

## Court Dismisses State Challenge to FERC Environmental Conditions

On March 13, 2009, the U.S. Court of Appeals for the D.C. Circuit dismissed for lack of standing a petition by the Delaware Department of Natural Resources and Environmental Control (“Delaware”) challenging orders by the Federal Energy Regulatory Commission (“FERC” or the “Commission”) that conditionally approved an application by Crown Landing LLC (“Crown Landing”) under the Natural Gas Act (“NGA”) to site, construct and operate a liquefied natural gas (“LNG”) terminal at the mouth of the Delaware River. Delaware claimed that FERC had exceeded its statutory authority by conditionally approving the application *before* the requirements of the Coastal Zone Management Act (“CZMA”) and Clean Air Act (“CAA”) had been satisfied. The court held that Delaware had suffered no injury in fact and so lacked standing to challenge FERC’s orders. *Delaware Department of Natural Resources and Environmental Control v. FERC*, No. 07-1007 (D.C. Cir. 2009).

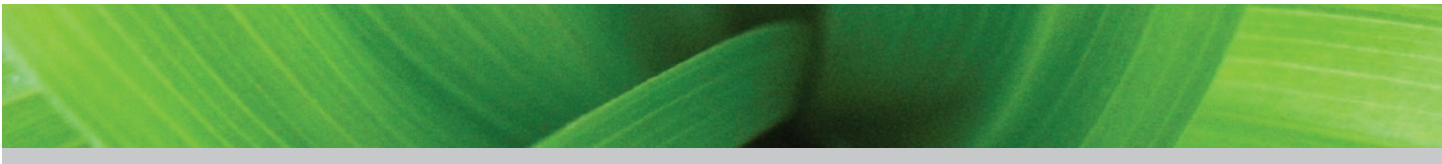
### REGULATORY BACKGROUND

Under the CZMA, any applicant for a Federal license to conduct activities affecting a “land or water use or natural resource” of a state’s coastal zone must certify to the relevant state agency that the proposed activity complies with the enforceable policies of the affected state’s coastal management plan. The state agency has six months to inform the Federal government whether it concurs with or objects to the applicant’s consistency certification. An applicant may appeal a state’s objection to the Secretary of Commerce, who can override the state’s objection if the Secretary finds that the activity is consistent with the objectives of the CZMA or otherwise necessary in the interest of national security.

The Clean Air Act establishes a joint state and federal program to control air pollution in the United States. Section 109 requires the Environmental Protection Agency (“EPA”) to establish National Ambient Air Quality Standards (“NAAQS”) for certain pollutants, known as “criteria pollutants” (e.g., ozone, sulfur dioxide, nitrogen dioxide, particulate matter, carbon monoxide, and lead). To meet these standards, section 110 requires each State to develop a state implementation plan or “SIP,” subject to review and approval by EPA. For areas that presently do not meet the NAAQS or have not met the limits in the past, the CAA prohibits a federal agency from licensing any activity that fails to conform to a state plan that has been approved by the EPA to meet the NAAQS. For these areas, federal agencies must ensure that any proposed project conforms with the applicable state plan prior to approval of the project.

### FACTS

On February 3, 2005, the Delaware Department of Natural Resources and Environmental Control issued a Coastal Zone Status Decision, which determined that the proposed LNG pier was prohibited by the state’s Coastal Zone Act. This decision was affirmed by Delaware’s Coastal Zone Industrial Control Board.



On June 20, 2006, the FERC issued an order approving Crown Landing’s application, but conditioned the approval upon Crown Landing’s obtaining state authorizations under the CZMA and CAA. Specifically, FERC’s order provided that no construction could commence until the state authorizations were obtained.

On rehearing, Delaware argued that the Commission did not have authority to issue an approval order unless the Commission first ensured compliance with the state’s environmental programs. Nevertheless, the Commission found that approving the Crown Landing project subject to the conditions imposed was consistent with case law, the Commission’s conditioning authority, and relevant agency regulations.

### THE D.C. CIRCUIT’S DECISION

Delaware argued that the CZMA unambiguously grants the state priority in the approval process. In considering whether Delaware had standing, the court said it would assume the validity of Delaware’s merits argument, i.e., that FERC had violated the statutory scheme by issuing a conditional order, because Delaware had “a statutory right to go first”. Nevertheless, the court said, it could not see how the “FERC’s allegedly illegal action” caused Delaware any injury in light of the State’s ability to veto the project. (In fact, as the court noted, Delaware had already rejected the project.)

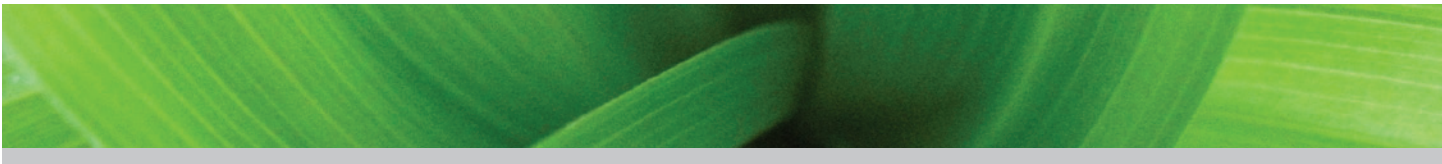
The court was not persuaded by Delaware’s argument that its rights were not protected adequately by FERC’s conditional order, because Crown Landing could appeal any state objection to the CZMA consistency certification denial directly to the Secretary of Commerce. Because the Commission’s order was conditioned on Delaware’s approval, it would be unaffected by any subsequent action overriding Delaware’s objection by the Secretary of Commerce. Such intervention by the Secretary of Commerce would require a new order by the Commission.

The court dismissed Delaware’s concern that it would “face intense political pressure to acquiesce in FERC’s conditional approval” saying that “Delaware is essentially asking us to prevent it from changing its own mind.” Concerning the argument that Delaware had “suffered the loss of a statutory procedural right – the right to precede FERC and thereby prevent a FERC proceeding”, the court found that the procedural injury did not confer standing because it did not affect a concrete substantive interest.

### IMPLICATIONS

Although the D.C.Circuit’s decision does not decide the merits of FERC’s longstanding practice of issuing a certificate order conditioned on subsequent compliance with other Federal permitting requirements, it leaves that practice in place. Similar challenges have been made to FERC’s conditioning authority under the NGA concerning other LNG and pipeline projects, as well as to FERC’s authority to issue conditional licenses for hydrokinetic projects under the Federal Power Act (“FPA”). In fact, a similar challenge pending before the D.C. Circuit on FERC’s issuance of a conditional hydrokinetic license is being held in abeyance, pending the outcome of this decision. Such challenges could also be raised to FERC authorizations under the FPA for siting transmission facilities.

The decision suggests that the standing doctrine could limit future challenges to FERC’s approach of issuing conditional certifications, effectively precluding attacks on FERC’s pragmatic approach to the timing of multiple



permits required to construct energy infrastructure projects under its jurisdiction. Yet, two factors in this case might distinguish this case from others: the challenge here was being brought by the state itself, and the state already had denied the consistency determination under the CZMA. The decision, however, does not affect the ability of a state to delay or halt a project by denying a permit required by the CAA or CZMA.

#### FOR ADDITIONAL INFORMATION

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