

# U.S. District Court Finds Local Zoning Law Preempted by FERC's Exclusive LNG Terminal Siting Authority under the Natural Gas Act

January 26, 2007

On January 23<sup>rd</sup>, the U.S. District Court for the District of Maryland determined that a zoning law promulgated by the Baltimore County Council to regulate the siting of an LNG import terminal was preempted under the Supremacy Clause of the U.S. Constitution by the Natural Gas Act (NGA), as amended by the Energy Policy Act of 2005 (EPA 2005), which gave the Federal Energy Regulatory Commission (FERC) "exclusive authority" over the siting construction, expansion and operation of liquefied natural gas (LNG) import terminals. (*AES Sparrows Point LNG, LLC v. Smith, et al.*, CA No. RDB-06-2478) This is the first court decision applying the provisions of EPA 2005 to determine the legality of local zoning laws aimed at prohibiting and limiting the siting of such LNG import facilities. The decision comes at a time when many state and local authorities are testing the limits of their historic police powers over the siting of LNG import terminals.

## Background

In 2005, Congress amended the NGA to address growing concerns about state interference with FERC's siting authority and to clarify the roles of both FERC and the states. Section 311(a)(1) of EPA 2005 granted FERC the "exclusive authority" to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Section 311(d), however, specifically reserved to the states their federally delegated authority under the Coastal Zone Management Act, the Clean Air Act, and the Federal Water Pollution Control Act. Congress also included a provision in EPA 2005 which requires FERC to consult with state authorities during the application process regarding "state and local safety considerations" before issuing an order on the merits of a proposed LNG import terminal.

AES Sparrows Point LNG, LLC has proposed an LNG terminal in Baltimore County, Maryland. In 2006, the Baltimore County Council approved an amendment to its zoning rules which provided that an LNG terminal could be constructed only under a special exception to local zoning rules, and required that it must be at least five miles from residential zones, and five hundred feet from business zones. The new rule would have prevented siting the proposed terminal at the Sparrows Point site. AES filed an action in U.S. District Court seeking declaratory and injunctive relief on the ground that the zoning rule was preempted by federal law.

## The Court's Decision

After examining the statute and its legislative history, the Court determined that the local zoning ordinance was preempted by the Natural Gas Act, as amended:

By giving "exclusive authority" to FERC to regulate the "siting, construction, expansion, or operation of an LNG terminal," Congress explicitly intended to prevent states from imposing *additional* restrictions on the siting of LNG facilities.

A Professional  
Corporation

1050 Thomas Jefferson  
Street, NW  
Washington, DC  
20007-3877  
(202) 298-1800  
(202) 338-2416

The Millennium Tower  
719 Second Avenue  
Suite 1150  
Seattle, Washington  
98104  
(206) 623-9372  
(206) 623-4986

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The Court also found that Congress “intentionally structured the NGA to give [states]...a voice, but no decision-making authority” and that the Baltimore County Zoning Amendment “turns the statutory and constitutional hierarchy of federal and state authority on its head, turning state consultation and advice into state mandate and control.”

### **Impact of the Decision**

This decision is important not only because it is the first federal court decision to interpret the provisions of EPCRA 2005 which apply to LNG terminal siting, but also because the court determined that the text, context, and legislative history of the NGA clearly reflect the intent of the U.S. Congress to preempt local governments with respect to the siting of LNG facilities.

### **For Additional Information**

For additional information on the court decision or assistance in assessing how the laws affects your company and siting of LNG import facilities, please contact John Burnes, Julie Richardson, John Buchovecky, or any member of our LNG or Natural Gas practices at (202) 298-1800.

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