

U.S. District Court Upholds State Authority Under Coastal Zone Management Act to Block Siting of LNG Terminals

June 26, 2007

On June 22, the U.S. District Court for the District of Maryland upheld a Baltimore County Council zoning amendment prohibiting the siting of liquefied natural gas (LNG) facilities in previously designated Chesapeake Bay “Critical Areas” in Baltimore County. The Court determined that the zoning amendment was not preempted by the Natural Gas Act (NGA) since it was within the delegated authority of the State of Maryland and Baltimore County under the Coastal Zone Management Act (CZMA). This decision presents a significant challenge for the LNG import terminal project proposed by AES Sparrows Point LNG, LLC in Baltimore County and 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 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 the Energy Policy Act 2005 (EPAAct 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 CZMA, the Clean Air Act, and the Federal Water Pollution Control Act.

AES Sparrows Point LNG, LLC proposed to site an LNG terminal at Sparrows Point in Baltimore County, Maryland. On June 19, 2006, the Baltimore County Council approved an amendment to its zoning rules providing that an LNG terminal could be constructed only under a “special exception” and required that the facility be at least five miles from residential zones and 500 feet from business zones. This zoning amendment would have prevented construction of an LNG terminal at the Sparrows Point site. On January 23, 2007, the U.S. District Court for the District of Maryland determined that the local zoning amendment was preempted by the NGA, as amended by Section 311 of EPAAct 2005, which gave FERC “exclusive authority” over the siting, construction, expansion, and operation of LNG import terminals (*AES I*). (See Jan. 26, 2007 Issue Alert [U.S. District Court Finds Local Zoning Law Preempted by FERC’s Exclusive LNG Terminal Siting Authority under the Natural Gas Act.](#))

On February 5, 2007, the Baltimore County Council passed a second zoning amendment, which added the siting of LNG terminals to the list of prohibited activities in Baltimore County’s environmentally sensitive Chesapeake Bay Critical Areas. The zoning amendment would prevent AES from siting an LNG terminal at Sparrows Point. AES filed an action seeking declaratory relief on grounds that the zoning amendment was unconstitutional and was preempted by the NGA. Defendants claimed that the zoning amendment was not preempted because it was enacted as part of Maryland’s Coastal Zone Management Plan under the CZMA.

The Court’s Decision

On June 22, 2007, the U.S. District Court for the District of Maryland upheld the local zoning amendment. The Court noted that EPAAct 2005 added two provisions to the NGA, the first of which gave FERC “exclusive authority” over siting of LNG terminals, but the second carved out an exception to that exclusive authority, providing that nothing in the NGA affects the delegated authority of states under three federal environmental statutes, including the CZMA. The Court distinguished its decision in *AESI*, stating that “[t]he Zoning Amendment at issue in this case, unlike the first zoning ordinance, only prohibits the construction of LNG facilities in Baltimore County’s environmentally

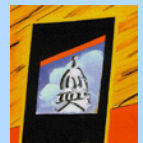
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sensitive Chesapeake Bay Critical Areas and has now been incorporated into the State of Maryland's Coastal Zone Management Act program.”

The Court rejected AES' argument that the local zoning change was an amendment to Maryland's CZMA management plan and was not enforceable unless specifically approved by the Secretary of Commerce. The Court determined that the zoning change did not constitute an amendment to Maryland's CZMA management plan, but was rather the implementation of the plan at the local level. The Court held that Maryland's CZMA plan specifically contemplated local zoning changes enacted by the Baltimore County Council. It is important to note that the Court's ruling on an evidentiary issue may have impacted the outcome, as a footnote in the opinion dismisses as inadmissible hearsay a letter from the National Oceanic and Atmospheric Administration stating that it would not approve such an amendment to Maryland's CZMA plan. This issue may become important in future cases or on appeal.

Finally, the Court refused to declare the zoning amendment unconstitutional, finding instead that the zoning amendment did not discriminate on its face or unduly burden interstate and foreign commerce in violation of the dormant Commerce Clause. The Court noted that the amendment only prohibits the siting of LNG terminals in a small percentage of coastal land, and that the minimal burden is clearly outweighed by the local public interest in protecting the areas surrounding the Chesapeake Bay.

Impact of the Decision

This decision reaffirms the holding in *AES I*, that the NGA, as amended by Section 311 of EPAct 2005, preempts state and local governments with respect to the siting of LNG facilities, but demonstrates the power retained by states under their federally delegated authority under the CZMA to regulate the siting of LNG terminals in environmentally sensitive areas. This is the first federal court decision interpreting the scope of state CZMA authority over siting of LNG terminals as provided in the Energy Policy Act of 2005.

For Additional Information

For additional information on the decision, please contact John Burnes, Julie Richardson, or any member of the firm's LNG Practice Group at (202) 298-1800.

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