

## First Circuit Affirms District Court Decision Striking Down State Effort to Regulate Siting and Construction of LNG Terminal

On October 26, the U.S. Court of Appeals for the First Circuit upheld a decision of the U.S. District Court for the District of Rhode Island, and held that the failure of the Rhode Island Coastal Resources Management Council (CRMC) to respond within six months to an application for Coastal Zone Management Act (CZMA) consistency certification results in a conclusive presumption of consistency under the CZMA. The Court also upheld the District Court's determination that the state licensing process for coastal dredging was preempted by the Natural Gas Act (NGA).

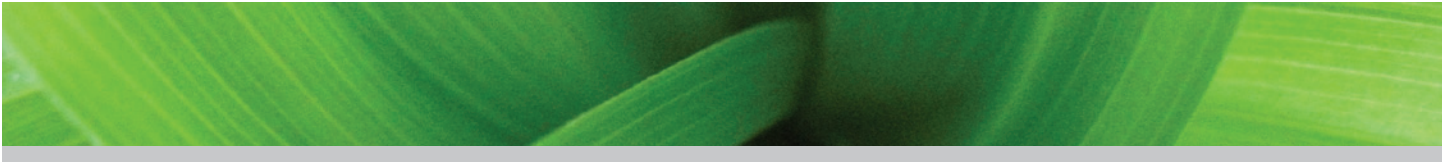
### BACKGROUND

In 2005, Congress amended the NGA to address growing concerns about state interference with the authority of the Federal Energy Regulatory Commission (FERC) over LNG terminal siting and to clarify the roles of both FERC and the states. Section 311(a)(1) of Energy Policy Act of 2005 (EPAct 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 three federal statutes, including the CZMA.

The CZMA provides states with a limited opportunity to review activities proposed by an applicant for a federal permit that are listed in the state's federally-approved coastal management plan for consistency with the plan. If a state agency does not either concur with or object to a consistency certification application within six months from the date the application is submitted with "all necessary data and information," the state agency's concurrence is "conclusively presumed."

In December 2003, Weaver's Cove Energy, LLC (Weaver's Cove) proposed an LNG terminal in the City of Fall River, Massachusetts. FERC approved the project in 2005, subject to certain conditions. Weaver's Cove amended the proposed project in 2009 to permit ships to deliver their cargo to an offshore berth in the Massachusetts coastal waters of Mount Hope Bay, from which the LNG would be transported via a submerged pipeline to the onshore terminal. The terminal, offshore berth, and pipeline would all be located in Massachusetts. The only planned activity in Rhode Island waters is dredging in a federal navigation channel.

To dredge the navigation channel in Rhode Island, Weaver's Cove sought authorization from the U.S. Army Corps of Engineers (Army Corps) pursuant to the Rivers and Harbors Act. This dredging request triggered the requirement that Weaver's Cove seek a consistency certification with CRMC, the federally-designated state agency under the CZMA responsible for administering the Rhode Island Coastal Resources Management Program (CRMP). Additionally, Rhode Island requires parties seeking to conduct an activity listed in the CRMP, such as dredging, to obtain a license for the activity from the State, called an "Assent." No federal statute limits how long



a state decision regarding an Assent might take or provides for federal review. CRMC's guidelines permit the Assent and consistency review processes to overlap, but views the approvals as distinct.

The CRMC informed Weaver's Cove that the consistency certification application was incomplete because Weaver's Cove had failed to provide documentation that the dredged materials would be accepted by "an approved upland facilit[y]." Weaver's Cove responded with a letter explaining that the information was not required because the dredge materials would be disposed of in Massachusetts. CRMC disagreed and, based on its belief that the six-month review period was tolled due to the incomplete application, refused to commence review of Weaver's Cove consistency certification or the request for the Assent.

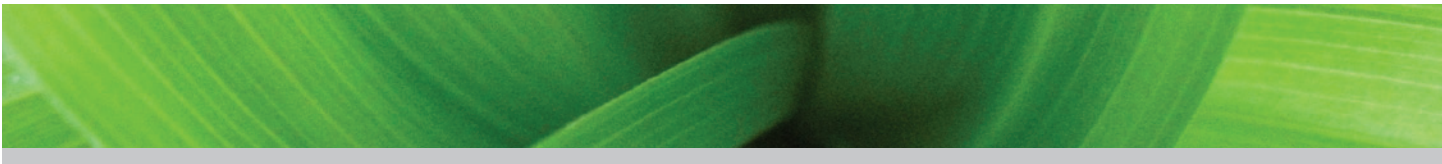
More than one year later, Weaver's Cove filed requests with the National Oceanic Atmospheric Administration (NOAA), FERC, and the Secretary of Commerce seeking a determination that CRMC's concurrence was "conclusively presumed" because CRMC had failed to act on Weaver's Cove's application within the statutorily required six-month period. NOAA took no action, FERC concluded that it did not have authority to address the issue, and the Secretary of Commerce determined that it could not review the matter without an actual objection from CRMC.

Weaver's Cove filed an action in U.S. District Court on June 29, 2007, seeking declaratory and injunctive relief on the ground that CRMC's concurrence should be conclusively presumed because it failed to act within the six-month period after it had all "necessary data and information." Weaver's Cove also argued that the Assent was preempted by the NGA. The District Court granted summary judgment in favor of Weaver's Cove on both the CZMA and NGA claims. The CRMC appealed and the Commonwealth of Massachusetts and the City of Fall River filed briefs amicus curiae.

## THE FIRST CIRCUIT'S DECISION

After finding that it had jurisdiction to hear the case, the First Circuit upheld the District Court's grant of summary judgment to Weaver's Cove. The Court held that CRMC's concurrence with Weaver's Cove's dredging plans must be conclusively presumed because CRMC failed to respond within the six-month period following Weaver's Cove's submission of the consistency certification. The Court rejected CRMC's argument that the six-month period was tolled because Weaver's Cove's application did not contain all the "necessary data and information," specifically a letter certifying the acceptance of dredged material. The Court concluded that the letter was not "necessary data and information" because the CRMP can only be read to cover dredge disposal in Rhode Island, and dredge materials from Weaver's Cove would be disposed of in Massachusetts.

The First Circuit also held that Rhode Island's licensing program for coastal dredging was preempted by the NGA on the ground of conflict preemption. The Court reasoned that FERC found the dredging activities to be within its jurisdiction as part of the construction and operation of the terminal facility and extensively reviewed the proposed dredging activities in both Rhode Island and Massachusetts as part of the overall terminal construction and operation plan. The Court concluded that because the Assent process could block the dredging activities, and thus independently block full licensing of the facility, it constitutes an application of a state law that delays



or has the potential to prohibit the ultimate licensing and construction of the LNG terminal, and thus is preempted by the NGA.

### IMPACT OF THE DECISION

This decision is important because it reaffirms FERC’s “exclusive jurisdiction” over the siting of LNG facilities under the NGA, as amended by Section 311 of EPLA 2005. The First Circuit’s holding that the parallel state licensing program for dredging activities is preempted by FERC’s exclusive jurisdiction under the NGA clarifies that the proper role for the State’s review of proposed project activities included in the coastal management plan is through CZMA consistency review. Moreover, the First Circuit provides a judicial remedy to the dilemma faced by Weaver’s Cove and potentially other project developers based on the refusal of a state to process, or even commence, CZMA consistency review and the inability of NOAA, FERC, or the Secretary of Commerce to intervene. Judicial review, however, is a lengthy and costly process, and, for some projects, may not provide a timely remedy. In the case of Weaver’s Cove, for example, the applications that were the subject of this litigation have been pending since July 2004.

### FOR ADDITIONAL INFORMATION

Van Ness Feldman represents clients in virtually every aspect of the LNG value chain, including pre-development, project structuring, development, permitting, construction, operation and expansion. For additional information on the court decision or assistance in assessing how the laws affect your company and siting of LNG facilities, please contact John Burnes, John Buchovecky, or any member of our LNG or Natural Gas practices at (202)298-1800.

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