small size of the dredge footprint relative to the size of the Patapsco River estuary.²⁰³ The unstable nature of the benthic community in the area of the dredge footprint as a result of frequent disturbances, including annual maintenance dredging, and the fact that the benthic community is composed of opportunistic species, further support the conclusion that the area will rapidly recolonize.²⁰⁴ Dredging impacts will also be mitigated through a number of proposed measures, including the use of a closed clamshell bucket dredge and silt curtains to lessen sediment suspension during dredging, which should also aid recolonization.²⁰⁵

communities, such as polychaete worms, present in or adjacent to the proposed terminal site. See RR 3, Tables 3.3.1-1, 3.3.1-2, and 3.3.1-3.

¹⁹⁷ RR 3, Section 3.3.3 Construction and Operation Impacts and Mitigation; Appendix 3B. AES prepared the essential fish habitat assessment pursuant to correspondence with NMFS. See RR 3, Appendix 3C (Letter from Matthew Stetter, Senior Scientist, Northern Ecological Associates, Inc., on behalf of AES (Apr. 7, 2006); Letter from John Nichols, NMFS, to Matthew Stetter, Senior Scientist, Northern Ecological Associates, Inc., on behalf of AES (May 23, 2006)).

¹⁹⁸ Id.

¹⁹⁹ RR 3, Section 3.3.3 Construction and Operation Impacts and Mitigation.

²⁰⁰ RR 2, Section 2.4.8.4 Marine Dredging; Letter from Christopher Diez, AES, to Elder Ghigiarelli, MDE, at Numbers 16, 18 (May 30, 2007).

²⁰¹ RR 3, Section 3.3.3 Construction and Operation Impacts and Mitigation.

²⁰² Id.

²⁰³ Id.

²⁰⁴ Id.

²⁰⁵ RR 2, Section 2.4.8.4 Marine Dredging and RR 3, Section 3.3.3 Construction and Operation Impacts and Mitigation.

No impacts to submerged aquatic vegetation are anticipated from the Project. NMFS has identified submerged aquatic vegetation as a habitat area of particular concern in the Chesapeake Bay. Based on preliminary mapping of the 2005 distribution of submerged aquatic vegetation in the Chesapeake Bay by the Virginia Institute of Marine Sciences, however, no such beds are present in the proposed workspace areas for the approach channel, turning basin, and docking facilities adjacent to the terminal.²⁰⁶ AES conducted an in-water survey in June 2006 that corroborated the Institute study.²⁰⁷ In addition, no such beds have been documented along the proposed LNG tanker route.²⁰⁸

Maryland neither argued that the information AES provided was insufficient to fully assess adverse coastal effects of the Project on this point, nor contested the accuracy of AES's data and analyses concerning the Project's adverse coastal effects on fish and aquatic vegetation.²⁰⁹

Comments on the adverse coastal effects of the Project were specifically requested from other Federal agencies involved in reviews of the Project, including Region III of the EPA and the Baltimore District of the Corps, and the Pennsylvania Field Office of the FWS, and EPA's Chesapeake Bay Program Office.²¹⁰ These agencies provided no negative comments regarding adverse coastal effects on fish and aquatic vegetation.²¹¹

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects of the Project on fish and aquatic vegetation. Additionally, because impacts to fish and aquatic vegetation will be localized to the dredged area and recolonization should occur within months, and because AES will use mitigation measures to further minimize these impacts, the record establishes that the adverse coastal effects on fish and aquatic vegetation will not be significant.

vi. Adverse coastal effects on the Chesapeake Bay.

Although not raised by Maryland, the potential effects associated with vessel traffic that would transit the Chesapeake Bay to deliver LNG to the proposed terminal have been considered. The United States Coast Guard has analyzed whether the Chesapeake Bay waterway accessing the

²⁰⁶ RR 3, Section 3.4 Vegetation; Section 3.4.1.1 Terminal Site and LNG Marine Traffic Transit Route.

²⁰⁷ RR 3, Section 3.4 Vegetation; Section 3.4.1.1 Terminal Site and LNG Marine Traffic Transit Route; RR 3, Appendix 3A, Aquatic Finfish/Epibenthic Invertebrate Sampling Data Report.

²⁰⁸ Id.

²⁰⁹ Maryland Brief, at 14-19, 25-26.

²¹⁰ See Letters from Joel La Bissonniere, NOAA, to Joseph Kelliher, FERC, and Robert Van Antwerp, Corps (Oct. 11, 2007); Letters from Joel La Bissonniere, NOAA, to Vance Hobbs, Corps, Baltimore District, William Muir, EPA, Region 3, Donald Welsh and Jeffrey Lape, EPA (Feb. 15, 2008).

²¹¹ See Letter from Vance Hobbs, Corps, Baltimore District, to Joel La Bissonniere, NOAA (Apr. 2, 2008); Letter from Donald Welsh, EPA, Region 3, to Joel La Bissonniere, NOAA (Mar. 13, 2008).

Project's terminal can be made suitable for LNG traffic and issued a Waterway Suitability Report on February 25, 2008. The report summarizes the additional safety and security measures that the Coast Guard may impose as conditions on the Project for the safe passage of LNG vessels to the terminal.²¹² While this document is not final agency action, it preliminarily concludes that "the Chesapeake Bay is not currently suitable, but can be made suitable, for the type and frequency of LNG marine traffic associated with the proposed LNG facility, provided additional safety measures necessary to responsibly manage the maritime safety and security risks are in place."²¹³ These measures include establishing and enforcing safety/security zones and providing for shoreline surveillance and monitoring.²¹⁴

Maryland neither argued that the information AES provided was insufficient to fully assess adverse coastal effects of the Project on this point, nor contested the accuracy of AES's data and analyses concerning the Project's adverse coastal effects on the Chesapeake Bay.²¹⁵

Comments on the adverse coastal effects of the Project were specifically requested from interested Federal agencies, including agencies involved in reviews of the Project such as Region III of the EPA, and EPA's Chesapeake Bay Program Office.²¹⁶ These agencies provided no negative comments regarding adverse coastal effects of the Project on the Chesapeake Bay.²¹⁷

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects of the Project on the Chesapeake Bay ecosystem. Additionally, with respect to these adverse coastal effects, there is no evidence in the record that they will be significant or broad.

²¹² USCG Water Suitability Report (Feb. 25, 2008).

²¹³ Id.

²¹⁴ Safety zones are defined as "water area[s], shore area[s], or water and shore area[s] to which, for safety or environmental purposes, access is limited to authorized persons, vehicles, or vessels. [Such areas] may be stationary and described by fixed limits or [they] may be described as a zone around a vessel in motion." 33 C.F.R. § 165.20. Security zones are defined as "area[s] of land, water, or land and water which [are] so designated by the Captain of the Port or District Commander for such time as is necessary to prevent damage or injury to any vessel or waterfront facility, to safeguard ports, harbors, territories, or waters of the United States or to secure the observance of the rights and obligations of the United States." 33 C.F.R. § 165.30(a). Safety/security zones for areas relevant to the Project are described in Coast Guard regulations at 33 C.F.R. §§ 165.500 (Chesapeake Bay, Maryland Zone), 165.503 (Captain of the Port Hampton Roads Zone).

²¹⁵ Maryland Brief, at 14-19, 25-26.

²¹⁶ See Letters from Joel La Bissonniere, NOAA, to Joseph Kelliher, FERC, and Robert Van Antwerp, Corps (Oct. 11, 2007); Letters from Joel La Bissonniere, NOAA, to Vance Hobbs, Corps, Baltimore District, William Muir, EPA, Region 3, Donald Welsh and Jeffrey Lape, EPA (Feb. 15, 2008).

²¹⁷ See Letter from Vance Hobbs, Corps, Baltimore District, to Joel La Bissonniere, NOAA (Apr. 2, 2008); Letter from Donald Welsh, EPA, Region 3, to Joel La Bissonniere, NOAA (Mar. 13, 2008).

vii. Adverse coastal effects on vessel traffic.

Although not raised by Maryland, the adverse coastal effects of the Project on vessel traffic have been considered. The Project area includes waters used by both recreational boaters and commercial vessels. There were 2,119 ship arrivals to the Port of Baltimore in 2005 (approximately six marine vessels per day entering and leaving).²¹⁸ Historically, traffic has been much greater—there were 4,033 arrivals in 1975.²¹⁹ These figures include deep draft cargo vessels, passenger vessels, and tug and tows. The addition of approximately 120 to 150 LNG ship arrivals into the Port of Baltimore planned for the LNG terminal reflects only a small incremental increase (approximately 5-7 %) to the overall number of arrivals in 2005.²²⁰

The proposed LNG facility would impact the Baltimore maritime community as a result of the effects of the moving security zone around arriving LNG vessels and the permanent fixed security zone around the LNG terminal. To determine adverse effects on commercial and recreational vessel traffic during passage of an LNG vessel through the main shipping channel, AES identified various scenarios based on a 1,000-foot ship and a 500-yard security zone ahead of and behind the LNG vessel. The total impact time while the LNG vessel passes any given point along the channel is estimated to be in the range of a few minutes.²²¹ Potential adverse effects on commercial and recreational vessels in the vicinity of the terminal would be somewhat greater because of the slow speeds necessary for vessel maneuvering and the proximity of the transit route to the mouth of Bear Creek, a waterbody used by local vessel traffic. LNG vessel simulations show that the total maneuvering time is about 45 minutes. Applying existing security zones would restrict the movement of commercial and recreational vessels transiting near the terminal site primarily as the LNG ship is turned into the terminal berth, a process that takes approximately 20 minutes. Access into Bear Creek, however, would never be completely eliminated even during this maneuvering.²²² Commercial and recreational vessels would also be restricted in areas immediately around the terminal site while LNG vessels are berthed. While a fixed security zone of 500 yards is currently applied to the vessel berths at the Cove Point terminal, the Project may be suitable for additional security measures such as floating barriers, which could safely reduce the zone surrounding the LNG vessel berth to less than 500 yards. The stationary security zone would impact commercial and recreational vessels in this small area offshore of the terminal for approximately 12 hours, two to three times a week, while LNG vessels discharge their cargos at the terminal.²²³

²¹⁸ RR 11, Section 11.4.4.1 Existing Commercial Traffic.

²¹⁹ Id.

²²⁰ Id.

²²¹ RR 11, Table 11.4.4.1.

²²² RR 11, Section 11.4.4.3 Summary of Impacts on Existing Vessel Traffic.

²²³ Id.

AES met with the Tidal Fisheries and Sport Fish Advisory Commissions of the Maryland Department of Natural Resources, as well as three fishing associations selected in an effort to cover the range of fishing that takes place in the Chesapeake Bay: the Maryland Waterman's Association, the Maryland Saltwater Sport Fisherman's Association, and the Upper Bay Charter Captains Association.²²⁴ These entities voiced several common concerns, including the impact of a moving security zone on their activities. Different approaches to establishing and enforcing a moving security zone were analyzed, and AES recommended that the current Captain of the Port (COTP) Baltimore security zone regulations be modified to align more closely with the COTP Hampton Roads and District Five regulations.²²⁵ These regulations establish a 500-yard security zone, but allow vessels proceeding at the minimum speed necessary to maintain navigation to come within 100 yards of a passing LNG vessel. This would provide a more consistent policy for LNG vessel security zones in the Chesapeake Bay and would permit fishermen to continue fishing along the channel edge.²²⁶

Maryland neither argued that the information AES provided was insufficient to fully assess adverse coastal effects of the Project on this point, nor contested the accuracy of AES's data and analyses concerning the Project's adverse coastal effects on vessel traffic.²²⁷

Comments on the adverse coastal effects of the Project were specifically requested from interested Federal agencies.²²⁸ These agencies provided no negative comments regarding adverse coastal effects of the Project on vessel traffic.²²⁹

Based on the foregoing, it is clear that the record is adequate to identify the adverse coastal effects of the Project on vessel traffic. Additionally, with respect to these adverse coastal effects, the record establishes that the small incremental increase over existing commercial traffic from the LNG vessel traffic associated with the Project will not cause significant adverse effects to vessel traffic, particularly given the higher historical vessel traffic in the Port of Baltimore. The record also establishes that adverse effects to fishing vessels and other commercial and recreational vessels will result from the moving security zone that would accompany LNG

²²⁴ RR 11, Section 11.4.4.2, Existing Recreational Traffic. Representatives from Halcrow HPA, a contractor hired by AES, also participated in this meeting.

²²⁵ Id.

²²⁶ RR 11, Section 11.4.4.3 Summary of Impacts on Existing Vessel Traffic.

²²⁷ Maryland Brief, at 14-19, 25-26.

²²⁸ See Letters from Joel La Bissonniere, NOAA, to Joseph Kelliher, FERC, and Robert Van Antwerp, Corps (Oct. 11, 2007); Letters from Joel La Bissonniere, NOAA, to Vance Hobbs, Corps, Baltimore District, William Muir, EPA, Region 3, Donald Welsh, EPA, Region 3, and Jeffrey Lape, EPA, Chesapeake Bay Program Office (Feb. 15, 2008).

²²⁹ See Letter from Vance Hobbs, Corps, Baltimore District, to Joel La Bissonniere, NOAA (Apr. 2, 2008); Letter from Donald Welsh, EPA, Region 3, to Joel La Bissonniere, NOAA (Mar. 13, 2008).

vessels, but that the measures recommended by AES would minimize the effects consistent with the security requirements for LNG vessels.

b. Cumulative adverse coastal effects.

Cumulative adverse coastal effects have been defined in past decisions as “the effects of an objected-to activity when added to the baseline of other past, present, and reasonably foreseeable future activities in the area of, and adjacent to, the coastal zone in which the objected-to activity is likely to contribute to adverse effects on the natural resources of the coastal zone.”²³⁰

Given the various adverse coastal effects of the Project established above, it is clear that these effects, when viewed cumulatively, will not be significant. The Project is located in an industrialized area. Dredging will occur in an area that has historically been subject to dredging, and the record shows that disposal of processed dredged material will be properly conducted. The pipeline will run along existing rights-of-way for much of its length. Vessel traffic will not increase appreciably. Adverse coastal effects on endangered and threatened species, fish and aquatic vegetation, and the Chesapeake Bay will not be significant.

AES has also provided information on cumulative adverse coastal effects of the Project in light of future activities in the Project area that may also have adverse effects on wetlands, vegetation and wildlife, or air quality.²³¹

Regarding adverse effects on wetlands and vegetation and wildlife, AES identifies two reasonably foreseeable proposals that may affect the Project area: an expansion of Interstate 95 near the Interstate 695 interchange and the construction of a new natural gas pipeline by Eastern Shore Natural Gas Company (Eastern Shore).²³² As is true for the Project, construction activities and related effects of the highway and the pipeline would be largely temporary, would be required to comply with Federal, state, and local permit conditions, and would take place primarily in areas where development already exists, such as existing industrial areas and highway and pipeline rights-of-way.²³³

With regard to cumulative adverse coastal effects on air quality, AES provided a cumulative air quality impacts analysis.²³⁴ AES concluded from this analysis that even with worst-case scenario

²³⁰ See Chevron, at 45 (citing Decision and Findings in the Consistency Appeal of Gulf Oil Corporation (Dec. 23, 1985)).

²³¹ RR 2, Section 2.5.4 Cumulative Impacts; RR 9, Section 9.3.5.1(I) Cumulative Impacts Analysis.

²³² RR 2, Section 2.5.4 Cumulative Impacts.

²³³ Id.

²³⁴ RR 9, Section 9.3.5.1(I) Cumulative Impacts Analysis. AES also provided information and analysis of the air quality impacts of the Project itself. AES described estimated Project emissions, potential air quality impacts due to Project construction and operation, and proposed mitigation measures. Project construction emissions will be limited to the construction period, approximately three years, and emissions from Pipeline construction will not be

emissions modeling, the Project emissions will not be regionally significant.²³⁵ AES also provided additional modeling requested by FERC, in consultation with the Maryland Department of Natural Resources, to account for a proposed ethanol plant in Baltimore County.²³⁶ Results of this modeling indicate that the combined emissions of the Project and the ethanol plant will comply with all Ambient Air Quality Standards included in Maryland's State Implementation Plan developed under the Clean Air Act.²³⁷

Maryland neither argued that the information AES provided was insufficient to fully assess cumulative adverse coastal effects of the Project, nor contested the accuracy of AES's data on and analyses of cumulative adverse coastal effects.²³⁸

Comments on the adverse coastal effects of the Project were specifically requested from interested Federal agencies, including agencies such as Region III of the EPA that are involved in ongoing reviews of the Project and EPA's Chesapeake Bay Program Office.²³⁹ These agencies provided no negative comments regarding cumulative adverse coastal effects.²⁴⁰

Based on the foregoing, and acknowledging that further analysis of cumulative effects will occur pursuant to NEPA prior to the issuance of any Federal license or permit for the Project, it is clear that the record is adequate to identify the cumulative adverse coastal effects of the Project. Additionally, with respect to these adverse coastal effects, the record establishes that the cumulative adverse coastal effects on vegetation and wildlife from the Project, the expansion of

concentrated for any extended period within any particular location along the Pipeline route. Based on this analysis, direct and indirect emissions from the Project are not expected to significantly impact ambient air quality. AES will continue to assess Project construction emissions to support this conclusion. Modeling was conducted to evaluate impacts to air quality from Project operation. The modeling was performed in accordance with objectives and procedures to satisfy NEPA impact assessment criteria discussed in several teleconferences with FERC staff. Modeling guidance and meteorological input data were obtained through consultation with a subcontractor for the Maryland Department of Natural Resources, Environmental Resources Management, Inc. Modeling results showed that when representative ambient background concentrations were added to modeled impacts, compliance with all applicable National Ambient Air Quality Standards was demonstrated for all pollutants currently included in the Maryland State Implementation Plan. See RR 9, Sections 9.3.4 Potential Air Quality Impacts of Proposed Project due to Construction and 9.3.5 Potential Impact of Proposed Project due to Facility Operation; Table 9.3-9.

²³⁵ Id.

²³⁶ Letter from Christopher Diez, AES, to Kimberly Bose, FERC (July 2, 2007).

²³⁷ Id.

²³⁸ Maryland Brief, at 14-19, 25-26.

²³⁹ See Letters from Joel La Bissonniere, NOAA, to Joseph Kelliher, FERC, and Robert Van Antwerp, Corps (Oct. 11, 2007); Letters from Joel La Bissonniere, NOAA, to Vance Hobbs, Corps, Baltimore District, William Muir, EPA, Region 3, Donald Welsh, EPA, Region 3, and Jeffrey Lape, EPA, Chesapeake Bay Program Office (Feb. 15, 2008).

²⁴⁰ See Letter from Vance Hobbs, Corps, Baltimore District, to Joel La Bissonniere, NOAA (Apr. 2, 2008); Letter from Donald Welsh, EPA, Region 3, to Joel La Bissonniere, NOAA (Mar. 13, 2008).

Interstate 95, and Eastern Shore's construction of an additional natural gas pipeline will be temporary and largely limited to developed areas and existing rights-of-way. The record also establishes that the cumulative adverse coastal effects on air quality of the Project, including the ethanol plant proposed for Baltimore County, will not be significant or exceed Maryland air quality standards established under the Clean Air Act.

3. Balancing national interests versus adverse coastal effects.

For AES to succeed on Element 2, the national interests furthered by the Project must outweigh its adverse coastal effects, based on a preponderance of the evidence.²⁴¹

As discussed above, the Project furthers two national interests articulated in sections 302 or 303 of the CZMA in a significant and substantial manner: the Project involves the siting of a major coastal-dependent energy facility in an area where such development already exists, and the Project would develop the coastal zone. The Project's contribution to the national interests is significant because it advances the President's national priority of expediting the development and expansion of LNG terminals to improve natural gas availability and reduce prices. The Project's contribution to the national interests is also substantial because the Project will address critical future regional energy demands caused by regional growth and diminished natural gas supplies.

On the other hand, the record does not show any significant adverse coastal effects. As noted above, the Project is being constructed in a heavily industrialized area. It involves dredging in a channel that has previously been dredged and has long been used for commercial maritime traffic. The vast majority of the proposed pipeline will be sited along existing rights-of-way. The record includes information with respect to a range of potential adverse effects of the Project, including substantial evidence on those adverse effects of concern identified by Maryland (i.e., water quality effects from re-suspension of contaminated sediments during dredging, the disposal of processed dredged material, and wetland and waterbody impacts resulting from pipeline crossings). This information establishes that the adverse effects of the Project are largely confined to the footprint of the Project and will be of limited magnitude and temporary duration. The Project will not impact significantly any unique resources (such as endangered or threatened species) or result in broad ecological impacts to Maryland's coastal zone or the Chesapeake Bay.²⁴²

Based on the foregoing, the national interests furthered by the Project outweigh the activity's adverse coastal effects.

²⁴¹ See Islander East, at 35; Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc., at 41 (June 20, 1995).

²⁴² Cf. Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S., Inc., at 14-15, 19, 31, 33-34 (Jan. 7, 1993) (finding the national interest did not outweigh adverse coastal effects where the project was located near the Florida Keys National Marine Sanctuary and impacted "extremely unique and valuable" natural resources of south Florida, particularly "the only shallow-water . . . tropical coral reef ecosystem found on the North American coast" and "our nation's only mangrove coral reef ecosystem").

C. Element 3: There Is No Reasonable Alternative to the Project.

For AES to succeed on Element 3, there must be “no reasonable alternative available [that] would permit the [Project] to be conducted in a manner consistent with the enforceable policies of [Maryland’s Program].”²⁴³ An alternative cannot be considered unless Maryland submits a statement, in a brief or other supporting material, that an alternative would permit the Project to be conducted in a manner consistent with the enforceable policies of Maryland’s Program.²⁴⁴ The initial burden is on Maryland to identify a specific alternative that is consistent with its Program, and then the burden shifts to AES to demonstrate that the alternative is either unavailable or unreasonable.²⁴⁵

Here, Maryland has not identified any alternative that would allow the Project to move forward in a manner consistent with Maryland’s Program. The only alternative proposed by Maryland is to allow the state permit processes to proceed to conclusion.²⁴⁶ This alternative does not meet Maryland’s initial burden because it does not identify specific changes that would allow the Project to proceed in a different form, while still achieving its primary purpose, in a manner consistent with Maryland’s Program.²⁴⁷

Thus, there is no reasonable alternative to the Project.

V. CONCLUSION

Maryland’s objection to the Project is overridden. For the reasons set forth above, the record establishes that the Project is consistent with the objectives of the CZMA: it furthers the national interest in a significant and substantial manner; the national interest furthered by the Project outweighs the Project’s adverse coastal effects; and there is no reasonable alternative available for the Project.²⁴⁸ Given this decision, Maryland’s objection to the Project no longer operates as

²⁴³ 15 C.F.R. § 930.121(c).

²⁴⁴ Id.

²⁴⁵ Islander East, at 35 (citing VEPCO, at 39); Decision and Findings in the Consistency Appeal of Millennium Pipeline Co., L.P., at 23 (Dec. 12, 2003) (hereinafter Millennium).

²⁴⁶ Maryland Brief, at 26-27.

²⁴⁷ See 15 C.F.R. § 930.121(c); Millennium, at 21. Maryland also argued that the national interest in the Project is diminished because the Dominion Cove Point LNG facility in nearby Calvert County is undergoing expansion, but this argument does not satisfy the regulatory requirements for proposing an alternative because such an alternative would not permit the Project itself to be conducted in a manner consistent with Maryland’s Program. See Millennium, at 21.

²⁴⁸ Given this finding, it is unnecessary to determine whether the Project is “necessary in the interest of national security.” 16 U.S.C. § 1456(c)(3)(A).

a bar under the CZMA to Federal agencies issuing, in accordance with applicable law, licenses or permits necessary for the construction and operation of the Project.

This decision to override Maryland's objection does not supplant other state and Federal license and permit requirements and review processes, including environmental license and permit requirements and review processes. AES still will be required to obtain all necessary state and Federal licenses and permits, and all necessary review processes will need to be completed. Whether the state and Federal licensing and permitting agencies ultimately grant the required authorizations will depend on the record evidence then available to them and compliance with applicable law for the issuance of such authorizations.



Secretary of Commerce