

129 FERC ¶ 61,245
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

AES Sparrows Point LNG, LLC

Docket No. CP07-62-001

Mid-Atlantic Express, LLC

Docket Nos. CP07-63-001
CP07-64-001
CP07-65-001

ORDER ON REHEARING AND CLARIFICATION AND DENYING STAY

(Issued December 17, 2009)

1. On January 15, 2009, the Commission issued an order that granted AES Sparrows Point LNG, LLC (AES), in Docket No. CP07-62-000, authorization under section 3(a) of the Natural Gas Act (NGA), and Parts 153 and 380 of the Commission's regulations, to site, construct, and operate a liquefied natural gas (LNG) marine import terminal and associated facilities in Baltimore County, Maryland.¹ The terminal will include two ship berths, three LNG storage tanks, each with a nominal working volume of approximately 1,006,000 barrels, and regasification facilities able to send out gas at a rate of up to 1.5 billion standard cubic feet per day (Bcf/d). In addition, the Commission granted Mid-Atlantic Express, LLC (Mid-Atlantic),² in Docket No. CP07-63-000, NGA section 7(c) certificate authorization to construct and operate an 88-mile-long, 30-inch-diameter pipeline to transport up to 1.5 Bcf/d of gas from the AES's LNG terminal to Eagle, Pennsylvania, where the pipeline will interconnect with the interstate pipeline grid.

¹ *AES Sparrows Point LNG, LLC, et al.*, 126 FERC ¶ 61,019 (2009) (January 2009 Order).

² Mid-Atlantic is a wholly-owned subsidiary of AES's parent company, AES Corporation.

2. This order addresses the requests for rehearing, clarification, and stay of the January 2009 Order.

I. LATE MOTIONS TO INTERVENE

3. Late motions to intervene were filed by Londonderry Township, Chester County, Pennsylvania on January 14, 2009; West Marlborough Township, Chester County, Pennsylvania on January 7, 2009; East Fallowfield Township, Chester County, Pennsylvania on January 12, 2009; and Safety, Agriculture, Villages and Environment, Inc. on January 14, 2009.

4. Subsequent to issuance of the January 2009 Order, late motions to intervene were submitted by Chester County, Pennsylvania; Lisa and Joseph Gallick; Bob and Jill Holly; Cliff and Nancy Pollack; the Oscar F. Senn Trust; Caln Township, Chester County, Pennsylvania; and Newlin Township, Chester County, Pennsylvania.

5. The deadline for interventions in this proceeding was February 14, 2007.³ A petitioner for late intervention bears a higher burden to show good cause for late intervention after issuance of an order addressing the merits of an application, and generally it is Commission policy to deny late intervention at the rehearing stage.⁴ All of the above petitioners filed either after the January 2009 Order was issued or just a few days before it was issued.⁵ In any event, all of the petitioners filed almost two years after the due date for motions to intervene.

6. Further, although each of the petitioners for late intervention identifies an interest in the proceeding, none explained why they did not seek intervention at an earlier date. While the petitioners indicate they have environmental and safety concerns regarding the project, they do not raise specific issues. The petitioners' interests appear to be adequately represented by other parties in the proceeding. In addition, the Commission believes that granting the motions at this stage could cause unfair prejudice to the

³ See notice published in *Federal Register* on January 20, 2007 (72 FR 4250).

⁴ See, e.g., *Transcontinental Gas Pipe Line Corporation*, 126 FERC ¶ 61,097, at PP 9-13 and 127 FERC ¶ 61,018 (2009); *Texas Eastern Transmission, L.P.*, 121 FERC ¶ 61,003, at P 4 (2007); and *Cameron LNG, L.L.C.*, 112 FERC ¶ 61,146, at P 6 (2005).

⁵ None of the petitioners for late intervention request rehearing of the January 2009 Order. Chester County's and Caln Township's late motions to intervene included requests for stay of the proceeding and of Mid-Atlantic's certificate authority to seek eminent domain. Stay requests are addressed below.

applicants and other existing parties. In view of these considerations, the Commission finds no good cause for granting the petitioners' motions for late intervention and they will be denied.⁶

7. Some of the petitioners being denied late intervention also filed comments on the final EIS that were not addressed in the January 2009 Order. These comments are addressed as pertinent below.

II. FURTHER COMMENTS ON ENVIRONMENTAL CONCERNS

8. In our final EIS, we addressed comments submitted in response to our draft EIS that were received by the comment deadline of June 16, 2008,⁷ as well as comments submitted after the deadline. Although we did not invite comments on the final EIS, several were filed. In our January 2009 Order, we addressed those comments to the extent they raised new issues or presented additional material information that had not been addressed in the draft or final EIS. We do the same here with respect to comments received after issuance of our January 2009 Order or too late to be addressed in that order.

9. These comments, which are addressed as pertinent below, were filed by the Advisory Council on Historic Preservation (ACHP); Chester County, Pennsylvania; Downing Forge Home Owners Association; Jerry Havens; the State of Maryland (Maryland)⁸; William Munton; Maryland Waterfowlers Association (Waterfowlers); National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Fisheries); Liam J. O'Rourke; Pennsylvania Fish & Boat Commission, Division of Environmental Services, Natural Diversity Section (Pennsylvania Fish & Boat

⁶ See Rule 385.214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2009), setting forth the criteria used by the Commission in considering motions for late intervention.

⁷ See *Notice of Availability of the Draft EIS*, at 4 (April 28, 2008).

⁸ The comments were filed by the Maryland Department of Natural Resources (DNR), Power Plant Research Program (PPRP), which has been designated by the State of Maryland Governor's office to be the lead agency for the purpose of coordinating with the Commission throughout the licensing process for AES's LNG terminal project, including Mid-Atlantic's take-away pipeline project. Consistent with this role, PPRP was the lead agency in coordinating the state's review for the project and in developing the state's response to the draft Environmental Impact Statement (EIS) and final EIS.

Commission); Pennsylvania Bureau for Historic Preservation; Dodie S. Preston; Safety, Agriculture, Villages and Environment, Inc.; Frieda Ulman; the U.S. Army Corps of Engineers (COE); and the U.S. Department of the Interior's Fish and Wildlife Service (FWS).

III. REQUESTS FOR SUPPLEMENTAL EIS

10. Susan T. Barrett-Bullitt and James B. Bullitt III emphasize that several agencies have yet to take final action on requests for necessary approvals. In particular, they call attention to cultural and environmental surveys yet to be completed for new pipeline route variations and ask that further action on the project be delayed until the Commission has completed a supplemental EIS after all surveys are complete.⁹

11. Maryland also emphasizes that the approved route for the Mid-Atlantic pipeline varies from the originally proposed route, and contends the final EIS did not adequately consider the route variations' impacts on wetlands, waterways, state parklands, and historic resources. Maryland thus advocates further review and preparation of a supplemental EIS to consider these impacts.¹⁰

12. As explained in our January 2009 Order,¹¹ we commonly condition orders granting project authorization on the outcome of pending survey results, a practical accommodation to the fact that project sponsors are often unable to gain access to property at a proposed site or along a proposed route until they are able to rely on eminent domain authority, thus making it impossible to complete all necessary studies and plans.¹² We review the completed surveys and, as needed, adopt measures to avoid or mitigate environmental impacts. In cases, like this one, where the completed surveys and studies cover an area representative of the area yet to be surveyed (the adopted route variations for Mid-Atlantic's pipeline are relatively minor, and do not deviate far from

⁹ Comments by Susan T. Barrett-Bullitt and James B. Bullitt III filed on January 21, 2009.

¹⁰ Request for rehearing filed by Maryland on February 13, 2009.

¹¹ 126 FERC ¶ 61,019 at P 62.

¹² See, e.g., *Northern Natural Gas Company*, 127 FERC ¶ 61,038, at P 20 (2009); *Millennium Pipeline Company, L.L.C.*, 117 FERC ¶ 61,319, at P 262 (2006); *Islander East Pipeline Co. et al.*, 102 FERC ¶ 61,054, at P 157 (2003); *East Tennessee Natural Gas Company*, 102 FERC ¶ 61,225, at P 24 (2003); and *Maritimes & Northeast Pipeline, L.L.C.*, 87 FERC ¶ 61,061, at n.10 (1999).

the proposed route), we typically find the measures stated in the order are adequate to respond to the results of the pending surveys and studies.

13. Section 3.3.3 of the final EIS analyzed available data on impacts of the proposed and alternative routes on wetlands; waterbodies; parkland; forested, agricultural, and residential areas; and historic resources. The approved route, incorporating the adopted variations, remains subject to reassessment based on the results of any pending surveys and studies. The results of pending inquiries will inform agencies and the Commission, in advance of the commencement of construction, as to whether there is cause to address site-specific circumstances, modify mitigation measures, refine plans, or to revise the route in response to unanticipated results. A supplemental EIS will only be prepared if still uncompleted surveys or studies result in "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."¹³

IV. REQUESTS FOR REHEARING

14. The deadline for requests for rehearing of the January 2009 Order was February 17, 2009.¹⁴ Timely requests for rehearing and/or clarification of the January 2009 Order were filed by the following parties: Baltimore County, Maryland; the Bradford Glen Homeowners Association at Victoria Crossing (Bradford Glen Homeowners); the Brandywine Conservancy;¹⁵ Byers Commercial LP (Byers); Dawn and David Cassell; Richard J. and Victoria S. Channell; Columbia Gas Transmission

¹³ See 40 C.F.R. § 1502.9(c)(ii) (2009). See also *State of Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984) (finding a supplemental EIS is only merited if "new information provides a seriously different picture of the environmental landscape.").

¹⁴ Because the 30th day following the date of issuance of the January 15, 2009 Order was Saturday, February 14, 2009, and Monday, February 16, 2009 was a federal holiday, the deadline for filing requests for rehearing became February 17, 2009, by operation of section 385.2007(a)(2) of the regulations. 18 C.F.R. § 385.2007(a)(2) (2008).

¹⁵ The Brandywine Conservancy is a group of landowners that includes Emory A. Hamilton, Dr. William Munton, Dorothy A. Matz, Susan and Roger Mustalish, Dr. William and Helen Elkins, Diana Wister, Edward Fitts, William M. W. and Elizabeth Sharp, Rikki and Jesse Saunders, Richard and Carolyn Vermeil, Ronald and Densy Juvonen, Ralph and Suzanne Roberts, James and Mary O'Rourke, William Rubin, and Dr. James and Meriel Brewer.

Corporation, LLC (Columbia); Andrew and Ann Durkin; the Hankin Group and Hankin Enterprises, Ltd. (Hankin); LNG Opposition Team, part of the Greater Dundalk Alliance; Dodie S. Preston; and John L. Schmidt.

15. An untimely request for rehearing was filed by the Waterfowlers and Mr. William McQueen.¹⁶ NGA section 19 requires a party to file a request for rehearing within 30 days of the date of issuance of the order being contested. The statute does not give the Commission the discretion to waive this requirement. However, in this instance, to insure all potential project impacts receive due consideration, we will address the issues presented in the filings of the Waterfowlers and Mr. McQueen.

16. The applicants filed an answer in response to the requests for rehearing. Although our Rules of Practice and Procedure do not allow answers to requests for rehearing,¹⁷ we may, for good cause, waive this provision,¹⁸ and we do so in this instance as applicants' answer provides information of assistance in our decision making process. The issues raised on rehearing are addressed below.

V. REQUESTS FOR STAY

17. The Brandywine Conservancy, Bradford Glen Homeowners, Chester County and Caln Township¹⁹ ask for a stay, contending landowners will face irreparable harm in the event that Mid-Atlantic is permitted to invoke its certificate authority granted by the January 2009 Order and NGA section 7(h) to acquire property rights prior to resolution of the issues raised in the requests for rehearing.

18. In considering a request for stay, we have applied the standards set forth in section 705 of the Administrative Procedure Act²⁰ and have granted a stay when "justice so

¹⁶ The Waterfowlers filed a timely, unopposed motion to intervene at the beginning of this proceeding on January 30, 2007, and therefore became a party by operation of Rule 214(c)(1) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c)(1) (2009).

¹⁷ 18 C.F.R. § 385.213(a) (2009).

¹⁸ 18 C.F.R. § 385.213(a)(2) (2009).

¹⁹ Chester County's and Caln Township's requests for stay were included in their late motions to intervene filed on February 10, 2009 and February 27, 2009, respectively, which are denied above.

²⁰ 5 U.S.C. § 705 (2006).

requires."²¹ In assessing a request for stay, we consider several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.²² Our general policy is to refrain from granting stays in order to assure definiteness and finality in our proceedings.²³ If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.²⁴

19. In this case, the Bradford Glen Homeowners claim a stay is necessary to protect landowners' peaceable use and enjoyment of their properties; the Brandywine Conservancy adds that "[c]ondemnation is an irreparable act."²⁵ We do not believe a stay is necessary to avoid an irreparable injury, since until construction actually begins, there is no irreparable injury.²⁶ Mid-Atlantic may go so far as to survey and designate the bounds of an easement, but no further, e.g., it cannot cut vegetation, disturb ground, or transport materials to designated work areas until it demonstrates compliance with our environmental conditions and obtains written approval from the Commission's Director of the Office of Energy Projects (OEP) to commence construction.

20. Although a landowner may prefer that no easement encumber the land, we note that Mid-Atlantic will be required to compensate landowners for any property rights it acquires. Mid-Atlantic will not be allowed to construct unless and until there is a favorable outcome on all outstanding requests for necessary federal approvals, the project will not go forward, and Mid-Atlantic will have compensated landowners for property rights it cannot use. Therefore, we find that absent a stay property owners will not suffer

²¹ See, e.g., *Midwestern Gas Transmission Company*, 116 FERC ¶ 61,182 (2006) and *Independence Pipeline Company*, 91 FERC ¶ 61,102, at 61,363-64 (2000).

²² *Id.*

²³ See, e.g., *Sea Robin Pipeline Company*, 92 FERC ¶ 61,217, at 61,710 (2000).

²⁴ *Id.*

²⁵ The Brandywine Conservancy's *Request for Rehearing and Stay* at 45.

²⁶ In *Wisconsin Gas Company v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985), the court clarified that to qualify as irreparable harm "the injury must be both certain and great." We do not believe an easement, established in fact yet in fact unusable, meets these criteria.

irreparable injury.²⁷ Only after we are assured that Mid-Atlantic has in hand all necessary approvals will we grant clearance for construction to begin.

VI. CONDITION REQUIRING SITE-SPECIFIC PLANS

21. Mid-Atlantic requests we modify Environmental Condition No. 55, which directs Mid-Atlantic to refrain from invoking its certificate authority and NGA section 7(h) to acquire permanent rights-of-way on residential properties by eminent domain until (1) it develops plans specific to property owners with residences within 50 feet of construction work areas; (2) it provides evidence of a property owner's concurrence with the company's plan when work areas are within 10 feet of a residence; and (3) the Director of OEP approves the plans.

22. Mid-Atlantic states that until it can gain access to residential parcels, it cannot complete surveys necessary to develop site-specific plans for those properties. Mid-Atlantic proposes the Commission either (1) omit the requirement that Mid-Atlantic obtain approval from the Director of OEP for site-specific plans before Mid-Atlantic proceeds with condemnation proceedings with respect to these properties, or (2) clarify that when a property owner refuses to allow access to survey, Mid-Atlantic may submit a site-specific residential plan based on the "best available desk-top information."

23. Mid-Atlantic seeks clarification regarding the requirement that it demonstrate a property owner's "concurrence" with a plan when construction will be within 10 feet of a residence. Mid-Atlantic argues that "concurrence" should not be read as synonymous with "approval," as this would grant property owners a potential veto. Mid-Atlantic asks the Commission to specify that it can satisfy this condition by taking into account, to the extent reasonably practicable, an owner's concerns in developing a construction plan, and demonstrating that the owner is informed of the plan.

24. The January 2009 Order's Environmental Condition No. 55 requires that site-specific plans for properties with residences within 50 feet of construction work areas be filed by Mid-Atlantic after it had gained access to those properties. Mid-Atlantic points out that it may not always be possible to gain access to every property. In recognition of this, we will modify Environmental Condition No. 55 to provide that if Mid-Atlantic is

²⁷ As discussed at several points herein, project sponsors often are unable to gain access to property at a proposed site or along a proposed route until they are able to rely on eminent domain authority. Thus, a general policy of not allowing certificate holders to proceed with eminent domain proceedings until all necessary permits have been obtained could in some instances prevent project sponsors from obtaining information necessary to obtaining permits.

unable to obtain permission from a property owner to conduct an on-site survey, it may satisfy the condition by developing a site-specific residential construction plan based on the best information available. Because Mid-Atlantic must submit its construction plans, along with property owners' comments on those plans, for review and written approval by the Director of OEP, and because Mid-Atlantic cannot employ eminent domain authority to acquire permanent rights-of-way with respect to a residential property until it has obtained this written approval of a site-specific residential construction plan, we believe property owners are assured their concerns will receive appropriate consideration and they will be kept informed of work affecting them.

25. The January 2009 Order's Environmental Condition No. 55 also requires Mid-Atlantic to provide evidence of the landowner's concurrence with a site-specific residential plan if construction areas will be within 10 feet of a residence. Mid-Atlantic points out that it may not always be possible to obtain such concurrence. In recognition of this, we will modify Environmental Condition No. 55 to provide that if Mid-Atlantic is unable to obtain a landowner's concurrence with a site-specific plan, it may satisfy the condition by filing its plan and any comments by the landowner on the plan with the Commission. The OEP Director can then consider the points of discord in determining whether to approve, reject, or modify the plan.

VII. COMMISSION RESPONSE TO REQUESTS FOR REHEARING

A. Procedural Matters

1. The LNG Opposition Team

26. The LNG Opposition Team contends the AES resource reports contain only general information, not site-specific data and analyses as required. Accordingly, the LNG Opposition Team seeks "a full review of all evidence included in the FERC Consolidated Record" to ensure there has been a detailed review of the project's environmental impacts.²⁸

Commission Response

27. We reject the claim that the resource reports filed during this proceeding have been insufficiently precise. Commission staff reviewed the reports and found them to be complete. Further, the applicants have been responsive to requests to expand upon and update previously submitted information. During the course of the Commission's review, the description of this project and its impacts have been supplemented, refined,

²⁸ LNG Opposition Team's *Request for Rehearing*, at 12 (Feb. 17, 2009).

and revised as additional and more precise information has become available. Ideally, all such information would have been available earlier and been honed into a concise and coherent format; nevertheless, we do not believe that the quantity, quality, level of detail, or manner in which the applicants have presented information has been misleading, prejudicial, or insufficient. Consequently, we conclude that this proceeding, from pre-filing to rehearing, has provided the public, agencies, and the applicants a forum to fully investigate all aspects of the project and to define discrepancies between the facts and findings of the different parties. We have weighed the different points of view expressed and the evidence presented in reaching our decisions. We do not find a need for a further or fuller review.

28. As we explained in *Bradwood Landing LLC*,²⁹ the Commission's review process for proposed LNG import terminals comprises three distinct phases: pre-filing review, application review, and post-authorization review. Each stage of the review process requires the submission of progressively more detailed information and involves an exhaustive review and consultation with key stakeholders. This order is the culmination of the second phase of review. In the third phase, there will be two additional sets of authorizations necessary: one set prior to any project construction and the second prior to operation of the project. How these phases relate to the review of AES's project and build upon each other is described below.

29. As required by section 311 of the Energy Policy Act (EPA) of 2005,³⁰ prospective applicants seeking to obtain Commission authorization to construct and operate an LNG import terminal must participate in the Commission's Pre-Filing Process for a period of at least six months. This is the beginning of the Commission review and it involves not only an early analysis of the project proposal, but also provides a transparent forum for consultation and discussion among participants in the process (namely, the prospective applicant, the Commission's staff, affected landowners, other federal agencies, state and local entities, and the public). During this process, project-specific issues are raised through the environmental scoping process and/or other means, such as open-houses, public meetings, site visits, or filed comments. Information needs are identified and studies are conducted as necessary to fill data gaps.

30. As the end of the pre-filing process approaches, Commission staff assesses the progress made by all the stakeholders. When staff has determined that the project is ready to proceed to the application phase, it will so advise the prospective applicant.

²⁹ *Bradwood Landing LLC*, 124 FERC ¶ 61,257, at PP 56-61 (2008), *reh'g denied*, 126 FERC ¶ 61,035 (2009).

³⁰ Pub. L. No. 109-58, § 311, 119 Stat. 594, 685 (2006).

Once the applicant files its formal application and staff is satisfied that sufficient information exists in the record to produce a draft EIS, staff will establish a schedule for the completion of the environmental review. During the application review phase, all interested entities have the opportunity to place their concerns regarding the project into the record and file any evidence they believe to be important for the Commission to consider. The draft EIS is issued for public comment, and all comments received on that document are addressed in a final EIS.

31. The final EIS contains Commission staff's conclusions regarding the feasibility, safety, and environmental impacts associated with the proposed project and recommended measures for ensuring safety and mitigating any environmental impacts identified through analysis of the proposal and consideration of concerns raised during the pre-filing and application review. After issuance of the final EIS, the Commission considers the entire record of the proceeding. If the Commission ultimately finds that the project is in the public interest and issues authorization, project-specific mitigation measures identified by the Commission as necessary are included as conditions to the authorization. Development of the information and the consultation required by these mitigative measures are the subject of the third, post-authorization, phase of the Commission's review process.

32. It is during the post-authorization review phase that detailed plans for the Commission-required mitigation are developed. As an example, pursuant to section 3A(e) of the NGA, the LNG terminal operator shall develop an Emergency Response Plan, which must include a cost-sharing plan for safety measures. Details of the Emergency Response Plan, including details of the cost-sharing plan, are developed and submitted to the Commission for review and approval during the post-authorization review phase. Approval of this plan, and a number of others specified as conditions of an order, must be received before authorization to commence construction will be issued. The development of plans related to required mitigation plans can be a time-consuming process, both for the project sponsor and for stakeholders that must be consulted and/or participate in their development. Moreover, in many instances it is impossible to develop detailed plans related to certain aspects of a project before the details of the Commission's underlying authorization are known. Hence, it is more effective and efficient for all involved to delay the development of such plans until after the Commission has specified a project as being consistent with the public interest. Authorization to commence construction will not be issued until the conditions requiring pre-construction approval have been satisfied, with input as appropriate from all named agencies and others.

2. The Brandywine Conservancy

33. The Brandywine Conservancy faults the final EIS for: (1) mapping data that does not match the information provided to the Brandywine Conservancy by AES and its consultants; (2) not including a map of portions of the pipeline, e.g., mileposts 56.35-

56.85; (3) failing to account adequately for impacts to agricultural soils by not defining “prime farmland soils” broadly enough; and (4) a lack of clarity regarding water body crossings and certain wetlands.

34. Several parties object that there was not adequate time provided to review the final EIS, and insist the Commission should have provided for an extended comment period. In particular, the Brandywine Conservancy believes landowners were not assured adequate time to respond to information submitted by the applicants in response to Environmental Condition Nos. 6,³¹ 7,³² and 21.³³ The Brandywine Conservancy requests that landowners be provided three to six months to submit comments on plans presented by AES and Mid-Atlantic. The Brandywine Conservancy also requests that the Commission establish a post-compliance protocol and allow for oversight and public participation by: (1) creating a post-compliance docket so individuals who have not intervened in the case can intervene in the post-compliance proceeding; (2) requiring the companies to allow parties affected by a particular condition a minimum of 60 days for review and comment; (3) establishing a dispute resolution procedure; (4) requiring companies to abide by best practices and industry standards in providing information and to file plans in bundles (e.g., filing several related plans at once); and (5) allowing affected parties to invoke Commission involvement as needed.

³¹ Environmental Condition No. 6 requires AES and Mid-Atlantic to file detailed alignment maps/sheets and aerial photographs identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that will be used or disturbed and that have not been previously identified in filings with the Secretary. The condition provides that construction clearance for each of these areas must be requested in writing, and that for each area the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species could be affected, and whether any other environmentally sensitive areas are within or abutting the area.

³² Environmental Condition No. 7 provides that before construction of the respective project components, AES and Mid-Atlantic must file for review and approval initial Implementation Plans and describes what the Implementation Plans must contain.

³³ Environmental Condition No. 21 provides that prior to construction of the Kirks Mill Route Variation A, Mid-Atlantic must file for review and written approval a site-specific mitigation plan developed in consultation with the affected landowner, describing how Mid-Atlantic will protect horses during construction and restoration in the vicinity of the Marker property.

35. With respect to Environmental Condition Nos. 53,³⁴ 54,³⁵ 55³⁶ and 56,³⁷ the Brandywine Conservancy maintains the Commission should describe the degree of information and detail that must be provided for a site specific plan. The Brandywine

³⁴ Environmental Condition No. 53 provides that, for any residence which requires a site-specific plan, Mid-Atlantic shall complete all construction related activities (clearing through restoration) within one week on any property, weather permitting. Once a property is restored it may not be used as a travel lane.

³⁵ Environmental Condition No. 54 provides that, for each residence which requires a site-specific plan, Mid-Atlantic shall offer to monitor the foundation of every permanent structure within 50 feet of the construction work area for damage from construction.

³⁶ Environmental Condition No. 55 provides that prior to construction, Mid-Atlantic shall provide individual site-specific residential plans to the owner of each residence within 50 feet of construction work areas and to the owner of each property where construction will be within 10 feet of a residence. Mid-Atlantic must file these plans with the Commission, along with owners' comments, for approval by the Director of OEP. The site-specific residential plans should clearly show, *inter alia*, the residence in relation to the new pipeline and any other existing pipelines or utilities; the boundaries of work areas; other nearby structures and residential features (including decks, fences, driveways, etc.), indicating which will be removed or subject to restrictions after construction; trees and other landscaping, identifying vegetation that will be removed and where trees will not be allowed after construction; locations of soil storage piles; equipment travel lanes; safety fencing and other safety features; and the distances between construction work areas and permanent structures. In addition, the site-specific plans must include a detailed description of construction techniques that will be used (such as reduced pipeline separation, centerline adjustment, working over existing pipelines, pipeline crossover, bore, *etc.*); estimates of the time for construction; a description of restoration and revegetation measures; and a detailed description of the measures Mid-Atlantic will implement to ensure public safety during construction and to minimize impact from dust, noise, and vibration.

³⁷ Environmental Condition No. 56 provides that, prior to construction, Mid-Atlantic must obtain approval from the Director of OEP for a Residential Access and Traffic Mitigation Plan that identifies potential road closures and the measures that Mid-Atlantic will implement to minimize construction traffic impacts on affected residents. The plan must identify procedures for notifying residents about planned road closures and disturbances and specifically address each subdivision crossed by the project.

Conservancy asserts a site specific plan should be required for temporary as well as permanent rights-of-way.

36. The Brandywine Conservancy objects to Environmental Condition No. 1³⁸ because it permits modifications to construction procedures and mitigation measures. The Brandywine Conservancy asks that the Commission restrict any modifications that involve measures to mitigate adverse impacts which the Commission relied on in finding the project would result in no significant impacts. The Brandywine Conservancy further proposes that Environmental Condition No. 1 be revised to allow parties to the proceeding an opportunity to challenge changes to mitigation measures approved by the Commission and to request changes to mitigation measures.

Commission Response

37. We cannot speak to information that the applicants may have provided directly to the Brandywine Conservancy. However, we can state that the record in this proceeding and the EIS accurately disclose and analyze the proposed route, as described in the applications as submitted and supplemented.³⁹ Any alterations to the mapping – which may result from modifications made to respond to landowner concerns – will be reflected in the final design plans. Maps must be completed prior to construction, as required by Environmental Conditions Nos. 5⁴⁰ and 6.⁴¹

³⁸ Environmental Condition No. 1 states that AES and Mid-Atlantic must file for modification of approved procedures, measures, and conditions; justify each modification relative to site-specific conditions; explain how each modification provides an equal or greater level of environmental protection than the original measure; and receive approval in writing from the Director of OEP before proceeding with or employing any modification. Environmental Condition No. 2 provides, with respect to pipeline facilities, that the Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation. Such delegated authority allows for modifying the conditions of the Commission's order and designing and implementing any additional measures deemed necessary (including stop-work authority) to ensure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impacts resulting from project construction and operation.

³⁹ *See, e.g.*, the general baseline maps for the entire project that were included in the EIS as Appendix B; Figure B-21 includes the segment from milepost 56.35 to 56.85 in which the Brandywine Conservancy has expressed an interest.

⁴⁰ Environmental Condition No. 5 provides that the authorized facility locations

(continued...)

38. Section 4.2.3.1 of the EIS⁴² discusses prime farmland soils. “Prime farmland soils” is a designation defined by the U.S. Department of Agriculture and is not subject to broader reinterpretation by the Commission. However, in section 4.8.1.3 of the EIS,⁴³ we recognize the importance of minimizing impacts to all agricultural land, and therefore require the development, through consultation with state and county agricultural agencies, of an Agricultural Impact Mitigation Plan.

39. Section 2.3.2.2 of the EIS⁴⁴ addresses appropriate construction techniques for waterbody and wetland crossings and the applicants’ Environmental Construction Plan; Appendix T of the EIS includes general construction diagrams for each crossing technique; and Appendix I of the EIS reviews the proposed method of crossing for each waterbody. We believe this information provides interested persons with sufficient, and sufficiently detailed, information to be able to understand and comment on the impacts to waterbodies and wetlands associated with pipeline construction. Thus, we see no need for any clarification on this subject.

40. With respect to the submission of comments, in the January 2009 Order we observed that since the April 2006 start of the pre-filing process and the January 2007 filing of the applications, the public was given notice and an opportunity to state views on the matters described in the December 2008 final EIS. With the exception of certain

shall be as shown in the EIS, as supplemented by filed alignment sheets, and shall include all of the Commission staff’s route variations identified in section 3.3.3 of the EIS. As soon as they are available and before the start of construction, AES and Mid-Atlantic must file revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Commission order. All requests for modifications of environmental conditions or of site-specific clearances must be written and must reference locations designated on these alignment maps/sheets. The condition provides that Mid-Atlantic’s exercise of eminent domain authority granted in any condemnation proceedings must be consistent with the authorized facilities and locations and that the right of eminent domain does not authorize it to increase the size of its natural gas pipeline to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

⁴¹ Environmental Condition No. 6 is described *supra* at n. 33.

⁴² Final EIS at 4-22.

⁴³ *Id.* at 4-205 to 4-209.

⁴⁴ *Id.* at 2-33 to 2-35.

pipeline routing alternatives, the final EIS was restricted to the reconsideration of issues that were previously addressed in the April 2008 draft EIS. Thus, while we acknowledge that the final EIS constitutes a voluminous and detailed review of the project's impacts, the draft EIS is similarly voluminous and detailed, and because it covers the same material, interested persons had the opportunity to respond to matters presented in the draft EIS in comments on the draft EIS.

41. With respect to potential pipeline routing variations that were proposed after the draft EIS was issued, the public was informed generally – with landowners along each alternative route notified individually – and invited to comment prior to issuance of the final EIS. Because the final EIS did not introduce novel issues, but only discussed aspects of the project that previously had been presented in the draft EIS or in the description of the alternative routes identified after the draft EIS, we affirm our finding that there was no cause to extend the period for public comment on the final EIS.

42. Given the several rounds of notice and comment that have been provided – in pre-filing, when applications were filed, with the draft EIS, and with route variations introduced subsequent to the draft EIS and prior to the final EIS – we do not believe there is any need to modify our standard procedure and create a separate “post-compliance docket” as the Brandywine Conservancy requests. We note that Condition No. 8 requires Mid-Atlantic to “develop and implement an environmental complaint resolution procedure for at least three years following the completion of construction that provides landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction and restoration of the right-of-way.” If a question arises regarding the order's environmental conditions, or subsequent modifications to the conditions, or AES's and Mid-Atlantic's adherence to the conditions, then any person (whether a party to this proceeding or not) can submit a comment to the Commission in this docket or seek to resolve the matter through the Commission's hotline. These options should satisfy the Brandywine Conservancy's request to enable “affected parties to invoke Commission involvement as needed.”

43. We find no need to require additional information concerning the site-specific plans that Mid-Atlantic is required to prepare pursuant to Environmental Condition No. 55 for properties where construction will occur within 50 feet of residences. The level of baseline detail for these site-specific plans is clearly identified in Environmental Condition No. 55, which includes both temporary and permanent disturbances associated with construction.⁴⁵ The site-specific plans require review and written approval by the

⁴⁵ The requirements of Environmental Condition No. 55 are described *supra* at n.38.

Director of OEP, which provides us the opportunity, when warranted, to require additional details or landowner consultations for a plan in advance of its acceptance.

44. Environmental Condition No. 1 allows for modifications to the environmental conditions in order to allow the Commission and the applicants to adjust to unforeseen circumstances (e.g., uncovering cultural artifacts in the course of construction) and to ensure other agencies are able to apply additional conditions as they deem necessary. We see no impropriety in permitting such flexibility, and stress that for any proposal to modify an environmental condition, the applicant must submit a written justification and explanation (stating “how each modification provides an equal or greater level of environmental protection than the original measure”), and receive written approval from the Director of OEP before the modification may be implemented. Because this presents a high – if not insurmountable – hurdle for any modification proposed by either of the project sponsors that could undercut mitigation measures we relied on in reaching our finding of no significant impact, we see no need to prejudge potential modifications by adopting the Brandywine Conservancy’s suggestion that we prohibit some types of modifications or eliminate the OEP Director’s discretion to approve modifications. The Commission’s staff will consider any comments submitted in response to any applicant or agency proposed modifications to the environmental conditions or plans.⁴⁶

B. Need for the Project

45. Baltimore County, the Bradford Glen Homeowners, the Brandywine Conservancy, the LNG Opposition Team, and Maryland argue that the project is not needed, pointing to: unused capacity at existing LNG terminals; updated forecasts indicating a less rapid rise in gas demand than was predicted in the 2006 data the Commission relied on in making its decision; delays in LNG terminal construction and expansion; recent efforts to promote domestic sources of energy, particularly renewable sources; a declining trend in energy costs, energy demand, and economic growth; a potential increase in unconventional domestic gas resources; and claims that the project is not designed to serve the Mid-Atlantic region, but to transport LNG imports to markets in the Mid-West and Southeast New England.

46. The LNG Opposition Team declares that “[m]erely because an applicant is willing to assume the financial risk of a project does not demonstrate the need for a project, or its

⁴⁶ We also note that Rule 385.1902 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.1902 (2009), provides that staff action pursuant to delegated authority may be appealed by filing a request for rehearing pursuant to Rule 385.713, 18 C.F.R. § 385.713 (2009).

financial viability.”⁴⁷ The LNG Opposition Team would have the Commission require the applicants to present evidence that the capital market stands ready to provide project financing. The Bradford Glen Homeowners also urges the Commission to reassess how it interprets need and reconsider how it views the public interest to give greater weight to a project’s possible health, safety, environmental, and national security risks.

47. Baltimore County believes that importing foreign-sourced LNG conflicts with a goal of achieving energy independence, which it states “is vital to national defense and a sound energy policy.”⁴⁸ The LNG Opposition Team claims that “the major producers of natural gas are forming a cartel that will make America a hostage to foreign gas exporter interests, which runs contrary to the U.S. national security interest.”⁴⁹

Commission Response

48. In this case, a pre-filing proceeding was initiated in April 2006 and applications were submitted on January 8, 2007. During our review of the proposal, we made use of available estimates of national and regional energy supplies and consumption through 2030.⁵⁰ Those estimates unambiguously anticipate an increase in energy demand in the region that the project is designed to serve.⁵¹ Parties requesting rehearing do not

⁴⁷ LNG Opposition Team’s *Request for Rehearing* at 40.

⁴⁸ Baltimore County’s *Request for Rehearing* at 4.

⁴⁹ LNG Opposition Team’s *Request for Rehearing* at 3.

⁵⁰ See the final EIS at 1-3 and 1-4. We have previously commented on the important role that LNG will play in meeting future domestic demand and have found that the public interest is served through encouraging gas-on-gas competition by introducing new imported supplies. See, e.g., *Hackberry LNG Terminal, L.L.C.*, 101 FERC ¶ 61,294, at P 26 (2002). We also have found that LNG imports provide a needed diversification in current gas supplies, as well as a means to compensate for any declines in domestic production and Canadian gas imports. See, e.g., *Broadwater Energy LLC (Broadwater)*, 122 FERC ¶ 61,255, at P 31 (2008).

⁵¹ Specifically New York, New Jersey, Pennsylvania, Maryland, Delaware, and Virginia, and the District of Columbia, and while we find the project is designed primarily to meet gas consumers’ demands in these states and the District of Columbia, it is possible that LNG imports into the AES terminal could also support markets in the Mid-West and Southeast New England (more likely by displacement than by being transported to these regions). This potential to impact markets outside of the Mid-Atlantic region does not undermine our finding that the project will serve to satisfy a

(continued...)

challenge our conclusions based on the information we considered; rather, they ask that we reopen our review to account for more recent forecasts of future energy needs. Such changes in circumstances during an agency's review of a request for authorization have been considered by the Supreme Court, which has commented that:

Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated . . . If upon the coming down of the order litigants might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.⁵²

49. We recognize that between the time the applications were submitted in January 2007 and our order was issued in January 2009, economic circumstances changed. However, this is no more than a truism that holds for every project which has ever come before us. As a matter of practicality, we cannot track changing energy and economic results in real time. Instead we accept a snap shot of circumstances at the time we initiate our review, and consider a proposed project based on those circumstances. Admittedly, this is an imperfect means of assessing a proposal, since it treats a running stream of constantly updating data as if it was static. However, to do otherwise would preclude us from ever reaching anything more than a provisional interpretation which, like our conclusion in this case, would still be based on data that are inevitably outdated on the day a decision is declared. Thus, we rely on a company's reassessment and verification of a project's viability before going forward, taking into account recent market changes. However, our reliance on a company's willingness to assume the financial risk of a project in support a finding of need for a project does not cause us to give any less weight to a project's possible health, safety, environmental, and national security risks in determining whether to approve the project.

50. Parties requesting rehearing are adamant that recent changes in the domestic and foreign economy render the project unnecessary and ask AES and Mid-Atlantic to present evidence of the project's financial viability. We are confident the project sponsors will not continue to invest in a profitless endeavor, and thus find no reason to require AES and Mid-Atlantic to submit additional financial information. The applicants' updated

demonstrated domestic demand.

⁵² *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978), quoting *ICC v. Jersey City*, 322 U.S. 503, 514 (1944). See also *Northern Lines Merger Cases*, 396 U.S. 491, 521 (1970).

assessment of their project's financial viability will be self-evident, either funds will be forthcoming and the project will move forward, or funds will dry up and the project will die.⁵³

51. For a gas project of any significant size, it typically takes years of planning to be able to prepare an application, another year or more before the Commission can complete its assessment of the application, then another year or more to complete construction of the project. For an LNG terminal project, these time frames will be longer still. Once built, the service life of major gas infrastructure facilities can span several decades. Given the period of time before the AES and Mid-Atlantic project will go into service, and the period of time the project is likely to remain in service, we find no reason to view economic changes that are predicted to be, when compared to the life of the project, short-term, as necessarily undermining the financial viability of the project.

52. Parties seeking rehearing identify potential developments that could dampen long-term demand for LNG imports, e.g., an increase in domestic gas supplies from non-conventional sources. However, there are offsetting potential developments that could result in LNG imports rising over time, e.g., the substantial increase in liquefaction capacity scheduled to come on line in the next few years as traditional LNG exporters expand capacity and countries that have not previously exported LNG add new liquefaction facilities, which should allow the United States, with gas storage capacity far greater than any other consuming nation, to take in and offload LNG tankers during times when worldwide supply exceeds demand. Given that there is not a single accepted model to predict the nation's future need for LNG – other than a consensus that future energy demand will increase – we affirm our previously stated preference permitting determinations on the number, type, timing, and location of energy facilities to be guided by market forces, and not by Commission fiat.⁵⁴

53. The Bradford Glen Homeowners object to our implicit presumption that the outcome of pending surveys and studies will favor the project sponsors. In balancing a proposed project's anticipated benefits against its anticipated burdens we do assume, in

⁵³ As we stated in the January 2009 Order: “AES and Mid-Atlantic will assume the risk of the project's cost . . . since as new entrants to the natural gas market, neither has existing customers that might subsidize project costs in any way. It has been our experience that our policy of placing the applicant at risk by prohibiting subsidization of new projects by existing customers ensures that an authorized project will not go forward without adequate market support.” 126 FERC ¶ 61,019 at P 25.

⁵⁴ *See, e.g., Bradwood Landing LLC*, 124 FERC ¶ 61,257, at P 86 (2008).

effect, the answers to outstanding questions concerning impacts will weigh in favor of the proposal. However, we counterbalance this by conditioning our authorization to ensure that the project cannot be realized until the applicant is able to offer a satisfactory response to unresolved objections, which it can only do by fulfilling each of an order's economic, environmental, safety, and security conditions.

54. The question of whether it is inconsistent with the national interest to rely on gas supplies from foreign countries is appropriately addressed to the Department of Energy, which has jurisdiction under NGA section 3 over requests to import or export natural gas.⁵⁵ The Commission, as a matter of policy, takes no position on the relative merits of different types or sources of energy.⁵⁶

C. Contingent Nature of the Commission's January 2009 Order

55. Several parties argue the Commission should not have issued its final order until other agencies had reached decisions on necessary permits and approvals, insisting that doing so violates: (1) the NGA and the Administrative Procedures Act (APA)⁵⁷ by acting on the basis of inadequate information; (2) the Clean Water Act,⁵⁸ because a water quality certification under section 401(a) of that statute had not been issued; (3) the National Environmental Policy Act (NEPA),⁵⁹ for failing to take a hard look at the project's environmental impacts, because the full range of impacts cannot be ascertained until after environmental consultations are completed; (4) the National Historic Preservation Act (NHPA),⁶⁰ the Endangered Species Act (ESA),⁶¹ and the Magnuson-

⁵⁵ See DOE policy guidelines with respect to assessing the public interest in natural gas imports and exports. 49 FR 6684 (Feb. 22, 1984).

⁵⁶ For example, in answer to comments urging the Commission to act as a more forceful advocate for renewable or green energy sources in promoting alternatives to the project, the final EIS explains that "it is not within the FERC's authority to force or instruct applicants to 'go green' or seek renewable energy sources as a solution to regional energy demands. Final EIS at 3-4.

⁵⁷ 5 U.S.C. § 551 *et seq.* (2006).

⁵⁸ 33 U.S.C. § 1251 *et seq.* (2006).

⁵⁹ 42 U.S.C. § 4321 *et seq.* (2006).

⁶⁰ 6 U.S.C. § 470 *et seq.* (2006).

⁶¹ 16 U.S.C. § 1531 *et seq.* (2006).

Stevens Fisheries Conservation and Management Act (MSA),⁶² because environmental consultations were not completed; and (5) the Department of Transportation (DOT) pipeline safety standards,⁶³ because all of the required articles of pipeline safety and management were not written, submitted, formally reviewed, and approved by DOT, and then filed with the Commission, prior to its final authorization. Baltimore County adds that the Commission should not have issued its order until the project sponsors had complied with all the conditions in the appendix to the order.⁶⁴

56. Parties reject the Commission's previously stated position that its practice – of issuing a final order authorizing a gas project contingent upon studies and analyses being completed and an applicant subsequently obtaining favorable decisions on outstanding requests for necessary federal authorizations – is routine, longstanding, and a practical response to the reality that it can be impossible to obtain all necessary federal authorizations in advance of a Commission's order without unduly delaying a project.⁶⁵

57. Maryland states that when the January 2009 Order was issued, the Maryland Department of the Environment had yet to issue or waive a water quality certification under section 401 of the Clean Water Act. Maryland asserts the Commission should have withheld approval for the project in view of the Clean Water Act statement that “[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived.”⁶⁶ Maryland insists the Commission's issuance of a

⁶² 16 U.S.C. § 1801 *et seq.* (2006).

⁶³ 40 C.F.R. Part 192 (2009).

⁶⁴ Baltimore County urges the Commission to adopt the phrasing in orders such as *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,342 (2008) and *Gulf South Pipeline Company, LP*, 101 FERC ¶ 61,204 (2002), which state in an Ordering Paragraph that the Commission's project authorization shall be conditioned on compliance with the environmental conditions in the appendix to the order.

⁶⁵ *See, e.g., Bradwood Landing, LLC*, 126 FERC ¶ 61,035 (2009).

⁶⁶ 33 U.S.C. § 1341(a). Maryland adds that because both the Commission and the COE are required to grant a “license or permit” for the project, both must withhold approval until after the Maryland Department of the Environment issues a water quality certification or waives its right to do so. We concur that the project requires separate COE and Commission approvals. However, as discussed below, we find the Maryland Department of the Environment has waived its right to impose any requirements pursuant to a Clean Water Act section 401 water quality certification.

conditional authorization is inconsistent with this provision, citing *City of Tacoma, Washington v. FERC (Tacoma)*,⁶⁷ in which the court found the Commission lacks authority under the Federal Power Act to issue a license for a hydroelectric facility until the state first issues a water quality certification that satisfies section 401 of the Clean Water Act.⁶⁸ The applicants respond by asserting that the water quality certification requirement had been waived, because the Maryland Department of the Environment had failed to reach a decision within the statutorily-allotted one year time limit.

58. The Brandywine Conservancy argues that environmental impact statements that do not offer adequate details about mitigation and instead include conditions that merely allow the applicant to comply with those mitigation measures that are eventually developed are deficient.⁶⁹ It further argues that listing conditions without explanation is also deficient, as an agency must explain the rationale for the conditions and how they will address adverse impacts.⁷⁰ As examples, the Brandywine Conservancy points to Environmental Condition No. 21 which directs Mid-Atlantic to file a plan to protect horses during construction and restoration; Environmental Condition No. 33, which requires Mid-Atlantic to file a final Aquatic Resources Mitigation Plan that describes impacts on wetlands and mitigation and monitoring prior to construction; Environmental Condition No. 35, which requires Mid-Atlantic to file a final Exotic and Invasive Species Control plan; and Environmental Condition No. 82, which requires development of construction and mitigation plans for Octoraro Creek and Brandywine crossings.

Commission Response

59. Our discretion in exercising our NGA section 7 jurisdiction is “extremely broad”⁷¹

⁶⁷ 460 F.3d 53 (D.C. Cir. 2006). Maryland maintains the same result was obtained in other Federal Power Act hydropower cases, citing *Keating v. FERC*, 927 F.2d 616, 619 (D.C. Cir. 1991) and *PUD No.1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 707 (1994).

⁶⁸ *Id.* at 68.

⁶⁹ The Brandywine Conservancy’s *Request for Rehearing and Stay* at 22, quoting *Mid States Coalition for Progress*, 354 F.3d 520, 554 (8th Cir. 2003) and citing *Confederated Tribes & Bands of the Yakima Indian Nation v. FERC (Yakima)*, 746 F.2d 466 (9th Cir. 1984).

⁷⁰ *Id.*, citing *Northwest Indian Cemetery Protective Association v. Block*, 764 F.2d 581 (9th Cir. 1985).

⁷¹ See *Transcontinental Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th

(continued...)

and NGA section 3 affords us similarly broad authority to act to impose “such terms and conditions” as we find “necessary or appropriate” under the circumstances.⁷² In view of this, we see no impropriety in our routine practice of issuing a final order granting authorization for a project contingent on findings of future studies and favorable decisions on requests pending before other agencies. Such orders set forth the conditions under which a project may proceed, but until outstanding federal authorizations are obtained and the conditions of these authorizations and our final order are met, the applicant remains unable to exercise authority under the NGA to construct or operate a project. In other words, unless and until the necessary federal authorizations are granted, and the specified conditions of those authorizations and the Commission’s final order are fulfilled, no action can be undertaken that would have any adverse impact on the environment.

60. Further, our January 2009 project approval does not impinge on the decision-making process or the validity or force of decisions of the other federal agencies, and state agencies acting under federally delegated authority, that review requests for permits, authorizations, certifications, opinions, or other approvals. Our practice of issuing orders granting contingent project approval⁷³ is a practical response to the reality that, in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission issuing its authorization without unduly delaying the project.⁷⁴ We take this approach in

Cir., 1979). *See also FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (the Commission is the guardian of the public interest and has a wide range of discretionary authority in determining whether authorizations should be granted).

⁷² *See Distrigas Corp. v. FPC*, 495 F.2d 1057, 1066 (D.C. Cir. 1974) (construing NGA section 3 and 7 requirements as equivalent).

⁷³ *See, e.g., Golden Pass LNG Terminal LP*, 112 FERC ¶ 61,141 (2005); *Freeport LNG Development, L.P.*, 107 FERC ¶ 61,278 (2004); *Transco*, 102 FERC ¶ 61,305 (2003); *Islander East Pipeline Company*, 102 FERC ¶ 61,054 (2003); *Transco*, 98 FERC ¶ 61,027 (2002); *Gulfstream Natural Gas System, L.L.C.*, 94 FERC ¶ 61,185 (2001); *Florida Gas Transmission System*, 90 FERC ¶ 61,212 (2000); *Mojave Pipeline Company*, 72 FERC ¶ 61,167 (1995); and *Tuscarora Gas Transmission Company*, 71 FERC ¶ 61,225 (1995).

⁷⁴ *See, e.g., Broadwater*, 124 FERC ¶ 61,225, at P 59 (2008); *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 26 (2006); and *Millennium Pipeline Company, L.P.*, 100 FERC ¶ 61,277, at P 225-231 (2002).

order to make timely decisions on matters related to our NGA jurisdiction that will inform project sponsors, and other licensing agencies, as well as the public.⁷⁵

61. With respect to the status of the applicants' request for a water quality certification, the Clean Water Act specifies that "after receipt of such request" the decision-making authority has "a reasonable period of time (which shall not exceed one year)" to act, and if it "fails or refuses to act" within this time, then the water quality certification requirements "shall be waived."⁷⁶ AES and Mid-Atlantic maintain they submitted a water quality certification request to the Maryland Department of the Environment on January 8, 2007, as part of their State Coastal Facilities Review Act application.⁷⁷ Maryland, in turn, maintains that that the public notice of availability of the draft EIS, issued by the Commission jointly with the COE and published in the *Federal Register* on May 2, 2008,⁷⁸ "expressly served as the triggering event" to start the clock for the year allotted to the Maryland Department of the Environment to act on the water quality certification request.⁷⁹

62. We disagree with Maryland's interpretation of "the triggering event" for the start of the one-year decision-making period. We view the triggering event to be – as specified in the statute – the "receipt of" the request for a water quality certification. While the May 2, 2008 *Federal Register* notice observed that the project would require "a Water Quality Certification in accordance with Section 401 of the Clean Water Act from the Maryland Department of the Environment," and the state agency had "a statutory limit of one year in which to" act,⁸⁰ the recitation of these statutory provisions

⁷⁵ This practice avoids having the Commission (1) place its administrative process on hold indefinitely until states with delegated federal authority reach final decisions, or (2) deny applications when all federal permits have not been issued by the time the Commission completes its NGA review. Either of these approaches could preclude needed infrastructure projects from being placed in service in a timely manner, to the detriment of consumers and the public in general.

⁷⁶ 33 U.S.C. § 1341(a)(1) (2006).

⁷⁷ See Md. Code Ann., Envir. §§ 14-504 and 14-508.

⁷⁸ 73 FR 24276. The Commission issued the notice of availability of its draft EIS on April 25, 2008,

⁷⁹ Maryland's *Request for Rehearing*, at 5 (Feb. 13, 2009).

⁸⁰ 73 FR 24276, 24277.

did not, and could not, modify the “triggering event” set forth in the statute, i.e., the agency’s January 8, 2007 “receipt of” the applicants’ request.⁸¹

63. In accord with the provisions of the Clean Water Act, once the Maryland Department of the Environment received the water quality certification request, it had one year to act. Because the request was submitted on January 8, 2007,⁸² and because the Maryland Department of the Environment failed or refused to act for over two years, finally reaching a decision on April 24, 2009, we find that the water quality certification requirements have been waived.

64. With respect to NEPA, we have found that the review that takes place in the context of our pre-filing process and during the development of our draft and final EIS enables us to identify and take a hard look at the potentially adverse environmental impacts of a proposed project. This permits us to make an informed comparison among possible alternatives to the proposed project and, as necessary, to impose environmental mitigation conditions so we can be confident the project does not result in unacceptable adverse impacts. We believe this approach meets the NEPA expectation that an EIS contain “a reasonably complete discussion of possible mitigation measures,”⁸³ and that these measures “be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.”⁸⁴

65. Parties requesting rehearing point to statutory language that they insist renders the issuance of our January 2009 Order premature. For example, the Coastal Zone

⁸¹ See Table 1.3-1 of the draft and final EIS, designating January 8, 2007 as the date the water quality certification request was submitted to the Maryland Department of the Environment.

⁸² See *Georgia Strait Crossing Pipeline LP*, 107 FERC ¶ 61,065 (April 20, 2004) (Commission will calculate the one-year review period under Clean Water Act section 401 “from the day a project sponsor submits a request to an agency”) and *California v. FERC*, 966 F.2d 1541, 1554 (9th Cir. 1992) (finding the Commission rule for hydropower projects that one-year review period for a clean water certification starts when a state agency receives an application to be “fully consistent with the letter and intent of 401(a)(1) of the [Clean Water Act]”).

⁸³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

⁸⁴ *City of Carmel-By-The-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1154 (9th Cir. 1997) quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 353.

Management Act (CZMA)⁸⁵ states that “[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant’s certification.”⁸⁶ In addition, section 176 of the Clean Air Act states that “[n]o department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title.”⁸⁷ Parties cite additional statutes that either have similar language or that they construe to require that the Commission not issue an order granting NGA authorization for a gas project in advance of an applicant obtaining other necessary federal authorizations.

66. We do not view our January 2009 Order as inconsistent with any cited statute, since in that order we emphasized that the applicants would be precluded from initiating construction and operation until they receive all necessary federal authorizations and meet all environmental conditions. We believe this is in accord with *Public Utility Commission of California v. FERC (CPUC v. FERC)*,⁸⁸ in which the court explained that “[w]hile it is generally true that ‘NEPA procedures must insure that environmental information is available to public officials and citizens *before decisions are made and before actions are taken*’⁸⁹ . . . we held in [*Illinois Commerce Commission v. ICC*,⁹⁰] that this did not prevent an agency from making even a final decision so long as it assessed the environmental data before the decision’s effective date.”⁹¹

⁸⁵ 16 U.S.C. § 1456(c)(3)(A) (2006). In this case, on July 9, 2007, Maryland’s Department of the Environment concluded that the proposal was not consistent with its coastal zone management plan. AES appealed, and on June 26, 2008, the Secretary of Commerce found that the proposed project would be consistent with the objectives of the CZMA and further the national interest in a significant and substantial manner, that the national interest furthered by the project outweighed its adverse coastal effects, and that there is no reasonable alternative available for the project.

⁸⁶ 16 U.S.C. § 1456(c)(3)(a) (2006).

⁸⁷ 42 U.S.C. § 7506(c)(1) (2006). Regulations discussed below implementing the Clean Air Act have been issued by the EPA.

⁸⁸ 900 F.2d 269 (D.C. Cir. 1990).

⁸⁹ *Citing* 40 C.F.R. § 1500.1(b) (emphasis added by the court).

⁹⁰ 848 F.2d 1246 (D.C. Cir. 1988).

⁹¹ 900 F.2d 269, 282, *citing* 848 F.2d at 1259.

67. In the *CPUC v. FERC* case, as here, upon finding the non-environmental aspects of the project to be consistent with the public interest, we approved the project, with our approval contingent on the applicants' demonstrating the project's compliance with our environmental conditions and the receipt of other necessary federal environmental authorizations. In our January 2009 Order, we do not presume all necessary federal authorizations will be forthcoming; accordingly, the applicants will not receive approval for construction and operation until all applicable environmental conditions are fulfilled. Given this, we view the nature of a Commission order granting NGA authorization as "an incipient authorization without current force and effect," since absent action by the applicant and other state and federal agencies, and following that further action on the part of the Commission, construction cannot start.⁹² If an agency decides a project does not merit authorization – a decision the Commission is without authority to impact or alter – then the project cannot go forward.⁹³

⁹² *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 21 (2006). We observed that "[c]onditional Commission orders have been described in the context of constitutional standing analysis as 'without binding effect.'" *Citing New Mexico Attorney General v. FERC*, 466 F.3d 120, 275 (D.C. Cir. 2006), *quoting DTE Energy Co. v. FERC*, 394 F.3d 954, 960-61 (D.C. Cir. 2005). *Id.* at P 21, n. 27.

⁹³ For example, in *Broadwater* the Commission issued an order approving a new LNG terminal in Long Island Sound contingent upon, among other criteria, compliance with the CZMA. However, the state, acting under federally delegated authority, determined the project would be inconsistent with the state's coastal zone management plan; thus, the project could not go forward. In *Broadwater*, as here, we cite *CPUC v. FERC*. Maryland objects to our referencing this case, arguing that the authorization issued in *CPUC v. FERC* was conditioned on a single review procedure which was completed prior to the decision's effective date, whereas here the Commission's authorization is effective upon the order's issuance despite various environmental reviews remaining incomplete. We believe *CPUC v. FERC* validates our practice of authorizing a project subject to the completion of pending environmental studies and the development of environmental mitigation measures based on those studies, since as the court in that case found, the "Commission's deferral of decision on specific mitigation steps until the start of construction, when a more detailed right-of-way would be known, was both eminently reasonable and embraced in the procedures promulgated under NEPA." 900 F.2d 269, 282-283. In this case, as in *Broadwater*, approval to proceed is subject to completing studies that confirm the project's final design will be consistent with criteria specified in our and other agencies' authorizations; if the studies do not support such a finding, the project cannot proceed until it is modified or measures are put

(continued...)

68. The NGA authorization granted by our January 2009 Order is conditioned on completion of ESA mitigation measures. This is consistent with the ESA's regulatory requirements, which permit a federal agency to issue an authorization before the ESA consultation process has been completed, if that authorization is conditioned upon compliance with the ESA.⁹⁴

69. With respect to the Clean Air Act, Environmental Protection Agency (EPA) regulations are consistent with this procedural approach because they require that a federal agency "must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken."⁹⁵ We view "action" as commencing construction, not issuing an order conditionally authorizing a project.⁹⁶ Thus, while a Clean Air Act conformity decision must be reached "before the action is taken,"⁹⁷ we view the "relevant activity,"

in place to ensure the project will not cause any unacceptable adverse environmental impacts.

⁹⁴ See *No Oilport! v. Carter*, 520 F.Supp. 344, 364-366 (W.D. Wash. 1981) (issuance of pipeline right-of-way permit before completion of ESA consultation complied with ESA because Notice to Proceed with construction was "explicitly contingent upon compliance with the ESA"). See also *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985) (conditioning nationwide permit on compliance with ESA was "consistent with the [COE's] obligation" under ESA section 7(a)(2)).

⁹⁵ See 40 C.F.R. § 51.850(b) (2009). EPA's discussion of the appropriate timing of a conformity determination is consistent with such a reading. EPA noted specifically that a "full conformity determination on all aspects of an activity must be completed before any portion of the activity is commenced." 58 FR 63214, 63240 (Nov. 30, 1993).

⁹⁶ 40 C.F.R. § 51.852 (2006) provides in part that "Federal action means any activity engaged in by a department, agency, or instrumentality of the Federal Government, or any activity that a department, agency or instrumentality of the Federal Government supports in any way, provides financial assistance for, licenses, permits, or approves, other than activities related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. § 1601 *et seq.*). Where the Federal action is a permit, license, or other approval for some aspect of a non-Federal undertaking, the relevant activity is the part, portion, or phase of the non-Federal undertaking that requires the Federal permit, license, or approval."

⁹⁷ 40 C.F.R. § 51.850(a) (2009).

i.e., “the part, portion, or phase of the non-Federal undertaking” requiring the Commission’s “permit, license, or approval,”⁹⁸ as our approval to commence construction, and prior to issuing such approval, we will have completed our final Clean Air Act conformity analysis .

70. Regarding the CZMA, NOAA states that “any form of federal authorization must have the required elements to be considered a ‘federal license or permit’ for CZMA purposes.”⁹⁹ One of these required elements is that the federal license or permit “authorizes an activity.”¹⁰⁰ No activity involving construction or operation by AES or Mid-Atlantic was authorized in the January 2009 Order. Further, CZMA regulations support the Commission’s approach in this proceeding by imposing an affirmative obligation to act so that federal agencies “not delay processing applications pending receipt of a state agency’s concurrence.”¹⁰¹

71. Maryland contends our approach is incompatible with the outcome in *Tacoma*, a case considering the CZMA and Commission authority under the Federal Power Act. We have previously observed that *Tacoma* considered the issue of what constitutes a state certification under the Clean Water Act and only references in passing the Commission’s granting a license or permit within the meaning of the statute.¹⁰² We find *Tacoma* does

⁹⁸ *Id.*

⁹⁹ *Coastal Zone Management Act Federal Consistency Regulations*, 71 FR 788, 795 (Jan. 5, 2006).

¹⁰⁰ *Id.*

¹⁰¹ 15 C.F.R. § 930.62(c) (2009). We note a recent decision by the D.C. Circuit Court of Appeals on Delaware’s appeal of Commission orders authorizing Crown Landing’s proposed LNG terminal on the Delaware River conditioned on the favorable outcome of Delaware’s environmental reviews under the CZMA and the Clean Air Act. Delaware argued that the Commission could not authorize the project, even conditionally, until it reached a decision on the request for CZMA and Clean Air Act authorizations. Prior to the court proceeding, Delaware completed its reviews and denied the requested authorizations, thereby precluding the applicant from proceeding with the project. In view of this, the court dismissed the case, finding Delaware had suffered no injury worthy to give it standing. *See Crown Landing LLC*, 115 FERC ¶ 61,348 (2006), *reh’g denied and clarified*, 117 FERC ¶ 61,209 (2006), *appeal dismissed, Delaware Dept. of Natural Resources and Environmental Control v. FERC*, 558 F.3d 575 (D.C. Cir. 2009).

¹⁰² *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 27, n.38 (2006).

not involve “the direct construction” of the relevant “statutory terms with respect to procedural fact patterns similar to those presented here,” but “merely cite[s] or broadly describe[s]” the CZMA or the Clean Water Act.¹⁰³ Thus, we do not believe that there is any direct judicial precedent that speaks to our authority to conditionally approve applications in relation to state authority under the CZMA, the Clean Air Act, or any of the other statutes referenced by parties seeking rehearing. We conclude it was within our discretion to issue our January 2009 Order conditionally authorizing the AES and Mid-Atlantic project in advance of other agencies reaching decisions on other necessary federal authorizations.

72. In prior proceedings, in explaining our rationale for issuing orders granting conditional authorization, we have cited *City of Grapevine, Texas v. Department of Transportation (City of Grapevine)*,¹⁰⁴ a case in which the court upheld the Federal Aviation Administration's (FAA) approval of a runway project, conditioned upon the applicant's subsequent compliance with the NHPA. The Commission found NHPA to be analogous to the CZMA and Clean Water Act, in that the NHPA states the head of a federal agency “shall,” prior to the approval of the expenditure of any federal funds on an undertaking, take into account the effect of the undertaking on historic properties. The Commission explained that “this language expressly prohibits a federal agency from acting prior to compliance with its terms, a fact that did not deter the *City of Grapevine* court from upholding the FAA’s conditional approval of a runway.”¹⁰⁵

73. Maryland objects to our reliance on this decision, asserting it does not stand for the proposition that a federal agency can approve a project prior to completing the NHPA consultation, as that issue “appears not to have been before the Court.”¹⁰⁶ Maryland argues this case was limited to a decision on the approval of the expenditure of federal funds and did not reach the issue of whether it was legitimate to issue a license in advance of satisfying the NHPA requirements.

74. We read *City of Grapevine* differently. Whether or not the case turned on the issue of the legitimacy of expending federal funds or issuing a license, the court squarely faced the matter of a federal agency issuing a project approval subject to subsequently

¹⁰³ *Id.* at P 16, n.16.

¹⁰⁴ 17 F.3d 1502 (D.C. Cir. 1994).

¹⁰⁵ *Broadwater*, 124 FERC ¶ 61,225, at P 60 (2008) and *Georgia Strait Crossing Pipeline LP*, 108 FERC ¶ 61,053, at P 16 (2004).

¹⁰⁶ Maryland’s *Request for Rehearing* at 12.

fulfilling certain conditions. Petitioners argued the FAA had acted unlawfully by conditionally approving a runway project in advance of completing the review process required by NHPA. Petitioners rejected the FAA's approach, whereby it issued a conditional approval, then completed its final assessment seven months later after reviewing the conclusions and recommendations arising out of the consultation process required by NHPA section 106, then undertook six months of consultation and deliberation before concluding that there would be no adverse effect within the meaning of the NHPA. The court described this procedural approach and stated that:

Much of the relevant activity ... took place after the FAA had issued its Decision. Although it is of course desirable for the § 106 process to occur as early as possible in a project's planning stage, we do not agree with the petitioners that in this case the FAA's conditional approval of the West Runway violated any requirement of the NHPA. Merely by issuing its Decision the FAA did not "approve the expenditure of any Federal funds" for the runway ... [and] if the [applicant] commits its own resources to the West Runway – for further planning, engineering, or what have you short of construction – although the runway was only conditionally approved, then it does so at the risk of losing its investment should the § 106 process later turn up a significant adverse effect and the FAA withdraw its approval. In sum, because the FAA's approval of the West Runway was expressly conditioned upon completion of the § 106 process, we find here no violation of the NHPA.¹⁰⁷

We find the court's reasoning and result supports our interpretation of the case as establishing the principle that an agency can authorize a project conditioned on the subsequent compliance with pending applications for other necessary project authorizations.

75. Maryland further argues that the Commission's interpretation of the holding in the *City of Grapevine* case is "directly contradicted" by *Mid States Coalition for Progress v. Surface Transportation Board (Mid States)*,¹⁰⁸ quoting the court's statement that the regulations of the Advisory Council on Historic Preservation (ACHP) "when read in their entirety, thus permit an agency to defer completion of the NHPA process until after the NEPA process has run its course (and the environmentally preferred alternatives chosen), but require that NHPA issues be resolved by the time that the license is issued."¹⁰⁹ We

¹⁰⁷ 17 F.3d 1502, 1509.

¹⁰⁸ 345 F.3d 520 (8th Cir. 2004).

¹⁰⁹ 345 F.3d 520, 554.

do not view this as irreconcilable with our practice, in that the ACHP regulations permit an agency granting project approval to "defer final identification and evaluation of historic properties if it is specifically provided for in a programmatic agreement executed pursuant to § 800.14(b)."¹¹⁰

76. Our January 2009 Order discussed the programmatic agreement to be completed in consultation with the Maryland and Pennsylvania SHPOs, ACHP, and each applicant.¹¹¹ Environmental Condition Nos. 91 and 92 of the January 2009 Order and the programmatic agreements ensure the applicants will take measures, as required by section 800.8(c)(4) of ACHP's regulations, to "avoid, minimize, or mitigate" adverse effects on identified historic properties and other historic properties that may be identified following the completion of outstanding cultural surveys.¹¹² We believe this approach is consistent with the court's cautionary comment in *Mid States* that while "an agency may not require consultation in lieu of taking its own 'hard look' at the environmental impact of a project, we do not believe that NEPA is violated when an agency, after preparing an otherwise valid EIS, imposes consultation requirements in conjunction with other mitigating conditions."¹¹³

¹¹⁰ 36 C.F.R. § 800.4(b)(2) (2009).

¹¹¹ 126 FERC ¶ 61,019, Cultural Resources at PP 139-141.

¹¹² See 36 C.F.R. § 800.8(c)(4) (2009), which states:

If the agency official has found, during the preparation of an [Environmental Assessment (EA)] or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this subpart shall then be satisfied when either: (i) A binding commitment to such proposed measures is incorporated in: (A) The [Record of Decision], if such measures were proposed in a DEIS or EIS; or (B) A [Memorandum of Agreement] drafted in compliance with § 800.6(c); or (ii) The Council has commented under § 800.7 and received the agency's response to such comments.

¹¹³ 345 F.3d 520, 544.

77. We do not disagree with the Brandywine Conservancy's assertion that an EIS must describe mitigation measures in detail, and not simply mandate compliance with indistinct measures to be developed later. We do disagree, however, with their claim that our EIS failed to do so. Each of the mitigation measures in the January 2009 Order was discussed in the EIS, wherein Commission staff considers the adverse environmental impacts the proposed project might produce, and then sets forth conditions intended to avoid or alleviate these impacts.¹¹⁴ The environmental conditions resolve matters for most of the project impacts. In Appendix P of the final EIS, each comment received is summarized, and then the locations in the EIS are noted where the issues raised in each comment are addressed.

78. At the time we issued our January 2009 Order, we were not satisfied that all the potential environmental aspects of the proposed project would be adequately mitigated, because certain aspects of the project had not been assessed in sufficient detail. This was due to various difficulties, such as landowners barring access to the proposed right-of-way¹¹⁵ or studies that had not been completed, e.g., a species survey that must be conducted within a distinct seasonal time frame. In these comparatively few instances in which further data was needed to determine appropriate responses to potential adverse impacts, we specified which additional surveys, studies, or plans we needed to be able to refine and finalize our mitigation measures. We allowed for final versions of some plans to be developed after issuance of our January 2009 Order to enable other agencies and parties to provide input on how to further minimize project impacts. We also maintain the flexibility to revise our conditions to adapt to unforeseen circumstances that may arise in the course of construction.

79. Whereas the Brandywine Conservancy objects to the provisional aspects of certain environmental conditions, we find (1) that the description of the potential impacts to be mitigated and the steps that must be completed in order to do so are sufficiently precise, and (2) affording the Commission, the applicants, and the public some flexibility in determining how environmental impacts will be addressed allows for more timely and

¹¹⁴ See section 5 of the EIS, summarizing our findings and listing each proposed condition.

¹¹⁵ For example, Environmental Condition No. 21 reflects such circumstances: a landowner contends the project will necessitate relocating and boarding horses, but we are unable to respond to this concern until we are able to review where the horses are in relation to the right-of-way, the location and condition of fences on the property, and the extent to which transporting, storing, and installing pipe will be incompatible with the current use of the property. Only after obtaining and reviewing this information will we be in a position to act, if warranted, to impose appropriate conditions.

more accurate information to be incorporated into the mitigation measures that are ultimately adopted. As discussed herein, to identify and respond to every possible project impact before reaching a decision on the merits of the project is impractical, if not impossible. We believe our procedural approach is an appropriate means of satisfying the NEPA requirement to take a hard look at projects without unduly delaying projects.

D. Alternatives

80. Maryland promotes the alternative of the Mittal Steel site as its preferred location for AES's LNG terminal, as the Mittal Steel site is approximately 1.9 miles from residential areas and would require less dredging. It contends the Commission's failure to consider this site fails to meet the standard of "rigorous exploration and objective evaluation of the environmental impacts of all reasonable alternative actions, particularly those that might . . . avoid some or all of the adverse environmental effects."¹¹⁶ NOAA Fisheries and the COE ask AES to affirm that the Mittal Steel site is not available.

81. The Brandywine Conservancy claims the Commission did not adequately consider relying on renewable energy resources as a substitute for LNG imports, or using an existing Columbia pipeline, which it claims is currently operating at less than its full capacity.

Commission Response

82. We concur with the described comparative advantages of the Mittal Steel site; they are the same as those identified in our EIS.¹¹⁷ We asked AES to report to us on consultations it was engaged in concerning the use of this site for an LNG terminal. AES has done so, and based on its report, we find that the site's current owner is not prepared to sell or lease the land.¹¹⁸ Unlike certificate authority under NGA section 7, the authorization of an LNG terminal under NGA section 3 conveys no right of eminent domain. Thus, AES cannot employ eminent domain to acquire the necessary property

¹¹⁶ Maryland's *Request for Rehearing* at 22, quoting *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245, 1254 (D.D.C. 1977), citing Council on Environmental Quality Guidelines, 40 C.F.R. § 1500.8(a)(4) (1976).

¹¹⁷ Final EIS at 3-22.

¹¹⁸ See the AES and Mid-Atlantic *Comments in Response to NOAA's Comments* (March 5, 2009), which include affidavits from AES officers that state that the former and current owners of the Mittal Steel site have been unwilling to engage AES in substantive discussions regarding the availability of the site for sale or lease.

rights for this site, but must instead obtain such rights from the site's owner through negotiation. Since the current owner is not willing to offer the Mittal Steel site to AES, this site is not a viable alternate site.

83. Parties requesting rehearing propose we reassess alternatives to constructing a new LNG terminal and take-away pipeline in view of recent changes to expectations regarding energy generation and consumption. Because energy supply and demand projections are often volatile and always in flux, it is not reasonable to expect the Commission to align its review to the moving target of the latest prognostication.¹¹⁹ Similarly, while policy and technology can impact the energy market, we cannot realistically or reliably assess these impacts in advance. More to the point, as discussed above, while updated projections of short-term LNG demand are inconclusive, long-term projections uniformly forecast an increase in energy demand and a need for additional supply sources to meet this demand.

84. We considered the prospect of relying on environmentally preferable energy sources as an alternative, taking into account that regional entities had adopted goals and incentives for increased energy conservation and the use of renewable energy sources, leading us to conclude that renewable energy sources will play an increasing role in meeting energy demands within the region in the coming years. However, despite an expected growth in conservation and renewable energy supplies, we nevertheless found, and reaffirm, that:

Considered both individually and in combination, specific alternative energy sources would not meet the projected energy needs of the target markets. The energy source alternatives considered in our evaluation could reduce some environmental impacts associated with the proposed Project but could not individually or cumulatively meet the projected future energy needs of the Mid-Atlantic market ... Renewable energy sources, including wind, tidal, and solar power along with existing and proposed energy conservation measures will continue to play an increasingly important role in power generation for the regional markets; however, these sources represent only a small fraction of the projected energy demands for these markets for the foreseeable future, whether considered alone or in combination.¹²⁰

¹¹⁹ See, e.g., *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989), observing that "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." (Citations omitted.)

¹²⁰ Final EIS at 3-4.

85. We reviewed the potential for relying on an existing Columbia pipeline, in conjunction with an existing Transcontinental Gas Pipe Line Corporation (Transco) pipeline, as an alternative to Mid-Atlantic building a new, 88-mile-long pipeline. The existing Columbia and Transco pipelines, located in the general area of the Mid-Atlantic route, could be reached by building a new 20-mile-long line, but the existing pipelines could not accommodate the 1.5 Bcf/d of gas that the Mid-Atlantic pipeline is designed to carry. Both existing pipelines are fully subscribed and are operating at or near their design throughput capacity in the vicinity of the project. Further, looping Columbia's and Transco's existing pipelines would require 24-inch-diameter pipe and additional compression and would provide no environmental advantage, as looping the existing pipelines would require essentially the same construction activities and footprint as Mid-Atlantic's new parallel pipeline. Finally, relying on the existing pipelines would limit backhaul options and reduce the operational flexibility (including gas storage availability) that would otherwise be available via interconnections with other interstate pipelines at Eagle, Pennsylvania. We affirm our prior determination that there will be no environmental advantage in relying on existing and proposed gas pipeline systems to satisfy the purpose of the AES and Mid-Atlantic project.¹²¹

E. Objections to Aspects of the AES and Mid-Atlantic Project

86. In general, parties requesting rehearing tend to focus on either the AES LNG terminal or the Mid-Atlantic pipeline. Therefore, in responding to comments, we similarly focus on either the terminal or pipeline, although certain objections and answers apply to both portions of the project.

1. AES LNG Terminal – Safety and Security

87. The LNG Opposition Team, the Brandywine Conservancy, and Jerry Havens argue that safety issues remain unresolved. The LNG Opposition Team and the Brandywine Conservancy point to the preliminary determination by the U.S. Department of Homeland Security's Coast Guard (Coast Guard) that the project is unsuitable. They also speculate that as a result of funding cuts, the City of Baltimore, the Department of Homeland Security, and the Coast Guard may not have adequate resources to properly monitor the project and raise the issue of security costs, noting that the Emergency Response Plan, to be prepared in consultation with the Coast Guard and state and local agencies, does not yet include a cost-sharing plan.¹²² Baltimore County faults the project

¹²¹ See 126 FERC ¶ 61,019 at P 73 and the final EIS at 3-34.

¹²² For example, Maryland asks the Commission to condition AES's authorization on its paying the cost of additional security and emergency response measures required as the result of its activities, arguing that to do otherwise constitutes "an abdication of

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sponsors for not having made more progress in completing a Transit Management Plan, and insists that the anticipated LNG tanker traffic “will present [an] irreconcilable conflict with naval operations” at the Patuxent River Naval Air Station.¹²³

88. The LNG Opposition Team states that approximately 100,000 people live within 2.5 miles of the LNG terminal’s approved Sparrows Point location, and in view of this, cites EPA Act 2005 in claiming that since the “first order of the law is to mandate ‘remote siting,’” the Commission “is deficient in the law’s application.”¹²⁴ In addition, the LNG Opposition Team faults the Commission for considering a one-mile radius around the terminal to be an acceptable safety distance and insists on using a distance of at least 1.6 to 2.25 miles.¹²⁵ The LNG Opposition Team adds that there are approximately two million people living along the route of the project, and asserts that those who “are aware of the AES project oppose it by a 20 to 1 ratio.”¹²⁶

89. The LNG Opposition Team complains the Commission did not provide a risk assessment that weighs the impacts from possible terrorist actions, and itemizes obligations that it contends the Commission has yet to meet regarding the safety, production, transportation, and use of LNG.¹²⁷ The LNG Opposition Team posits scenarios in which LNG operations and facilities could be vulnerable to deliberate damage.¹²⁸

90. Jerry Havens challenges the methodology used in considering the potential for a vapor cloud explosion, asserting that the Commission did not adequately take into

regulatory responsibility in favor of the regulated party.” Maryland’s *Request for Rehearing* at 23, quoting *State of Idaho v. Interstate Commerce Commission*, 35 F.3d 585, 596 (D.C. Cir. 1994).

¹²³ Baltimore County’s *Request for Rehearing* at 9.

¹²⁴ LNG Opposition Team’s *Request for Rehearing* at 6.

¹²⁵ Citing the Government Accountability Office Report to Congress of February 2007, *Maritime Security Public Safety Consequences of a Terrorist Attack on a Tanker Carrying LNG Need Clarification*.

¹²⁶ LNG Opposition Team’s *Request for Rehearing* at 3.

¹²⁷ *Id.* at 9-11.

¹²⁸ See LNG Opposition Team’s May 4, 2009 supplement to its *Request for Rehearing*.

account: (1) the presence of heavy components such as ethane and propane mixed within a methane cloud; (2) the potential confinement of a vapor cloud due to the fences that will be placed along trenches leading to the spill sump at the AES terminal site; (3) a design assumption for spills when off loading LNG that does not rest on any stated quantitative justification; (4) the effect of an LNG spill that evades impoundment systems; (5) a spill from a ship in excess of the 12,500 cubic meters standard assumed by the Commission; and (6) dispersal of LNG vapor in conditions in excess of the two meters per second wind speed and stable conditions standard assumed by the Commission.

Commission Response

91. Our EIS and January 2009 Order address safety and security issues in detail. To the extent approvals for aspects of safety and security rest with agencies other than the Commission, we have conditioned our project authorization on the outcome of those other agencies' deliberations, as discussed below.

92. Given that the Coast Guard exercises regulatory authority over LNG facilities that affect the safety and security of port areas and navigable waterways,¹²⁹ before shipments can begin the Coast Guard must find that the Chesapeake Bay will be suitable for the type and frequency of LNG marine traffic that will serve the AES terminal. The Coast Guard undertook a risk assessment, as the LNG Opposition Team requests, and reviewed potential threats, vulnerabilities, and impacts related to efforts to deliberately damage LNG vessels. Based on that assessment and the Waterway Suitability Report,¹³⁰ the

¹²⁹ See Executive Order No. 10173; the Magnuson Act, 50 U.S.C. § 191, *et seq.* (2006); the Ports and Waterways Safety Act of 1972, as amended 33 U.S.C. § 1221, *et seq.* (2006); and the Maritime Transportation Security Act of 2002, 46 U.S.C. § 701, *et seq.* (2006).

¹³⁰ See Appendix J of the final EIS. The Coast Guard's Waterway Suitability Report finds that making the Chesapeake Bay suitable for LNG marine traffic requires implementing: operational conditions related to development of a Coast Guard-approved Transit Management Plan; safety/security zones for LNG vessels during transit and docking; the designation of necessary regulated navigation area(s); the use of safety measures such as security boardings, shoreline and waterway monitoring, underwater pier security sweeps, and vessel escorts; LNG vessel transit restrictions to ensure the safety of high capacity passenger vessels; annual Coast Guard inspections of LNG vessels and facilities; and the presence of tug escorts and towing vessels for LNG vessels. The Coast Guard's Waterway Suitability Report also recommends additional facilities and infrastructure, including: electronic surveillance systems; a 70-ton bollard pull commercial tractor tug with firefighting capability; development of regional plans for

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Coast Guard submitted a letter of recommendation to the Commission on March 18, 2009, finding that the Chesapeake Bay is not currently suitable for the type and volume of LNG tanker traffic AWS proposes, but can be rendered suitable if additional risk reduction measures are put in place to manage maritime safety and security risks.¹³¹

93. With respect to the potential disruption of training or activities at an active military installation, Environmental Condition No. 169 requires AES to work with the Coast Guard and the Patuxent River Naval Air Station to develop a Transit Management Plan to coordinate the arrival and departure of LNG vessels to avoid interfering with naval operations.¹³²

94. As discussed in section 4.12.6 of the final EIS, and in accordance with EPA Act 2005, Environmental Condition No. 110 requires AES to develop an Emergency Response Plan in consultation with the Coast Guard, local fire and police departments, emergency responders, and other appropriate agencies, which must be filed with the Commission. This Emergency Response Plan must be reviewed and approved by the Director of OEP prior to any project-related construction. Commission staff will ensure that appropriate state and local agencies have been involved in preparing the Emergency Response Plan and that the Coast Guard has been consulted and concurs.

communication between LNG vessels and all participating agencies and first responders; a notification system and procedures for the public; and drills and training for first responders. Environmental Condition No. 168 requires AES to ensure that LNG vessels transiting to and from its terminal comply with all requirements set forth by the Coast Guard, including all risk mitigation measures described in its Waterway Suitability Report.

¹³¹ For the project to be acceptable, the Coast Guard will require that: AES propose risk reduction measures which meet the level of safety and security required as determined by the Coast Guard's independent risk assessment; the port community have sufficient resources to implement the safety and security measures necessary to responsibly manage the risk; AES develop a Transit Management Plan, in consultation with the Coast Guard and participating agencies, that clearly spells out roles, responsibilities, and specific procedures for LNG ships, the LNG terminal, and the various agencies involved in responsibly managing the risks of LNG marine traffic; and the environmental impacts of the LNG ship transits and the accompanying risk reduction measures be fully understood and considered.

¹³² See the final EIS section 4.12.5.5 for further discussion of the Transportation Management Plan.

95. In situations where resource gaps are identified, Environmental Condition No. 111 addresses the issue of the availability of resources to properly monitor the project by directing AES to: (1) include in the Emergency Response Plan a Cost-Sharing Plan identifying the mechanisms for funding all project-specific security/emergency management costs that will be imposed on state and local agencies and funding mechanisms for the capital costs associated with any necessary security/emergency management expenses and equipment and personnel expenses, and (2) submit the Cost-Sharing Plan to the Commission for review and written approval by the Director of OEP prior to initial site preparation. In the absence of appropriate security/emergency response resources or funding, the Emergency Response Plan and the Cost-Sharing Plan will not be approved and construction will not begin.

96. We disagree with any interpretation of EPAct 2005 which reads it as requiring that LNG facilities can be placed only at remote locations.¹³³ In general, it is preferable to locate energy exploration, production, transportation, refining, storage, and wholesale consumption facilities at some distance from population centers, since such facilities may be characterized, to some degree, as intrusive. However, often this is not possible, since the highest priority energy demands are typically where population density is highest. Thus, we seek to reach a practical accommodation so that the public has access to adequate, reliable, and flexible energy supplies, which we do in this case by approving the siting of AES's LNG terminal at Sparrows Point, a relatively sparsely populated spot near a heavily urbanized area with potential access to regional market centers.

97. We have fully considered arguments that the project will pose a risk to those that live and work in proximity to the terminal and pipeline. However, as explained in the

¹³³ Congress has delegated the authority to DOT to adopt minimum safety standards for the location, design, and installation of new LNG facilities. *See* the Pipeline Safety Act of 1979 (Pub. L. No. 96-129). Remote sites for such facilities were one of the factors DOT was to consider in developing its standards. *See* 49 U.S.C. § 60103(a) (2006). DOT adopted comprehensive standards for the design and operation of onshore LNG facilities in 1980. *See* 49 C.F.R. Part 193 (2006), *Liquefied Natural Gas Facilities: Federal Safety Standards*. In addressing the remote siting issue in its rulemaking proceeding, DOT took into account the difficulty in predicting whether a remote location would remain remote during the operating life of an LNG facility. Therefore, as discussed below, the comprehensive LNG safety standards adopted by DOT in 1980 established thermal and flammable vapor dispersion exclusion zones to protect persons and property from the potential harm from being located in the vicinity of an LNG facility. *See LNG Facilities; Federal Safety Standard, Notice of Proposed Rulemaking*, 44 FR 8142 (1979) and 49 U.S.C. § 60103(a) (2006).

FEIS, the evaluation of safety is more than an exercise in calculating the consequences of worst case scenarios. Rather, it is a determination of the acceptability of risk which considers: the probability of events; the effect of mitigation; and the consequences of events. Based on the extensive operational experience of LNG shipping, the structural design of an LNG vessel, and the operational controls imposed by the Coast Guard and the local pilots, a cargo containment failure and subsequent LNG spill from a vessel casualty – collision, grounding, or allision – is highly unlikely. For similar reasons, an accident involving the onshore LNG import terminal is unlikely to affect the public. The AES terminal and Mid-Atlantic pipeline will meet the safety standards established by DOT, as well as our additional and separate standards governing an LNG facility’s location, design, and operation. We believe that the applicants’ adherence to these standards ensure that the LNG terminal and take-away pipeline will not present a significant risk to the public. The EIS discusses thermal radiation and establishes flammable vapor exclusion zones to ensure that no hazard exists outside the zones, regardless of the population density.¹³⁴ The public outside the exclusion zones is thus protected from harm due to a release of LNG from the terminal.

98. While EPLA 2005 added subsection (e)(1) to NGA section 3, stating that “[t]he Commission shall have exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal,” the Natural Gas Pipeline Safety Act, as amended, preempts the field regarding matters of safety,¹³⁵ and DOT has jurisdiction to promulgate and enforce regulations governing matters of safety with respect to the design and construction of LNG facilities.¹³⁶ DOT’s standards implement its conclusions regarding the necessary separation distances to protect the public in the vicinity of LNG facilities in the event of a spill. The Commission requires

¹³⁴ See the final EIS section 4.12.4, Siting Requirements.

¹³⁵ See, e.g., *Swango Homes, Inc. v. Columbia Gas Transmission Corp.*, 806 F. Supp. 180 (S.D. Ohio, 1992); *ANR Pipeline Co. v. Iowa State Commerce Comm’n*, 828 F.2d 465 (8th Cir. 1987); and *Tenneco, Inc. v. Public Service Comm’n of West Virginia*, 489 F.2d 334, 336 (4th Cir. 1973).

¹³⁶ As noted above, Congress gave DOT jurisdiction in 1979 to develop minimum safety standards for determining the location, design, and installation for new LNG facilities. Pipeline Safety Act of 1979 (Pub. L. No. 96-129); these standards are found in 49 C.F.R. Part 193 (2006). DOT’s authority over safety matters extends to the siting, design, installation, construction, initial inspection, initial testing, on-going inspection and operation and maintenance of LNG facilities. Operation and maintenance includes fire protection and security planning.

that every applicant demonstrate how a proposed facility would comply with DOT's regulations. As part of this process, the Commission's staff reviews the applicant's exclusion zone calculations to ensure consistency with staff's understanding of DOT's regulations and any formal interpretations issued by DOT.

99. The claim by Mr. Havens that the design spills used in determining exclusion zones for AES's LNG terminal were arbitrarily selected without any supporting analysis is not correct. DOT's regulations establish thermal and flammable vapor dispersion exclusion zones, based on standards of the National Fire Protection Association (NFPA), to protect persons and property from harm caused by heat radiation from fire and by dispersion and delayed ignition of gas vapor.

100. As stated in section 4.12.4 of the final EIS, DOT's incorporation of NFPA 59A in DOT's regulations in 49 C.F.R. Part 193 changed the way in which design spills and impoundment capacities are determined. NFPA 59A specifies that the capacity of impounding areas for vaporization, processing, or LNG transfer areas must equal the greatest volume during a 10-minute period from any "single accidental leakage source." Neither Part 193 nor NFPA 59A provide a definition of "single accidental leakage source." In consultation with DOT, the "single accidental leakage source" is determined based on a project specific analysis of the facility design, including detailed piping and instrumentation diagrams, to identify all small diameter attachments to the transfer piping.

101. Mr. Havens also raises concerns regarding the use of the SOURCE5 modeling program to determine the LNG vapor rate supplied to the DEGADIS dispersion model. Mr. Havens' concerns reflect those in the Fire Protection Research Foundation's March 2009 report, *LNG Source Term Models for Hazard Analysis: A review of the State-of-the-Art and an Approach to Model Assessment*. Mr. Havens emphasizes that the source calculations used in determining vapor dispersion exclusion zones do not address either flashing of the LNG released from a single accidental leakage source or for jetting effects resulting from a release from pressurized piping.

102. In accordance with DOT regulations,¹³⁷ an exclusion zone for each LNG container and LNG transfer system must be determined for the design spills defined in section 2.2.3.5 of NFPA 59A. Neither DOT's Part 193 regulations nor NFPA 59A specifically require consideration of flashing or jetting in determining exclusion zones. The analyses provided by AES assumed complete capture and conveyance of the design spill through trenches/troughs to impoundments which may be distant from the spill source. This is consistent with the typical approach used in demonstrating compliance with the exclusion

¹³⁷ 49 C.F.R. § 193.2059 (2009).

zones requirements of DOT's Part 193 regulations. Accordingly, based on our understanding of DOT's regulations, we believe that AES's impoundment system technically complies with 49 C.F.R. § 193.2059.

103. However, either flashing or jetting of any leaks could increase the downwind distance required for dispersion of flammable vapors. As a result, we are adopting a new Environmental Condition No. 170 (set forth in Ordering Paragraph (C) of this order) to require that AES examine provisions to minimize any effects from flashing or jetting on the downwind dispersion distance of vapor from a release from pressurized piping. The new condition provides that measures to be considered may include, but are not limited to: vapor fencing; installing spray shielding; or increasing the distance between leak sources and the plant property line. Prior to initial site preparation, AES will be required to file final drawings and specifications for these measures with the Commission for review and written approval by the Director of OEP.

104. In addition, Commission staff investigated the possible effects of vapor retention and wind scooping on the modeling analyzed in the final EIS. The vapor production model was adjusted to eliminate all vapor retention and the resulting source production curve from the sump floor was used as input to DEGADIS. A range of wind speeds occurring at least 90 percent of the time was modeled to determine the maximum downwind dispersion distance. Using this methodology, the maximum downwind distance to the 2.5 percent average gas concentration isopleth from the LNG Spill Containment Sump was found to be 580 feet in a 4.5 mph wind speed. This downwind vapor dispersion distance would not extend beyond the plant property line.

105. However, the above-referenced final report released by the Fire Protection Research Foundation in March 2009 notes that the equation which SOURCE5 uses to describe pool spread is unphysical and may lead to under-prediction of downwind dispersion distances. In order to address these concerns, we are adding new Environmental Condition No. 171 (set forth in Ordering Paragraph (D) of this order) to require that, prior to initial site preparation, AES file revised source term modeling which demonstrates that the vapor dispersion exclusion zones at the LNG terminal stay onsite within areas under AES's legal control. AES's filing must include an evaluation which addresses the scientific assessment and verification of the source term model used to determine pool spread and vaporization.

106. We believe our review, as discussed in the final EIS and based on discussions with DOT staff, is consistent with DOT's regulations in 49 C.F.R. Part 193. In addition, public safety issues related to AES's proposed LNG terminal were considered during both the engineering review conducted by Commission staff and the Coast Guard's waterway suitability assessment process. The results of these reviews were provided in section 4.12 of the final EIS. The January 2009 Order provides many conditions to ensure that the LNG terminal will be constructed and operated in a manner that does not impact public safety.

107. Mr. Havens maintains that AES's use of a computational fluid dynamic model in examining the control of vapors produced in trenches failed to satisfy the requirements of DOT's Part 193 regulations related to determining exclusion zones. As noted in all of the Commission's publicly issued environmental review documents for LNG projects since 2000, DOT's incorporation of NFPA 59A into its Part 193 regulations resulted in the removal of the requirement to include impounding systems around transfer piping. While Part 193 retains exclusion zones for LNG transfer systems, neither Part 193 nor NFPA 59A require the impoundment, which is the basis of the exclusion zone calculations. According to discussions with DOT staff regarding previous projects, exclusion zones are considered to be centered on impoundments, not on trenches. In order to account for the vapor produced along trenches leading to these impoundments, Commission staff has been requiring applicants to include vapor retention measures around the trenches to enhance the safety of the facility. Although not intended to be used in establishing exclusion zones, applicants such as AES have begun providing modeling to indicate these measures would be effective.

108. Mr. Havens comments on the influence of heavier hydrocarbons on the propensity for a detonation or deflagration with damaging overpressures. As mentioned in section 4.12.1 of the final EIS, less processed product with greater amounts of heavier hydrocarbons is more sensitive to detonation. LNG facilities have typically imported LNG with methane concentrations ranging from 89-96 percent, with occasional imports as low as 86 percent. These compositions are not in the range shown to exhibit overpressures and flame speeds associated with high-order explosions and detonations.

109. We note that Coast Guard studies referenced by Mr. Havens and in section 4.12.1 of the final EIS indicate overpressures of 4 bar and flame speeds of 35 m/s were produced from vapor clouds of 86-96 percent methane near stoichiometric proportions using exploding charges as the ignition source. The 4 bar overpressure was the same overpressure produced during the calibration test involving exploding the charge ignition source alone, so it remains unclear that the overpressure was attributable to the vapor deflagration. The ignition energy required to initiate an unconfined LNG vapor cloud detonation with a typical import composition near stoichiometric proportions is not reflective of credible release scenarios due to the safety and security measures which would be employed at the facility. Unconfined methane vapor clouds ignited with low energy ignition sources have been shown to produce flame speeds ranging from 5.2 to 7.3 meters per second, which is much less than the flame speeds associated with high order explosions or detonations.

110. As noted by Mr. Havens, the propensity of a vapor cloud to detonate or produce damaging overpressures may also be influenced by the level of confinement and congestion surrounding the vapor cloud. It is possible that the prevailing wind direction may cause the vapor cloud to travel into a partially confined or congested area. Mr. Haven references a Coast Guard study which tested the influence of obstacles on creating

a partially confined and turbulent scenario. The flame speeds were not significantly higher than the unconfined case and were not in the range associated with detonations. LNG vapors that are ignited in a confined space, such as a building or structure, can result in large overpressures. In order to prevent such an occurrence, buildings are located away from process areas containing flammable materials. Furthermore, as required by Environmental Condition No. 112 of the January 2009 Order, AES must demonstrate that all areas are adequately covered by hazard detection devices. In addition, AES's LNG terminal will not include any facilities for the extraction of natural gas liquids or other facilities that would cause a larger percentage of heavier hydrocarbons to be stored or handled.

111. Mr. Havens states that the siting requirements of DOT's 49 C.F.R. Part 193 regulations only govern the onshore portion of the facility, and that there are no mandated exclusion zones around the ships that serve the facility. The Coast Guard, as the federal agency responsible for matters related to maritime security, navigation safety, and vessel engineering and safety standards, examined the use of mandated exclusion zones around LNG marine traffic and found there was no need to apply for exclusion zone regulations to ships, as risks to the public from transportation systems are managed with "a combination of preventative and mitigation measures, including design standards, operational procedures, safety and security regulations, etc."

112. In addition, the Coast Guard referred to Navigation and Vessel Inspection Circular (NVIC) 05-05, which establishes a comprehensive review process by which the Coast Guard, in conjunction with stakeholders at the port, can ensure all safety and security issues have been addressed relating to the marine transportation of LNG for a proposed waterfront LNG facility. In its response to petitions in its proceeding in Docket No. USCG-2004-19615, the Coast Guard concluded that the risk-based approach in NVIC 05-05 was more appropriate than the issuance of regulations establishing thermal and vapor dispersion exclusion zones for marine spills of LNG. Although NVIC 05-05 was cancelled in December 2008, the Coast Guard issued NVIC 05-08, *Guidance Related to Waterfront LNG Facilities*, which incorporates the same risk-based approach. The Coast Guard's review process and conclusions are further discussed in section 4.12.5.5 of the final EIS.

113. Mr. Havens asserts that the Commission should await answers from tests being conducted at Sandia National Laboratories (Sandia) designed to address the potential for cascading failures due to brittle fracture of structural steel of an LNG vessel from contact with LNG and failure of LNG storage containers on vessels as the result of overpressure due to failure of non-heat resistance foam plastic insulation. Cascading failure of LNG carrier cargo tanks was addressed by Sandia in its 2004 report, *Guidance on Risk Analysis and Safety Implications of a Large LNG Spill Over Water*. In that report, Sandia concluded adverse events would be unlikely to involve more than two or three cargo tanks. While the expected fire duration from a cascading tank failure would increase, the

overall fire hazard would not be expected to increase by more than 20 to 30 percent. The majority of the expert panel consulted for the February 2007 Government Accounting Office (GAO) report, *Public Safety Consequences of a Terrorist Attack on a Tanker Carrying Liquefied Natural Gas Need Clarification*, also agreed with Sandia that cascading events are not expected to significantly increase the overall fire hazard. Nonetheless, GAO recommended that further study of this issue could be undertaken by Sandia.

114. We concur that further study on cascading mechanisms may clarify whether the subsequent failure of the fourth and fifth cargo tanks on an LNG vessel would occur over time and thereby extend the duration of the fire. In 2008, Sandia released a second report which examined LNG carriers larger than 200,000 m³ and concluded that hazard distances for larger LNG carriers are approximately seven to eight percent greater than the results presented in the 2004 Sandia report. Even with the increase in distance, the Sandia report concluded that the most significant impacts to public safety and property would remain within approximately 500 meters of a spill with lower impacts at distances beyond approximately 1,600 meters.

115. Sandia is continuing to research LNG fire physics and cascading failure. Removing the uncertainty inherent in modeling phenomena based on this research will result in more refined and accurate models that can be used by federal agencies, including the Commission, in future proceedings on other LNG projects. Such models are likely to result in identified consequence areas being smaller, not larger. In any event, in current areas of uncertainty, we have made conservative assumptions in section 4.12.5 of the final EIS regarding LNG vessels in determining the distances that thermal radiation and flammable vapor cloud hazards could extend as the result of credible spills.

2. AES Terminal – Flooding

116. Baltimore County argues that the flood control design elements for the AES terminal are inadequate to handle major storm events, such as hurricanes. The LNG Opposition Team faults the final EIS for failing to include a comprehensive risk assessment for the impacts of flooding and for the weight of impact from secondary effects, such as flooding and liquefaction.

Commission Response

117. The risks posed by floods and storms at the approved site at Sparrows Point were taken into account in the design of the LNG terminal. The EIS noted that the Federal

Emergency Management Agency Flood Insurance Rate Map indicates the 500-year flood limits do not encroach onto the terminal site.¹³⁸ To protect the site from flooding and storm surges resulting from hurricanes and severe weather, AES will incorporate shore protection features and install storm water collection and drain systems to collect and remove rain and flood waters from its terminal. The grade of the terminal site will be raised during construction, a bulkhead will be installed at the waterline, and AES will build an 8-foot-high earthen floodwall that will enclose an area of approximately 24 acres. In the event of a catastrophic event, the floodwall will be able to contain the contents of a single LNG tank's maximum liquid capacity. We find no reason to suspect these measures may be insufficient.

118. With respect to risk of liquefaction (i.e., erosion, shifting, or other movement of soil) at the terminal site due to flooding, we concluded in our January 2009 Order, based on preliminary results from site-specific ground motion analyses, that limited areas at the proposed terminal site may have liquefaction-susceptible sands. Therefore, we required that AES conduct additional subsurface exploration in these areas to confirm the presence of the loose sand layer and collect additional data proximate to the planned LNG tank locations prior to finalization of the foundation design. If a liquefiable sand layer is present, then the potential effects of liquefaction must be factored into the pile design of the LNG tank foundations to compensate for potential settlements due to liquefaction.¹³⁹

3. AES Terminal – Risk of Damage due to Seismic Events

119. The LNG Opposition Team argues the Commission has not adequately considered the risk of liquefaction of soil at the AES terminal site due to seismic events, and disputes the Commission's finding that there are no known active faults beneath or near the terminal site. The LNG Opposition Team states the site lies on a Class 5 Richter Scale fault line which, although inactive, has given rise to minor quakes of 2.5 or less in the immediate region.

Commission Response

120. In our January 2009 Order we found that there is only a remote possibility of a seismic event forceful enough to cause liquefaction of soil at the AES terminal site. Nevertheless, to guard against this possibility as well as the possibility of liquefaction

¹³⁸ Final EIS at 4-7.

¹³⁹ Environmental Conditions Nos. 98 through 107 in the appendix to the January 2009 Order include requirements to ensure that final design plans for the terminal take into account the risks posed by liquefaction.

caused by flooding, as discussed above, we imposed Environmental Condition No. 98, which requires additional subsurface exploration to confirm the presence of a loose sand layer and to collect additional data proximate to the planned LNG tank locations before completing the final foundation design. In addition, Environmental Condition No. 100 directs AES to use additional boring, cone penetration tests, shear wave velocity data, and the peak ground acceleration for the Safe Shutdown Earthquake of 0.15 gravity to provide revised liquefaction calculations prior to construction.

121. If it is determined that the soils will liquefy, Environmental Condition No. 101 requires that AES provide, prior to construction: (1) calculations and estimates of liquefaction associated settlements and pile down drag loads; (2) details of the liquefaction mitigation method(s) procedures, plan extent, and verification methods proposed to verify mitigation of liquefaction potential; and (3) detailed calculations of seismic slope stability and lateral movements anticipated after the liquefaction mitigation is implemented in order to verify the stability of critical structures for the project design earthquake motions. We believe these measures constitute an adequate consideration of the risk of liquefaction of soil at the LNG terminal site and a prudent response thereto. The AES facility will be constructed to design standards tailored to the characteristics of the soils at the site.

122. We repeat our former finding that the AES terminal site and the Mid-Atlantic pipeline route are in areas with a relatively low potential for seismic activity, with no mapped or active surface faults known to exist. The U.S. Geological Survey and the Maryland Geological Survey concur in the determination that there are no active faults under or anywhere near the approved Sparrows Point terminal site.¹⁴⁰ Local earthquakes are not associated with any specific faults or seismic source zone. Despite the small possibility of a moderate earthquake occurring anywhere in the region, the LNG facility nevertheless will be designed to withstand the impacts of an earthquake of a magnitude of approximately 5.0-5.5 occurring directly beneath the site.

4. LNG Tanker Traffic

¹⁴⁰ We are uncertain if the LNG Opposition Team's reference to a "Class 5 Richter Scale Fault" is intended to indicate that there is a fault beneath the site area that generated a Richter Scale Magnitude 5.0 earthquake. If so, this is incorrect. The largest recorded

earthquake epicenter within Maryland was a Richter Scale Magnitude 3.7 event in 1939 centered near Phoenix, Maryland, approximately 22 miles to the north-northwest of Sparrows Point.

123. Maryland maintains that the final EIS fails to evaluate the seasonal impact of the intake and discharge of ballast water from the tankers which will bring LNG to the AES terminal. Maryland further asserts that the January 2009 Order fails to incorporate the recommendations of the NOAA Fisheries that ballast water intakes be screened to 2.0 mm and that intake velocity be limited to less than 0.5 feet per second (fps).

124. Baltimore County contends the record does not adequately demonstrate that an LNG spill will not cause significant adverse impacts on surface water quality.

125. The LNG Opposition Team argues that sediment disturbances due to tug traffic will increase turbidity and re-suspend contaminants, and that the volume of LNG tanker traffic will prevent these re-suspended sediments from settling, causing a sediment plume that will migrate throughout the Patapsco River Basin and the Chesapeake Bay, drive all aquatic life from the immediate region, and devastate oyster recovery efforts at Fort Carroll.

Commission Response

126. NOAA Fisheries expressed a preference for 2.0 mm mesh screens over tanker ballast intake apertures and restricting ballast intake velocities to 0.5 feet per second.¹⁴¹ However, in its most recent recommendations, NOAA Fisheries did not request that we incorporate these specifications as conditions.¹⁴²

127. While AES does not expect to own any of the LNG vessels delivering cargos to its terminal, as observed in the EIS, AES will recommend to its LNG carriers that they comply with the NOAA Fisheries' recommended use of 2 mm mesh screens over tanker ballast intake apertures and restriction of ballast intake velocities to 0.5 feet per second.¹⁴³ In any event, ballast water intake generally will occur while an LNG vessel is at or near the dock (i.e., while the ships are in slips), reducing impacts as these areas are likely to provide less favorable fish habitat than areas remote from slips. Further, although several habitats of particular concern may occur along potential vessel transit routes, no direct or indirect impacts to habitat are expected in view of the overall depth of the water most likely to be traversed by LNG carriers and the fact that no ballast will be released or drawn while in transit.¹⁴⁴

¹⁴¹ NOAA Fisheries' *Comments on the Draft EIS* (June 16, 2008).

¹⁴² NOAA Fisheries' *Comments on the Final EIS* (January 12, 2009).

¹⁴³ Final EIS at 4-113.

¹⁴⁴ *Id.* at 4-125.

128. The project does present the potential to adversely impact surface water quality, but not from LNG spills. As indicated in the EIS, an LNG spill would float on the water until vaporized and then dissipate into the atmosphere.¹⁴⁵ It would leave no residue in the water, avoiding the possibility of significant adverse impacts on the surface or in the water.

129. We do not expect sediments disturbed by ship traffic to remain in suspension for a significant period of time; thus, we do not expect the sediments suspended and redeposited to have the severe impacts on aquatic life that LNG Opposition Team anticipates. AES evaluated the potential for siltation from dredging and the impacts on resources in the general area of the LNG Terminal. AES found that turbidity plumes from using clamshell, hydraulic, and hopper dredging within soft sediments are highest within the dredge site and decrease with distance away from the site; at a distance of about 1,200 feet or more from the dredge site, turbidity levels will be generally negligible and have little to no impact on oyster bed survival and growth.¹⁴⁶

130. The Fort Carroll oyster reef restoration project is located about 1,500 feet away from the closest area to be dredged. We discussed the Fort Carroll project in the EIS.¹⁴⁷ To ensure it is not affected, we included Environmental Condition No. 41, which instructs AES to consult with the Maryland DNR to verify whether the oyster population at Fort Carroll is productive, and if so, whether time-of-year restrictions on dredging activities are needed. Any recommended restrictions will be directed to the Maryland Department of the Environment and the COE for inclusion in their permits.

131. Based on modeling of the impact of tugs on the resuspension of sediments and their dispersion and settlement at the Sparrows Point site, we determined that: (1) nearly all disturbed sediments would be deposited back to the river bottom within seven or eight days; (2) resuspended sediments would remain in the near-field Patapsco River-Bear Creek area; (3) no sediments would be transported far upstream in Bear Creek; and (4) only very low amounts of sediments could be transported far into Chesapeake Bay. In view of these determinations, we affirm that we “expect the majority of sediment re-deposition to occur relatively close (within 1 to 2 km) to the dredging site.”¹⁴⁸ Finally,

¹⁴⁵ *Id.* at 5-6.

¹⁴⁶ The Essential Fish Habitat Assessment finds it is unlikely that construction activities will cause any long-term impacts on water quality and that impacts from dredging and vessel transit will be short-term. *See* Appendix E of the final EIS at E-45.

¹⁴⁷ Final EIS at 4-109.

¹⁴⁸ *Id.* at 4-57.

we note that water quality will be sampled within 1000 feet upstream and downstream of the dredge area before, during, and 30 days after dredging, with results submitted to the COE. We expect this information will indicate whether further measures are required with respect to turbidity and resuspended contaminants.

5. Dredging of the Turning Basin for LNG Tankers

132. The AES project involves the dredging of an approximately 118-acre turning basin for LNG vessels adjacent to the terminal to a depth of approximately 45 feet. The dredging will take place within the Patapsco River.

133. Baltimore County maintains it was improper for the Commission to find the environmental impacts of the project to be acceptable without (1) a thorough examination of dredging impacts, in particular the effect of the re-suspension of bottom sediments on aquatic species, and (2) a definite answer on the fate of the dredged sediment. Maryland, NOAA Fisheries, and the Brandywine Conservancy are similarly concerned with where and how the dredged sediment will be disposed. They assert the Commission's presumption that it will be suitable for landfill or other uses cannot be confirmed without further study of the chemical content of the dredge sediment after combination with reagent admixtures and an assessment of the impact of the material at and near the locations where it will be deposited. Noting that the ultimate destination for this material has not yet been determined, NOAA Fisheries and the COE recommend AES be required to prepare an alternative plan for Commission review in the event landfill sites prove unavailable or insufficient. The Brandywine Conservancy seeks to mitigate traffic impacts from trucks hauling dredged material.

134. Maryland and the LNG Opposition Team assert that dredging will modify the bay bottom and result in a less diverse environment. Further, Maryland insists dredging will result in permanent anoxic conditions for 118 acres of bottom habitat and that the section 401 water quality certification cannot mitigate for this condition.

135. Maryland argues that the Commission should require AES to comply with the Maryland Department of the Environment's finding that all decant water generated during the dredging process should be pumped to onshore tanks for additional treatment prior to discharge into the Patapsco River. NOAA Fisheries also recommends that decant generated during dredging of all soft and/or contaminated sediments should not be discharged directly into the Patapsco River after initial settling, but should be pumped to onshore tanks for additional treatment.¹⁴⁹ NOAA Fisheries wants discharged decant

¹⁴⁹ This treatment was described in the draft EIS and set forth by NOAA Fisheries as Conservation Recommendation 3 in comments it submitted on June 16, 2008.

water to meet Maryland water quality standards, especially regarding turbidity and suspended soils. At a minimum, NOAA Fisheries asks the Commission to state that additional onshore treatment of decant is preferred prior to discharge into the Patapsco River. The LNG Opposition Team contends AES will be in violation of Clean Water Act pretreatment requirements unless it constructs a tertiary pretreatment facility to collect and process water runoff from the site.¹⁵⁰

136. NOAA Fisheries asks that AES avoid using the Cox Creek and future Masonville Dredge Material Containment Facilities as a disposal option. NOAA Fisheries states that Cox Creek is the only facility available to the Port of Baltimore for disposal of contaminated material, and its capacity is limited. NOAA Fisheries adds that the Masonville facilities are intended for contaminated material generated by dredging the Port's channels and the Maryland Port Administration affiliates' channels and berthings; consequently, the Masonville facilities would reach capacity prematurely if they took in AES's dredging residue.

137. The LNG Opposition Team challenges (1) AES's assessment that there are only 69 priority pollutants¹⁵¹ in the sediments to be dredged, asserting other studies have identified 103 priority pollutants, and (2) the Commission's expectation that the worst of the toxic materials are in the upper two to four feet of sediment, and believes dredging will result in an imminent hazard by re-suspending and releasing sediments into open waters. The LNG Opposition Team identifies what it describes as contradictory statements in the final EIS regarding the presence of PCBs. The LNG Opposition Team states that AES's plan to make use of the dredged material is barred by Maryland and Baltimore laws.

138. The LNG Opposition Team disputes the Commission's description of the Sparrows Point site as containing fill materials that include dredge spoil. The LNG

¹⁵⁰ Referencing 33 C.F.R. § 1329, subsections 402-405 (2009). The LNG Opposition Team also references the Clean Water Act in faulting the final EIS for not including Bear Creek and Patapsco River in the Maryland Department of the Environment's Clean Water Act section 303d list of "severely impaired" waterbodies. In fact, page 4-36 of the final EIS states that "Baltimore Harbor, which is on the Maryland 303d list" includes "portions of the Patapsco River and Bear Creek, [and] is impaired due to contamination by chlordane, PCBs, metals, low oxygen, and bacteria in tidal waters." Thus, the impaired status of Bear Creek or the Patapsco River was taken into account during the environmental analysis of the project.

¹⁵¹ See the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (2006).

Opposition Team insists there is no dredge spoil, but there is a 20 to 40 foot deposit of steel slag, which it describes as toxic waste. The LNG Opposition Team adds that the entire terminal site has been identified as a hazardous waste site by EPA, with a preliminary determination of High Priority contamination. In view of this, the LNG Opposition Team asserts that AES's plan to excavate contaminated soil and relocate it to another location on site and cap it, or to move it to a location off-site, violates EPA's regulations requiring that the soil must be disposed of in a chain-of-custody transport to a Registered Hazardous Material Containment Facility.¹⁵²

139. The Waterfowlers reference the final EIS's acknowledgment of the potential for dredging to adversely impact waterfowl winter survival rates. The Waterfowlers observe that the Maryland DNR may seek to restrict dredging from November 15 through March 1 and ask that this restriction be put in place independent of any action by the Maryland DNR.

Commission Response

140. With respect to the ultimate disposition of the dredged material, AES remains confident a commercial market will develop and be available for the processed dredged material. Alternatively, as directed, AES has developed a plan in the event reuse does not prove to be a viable option. This plan, as described in the final EIS, would have AES haul dredge spoils to landfills in Virginia that are certified to handle such material. In response to parties' inquiry on whether the dredged material would be accepted at landfill sites, AES submitted a letter from Waste Management stating that (1) it reviewed samples of the material proposed to be dredged and found it suitable for acceptance at five identified Virginia landfills, and (2) based on the capacity of these landfills and AES's proposed dredging schedule, Waste Management has the capacity to accept the anticipated 3.7 million cubic yards of material, i.e., 2.5 million tons annually.¹⁵³ We find the documentation AES has presented is sufficient evidence of the viability of a plan for

¹⁵² *Citing* 40 C.F.R. Chapter 1, Part 268, subpart C (2009).

¹⁵³ *See* the AES and Mid-Atlantic *Comments in Response to NOAA's Comments*, EFH5 Attachment A, letter of March 2, 2009 from Waste Management to AES. This letter, in effect, follows up on a November 1, 2007 letter from Waste Management stating it is able to take the anticipated volume of dredged material. The November 1, 2007 letter and a similar September 6, 2007 letter from Allied Waste Services, which indicates its willingness to accept dredged material at landfill sites in Virginia, are reproduced in the EIS, Appendix D, Consolidated Dredge Plan, at D-82 and D-83, respectively.

disposal and long-term maintenance of dredged material if AES is unable to employ the preferred means of disposal.¹⁵⁴

141. In light of this assurance that there will be an acceptable repository for the full volume of dredged material, we clarify that our project approval is not dependent on this material being put to beneficial or productive reuse. We nevertheless urge the applicants to do so where possible, which the final EIS noted was the case with a similar dredging project in New Jersey.¹⁵⁵ We agree with Maryland that the chemical makeup of the processed dredged material should be analyzed, the locations for reuse identified, and appropriate environmental review initiated for the specific reuse site. Additionally, the physical and chemical characteristics of the dredged material should be accounted for during processing to assess the types and ratios of admixtures appropriate to the material's end use and to assure compliance with applicable permit requirements for this use.¹⁵⁶ It is not possible to reach a conclusion on permissible end uses now, because until the dredged material is processed, adequate analysis of its content is not physically possible, and until specific end use sites are identified, the environmental requirements specific to the sites cannot be considered. It is possible, however, to affirm that the processed dredged material cannot be employed in any manner or at any site that would violate the environmental regulations governing reuse and disposal.

¹⁵⁴ The preferred disposition may include using processed dredge material for 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. *See* final EIS at 2-25.

¹⁵⁵ *See* discussion of the Consolidated Dredge Plan at 4-58 to 4-62 of the final EIS.

¹⁵⁶ If analytical testing shows processed dredged material cannot be productively reused, it will be disposed of in accordance with all applicable environmental regulations, presumably at sites in Virginia. Maryland raises that possibility that four million cubic yards of dredged material would end up being stockpiled on site until a suitable location for disposal is determined. We find this implausible, as the anticipated volume of material would not fit within the current bounds of the terminal site; either the applicants would have to acquire additional acreage to stockpile dredged material or dredging would have to halt when the current site reaches its capacity. We accept that there may be circumstances that merit provisional on-site stockpiling; however, we expect the disposition of dredged material to be resolved in advance of beginning dredging operations, and we expect the process of transporting processed dredged material to its ultimate destination to proceed apace with its generation.

142. Whereas NOAA Fisheries cautions against using Maryland Port Administration facilities as a dredge material disposal option, including the existing Cox Creek and future Masonville dredge material containment facilities, AES argues these facilities are intended specifically to receive material generated from channel and port dredging projects. AES stresses that after its project is constructed and operating, the material generated by maintenance dredging will be eligible – as is dredged material from all other private terminals in Baltimore Harbor – for disposal at the Maryland Port Administration facilities. AES nevertheless restates its commitment to make use of economically feasible dredge disposal options that do not include the Maryland Port Administration facilities.¹⁵⁷ We do not expect AES will need to rely on these Maryland facilities in view of the above-described landfill disposal alternative. That said, we do not believe it would be appropriate for the Commission to bar AES from employing these facilities if it can qualify to do so under state provisions.

143. Maryland is convinced that dredging will cause a permanent anoxic condition, and a consequent loss of an existing ecosystem, which no environmental conditioning can avoid. We are not convinced this is the case. We acknowledge that a decrease of dissolved oxygen concentrations could be detrimental to benthic (bottom-dwelling) organisms in the affected area during the summer months.¹⁵⁸ However, the area to be dredged is dominated by polychaete worms, a pioneering species that can be expected to quickly recolonize the benthic substrates after dredging and outside of the seasonal anoxic conditions. When anoxic conditions dissipate in early fall, deep habitats are repopulated within weeks by small, rapidly-growing polychaetes.¹⁵⁹ In deep habitats, annual abundance and biomass of benthic organisms is depressed because of adverse effects associated with oxygen-depleted bottom waters that occur during warmer months. However, benthic organisms can occur in habitats that regularly experience the seasonal anoxia associated with deep channels, and among these are small, rapidly-growing forms that can reproduce in any season.

144. Given this scenario, we expect additional mitigation could alleviate the water quality impact associated with dissolved oxygen levels and habitat disturbances. To this

¹⁵⁷ AES and Mid-Atlantic *Comments in Response to NOAA's Comments* at 16.

¹⁵⁸ Benthic populations (aquatic insects and other bottom-dwelling organisms) are an important source of food for many species of game and non-game fish, particularly in rivers.

¹⁵⁹ See *Chesapeake Bay Monitoring; Monitoring for Management Actions*, the Maryland Office of Environmental Programs, Chesapeake Bay, Water Quality Monitoring Program, First Biennial Report, February 1987, Robert E. Magnien, editor.

end, Environmental Condition No. 40 requires AES to continue to consult with NOAA Fisheries, the Maryland DNR, and the Atlantic States Marine Fishery Commission regarding depressed dissolved oxygen in the Patapsco River due to dredging and maintaining the ship channel, and to file with the Commission the results of this consultation as well as any agency-recommended mitigation plans, which could include a revised Aquatic Resources Mitigation Plan.

145. AES's plan for decant water/spoil handling is to use portable pumps at the dredging site to remove decant water from the loaded scows, which will be placed into a primary holding scow and allowed to settle for a period of 24 hours. The water will then be pumped off of the primary holding scow into a secondary holding scow, with the decant water again allowed to settle for a period of 24 hours or until the total suspended solids content of the water is below 75 ppm (mg/L). This monitoring should satisfy the concern NOAA Fisheries expressed regarding turbidity and suspended soils. Finally, the water will be discharged from the secondary holding scow back to the Patapsco River. A chemical and physical analysis will be conducted on the decant water in accordance with the Maryland Department of the Environment's Water Management Program, in accordance with the terms of a water discharge permit required for the dredged material recycling facility.

146. The alternative decant water/spoil handling option endorsed by Maryland and NOAA Fisheries would add a further processing step after the secondary settling discussed above; that additional next step would be to pump the decant water to onshore tanks for additional settling, toxic chemical analysis testing, and treatment prior to discharging into the Patapsco River.

147. Though slightly different than the alternative option endorsed by Maryland and NOAA Fisheries, AES intends to maintain an alternative option of dewatering the loaded scows onshore at the dredged material recycling facility. The same types of controls would be in place to ensure water quality is maintained prior to discharging water back to the body of water from which it came. AES's alternative process begins by allowing the loaded scows to settle so that the free-liquid portion will be visibly free of suspended sediments. The decant water will then be pumped to the cargo area of a dedicated dewatering barge. After settling, the decant water from dewatered dredged material will pass through an onshore settling tank system of four tanks with a capacity of approximately 21,000 gallons each, and then be filtered prior to discharge back to the Patapsco River. Again, chemical and physical analyses will be conducted on the decant water, concentrating on monitoring for turbidity and suspended sediments. If necessary, the tank contents can be pumped into tanker trucks for transport and delivery to an offsite facility capable of treating wastewater that does not meet the permit requirements at the dredged material recycling facility.

148. Compliance with National Pollutant Discharge Elimination System permits for the terminal should resolve the LNG Opposition Team's concerns regarding process water

runoff, while the prescribed treatment for decant water should resolve NOAA Fisheries' concerns regarding compliance with the Maryland Department of the Environment's water quality standards. Provided the offshore treatment described above proves adequate to meet Maryland standards, we see no need to compel AES to undertake additional onshore treatment.¹⁶⁰ AES observes that its dewatering method has been accepted and employed by dredgers under the regulatory oversight of the COE, the New Jersey Department of Environmental Protection, and the New York State Department of Environmental Conservation for over eight years. We observe that with regard to decant water, AES will need to comply with the permit requirements of the relevant sections of the Clean Water Act and section 10 of the Rivers and Harbors Act.

149. The applicants have sought approval from the COE to discharge dredged or fill material under Clean Water Act section 404, which requires that the Maryland Department of the Environment issue or waive a water quality certification under Clean Water Act section 401. As previously discussed, we find this water quality certification requirement has been waived.

150. The issue of traffic impacts attributable to trucks hauling dredged material was addressed in the final EIS and by AES's draft Traffic Management Plan. AES submitted its draft traffic plan to major employers at Sparrows Point for review and received responses from six area employers stating traffic associated with the LNG terminal site would not disrupt their operations. AES is continuing to consult with the remaining area employers. Environmental Condition Nos. 88 and 89 are designed to address the issue of traffic impacts. We expect that compliance with these conditions will be sufficient to mitigate traffic impacts.¹⁶¹

¹⁶⁰ We note that if the COE and Maryland Department of the Environment determine additional onshore treatment is needed, and incorporate such treatment into their permit requirements, then the applicants will have to satisfy the additional onshore treatment requirements. Accordingly, it will be for Maryland rather than the Commission to determine if, as the LNG Opposition Term contends, AES will be in violation of the Clean Water Act unless it constructs a tertiary pretreatment facility to collect and process water runoff from the site.

¹⁶¹ Environmental Condition No. 88 requires AES to continue consultation with Severstal Steel and other major employers at Sparrows Point and prepare a final Construction Traffic Management Plan that: (1) addresses and minimizes potential problems with worker access to other employment centers of the Sparrows Point industrial complex; (2) addresses total vehicular traffic at the construction site, including the volume of traffic from employers and their schedule of shift changes; and (3) describes potential restrictions on AES construction traffic during shift changes, as

(continued...)

151. We do not disagree with the LNG Opposition Team's observation that additional priority pollutants may be identified in Baltimore Harbor. The analysis in the final EIS was based on a literature review of past sampling events, as well as site-specific sampling in the immediate area to be dredged. The sampling parameters and protocols were established through consultation among AES, the Maryland Department of the Environment, COE, EPA, and the Commission to determine the appropriate analysis for the area. We do not agree that the EIS presented contradictory statements regarding the presence of PCBs. All sampling results were presented as analyzed in the laboratory, and while one EPA protocol did not identify PCBs, a different EPA protocol did.

152. The site-specific sampling results by depth do not contradict our determination that below 10 feet in the sediments, there is little or no evidence of contamination in the Sparrows Point nearshore sediments. Dredging activities would be conducted in accordance with all final COE and Maryland Department of the Environment permit conditions, including the extra mitigation measure of using an environmental bucket to minimize the re-suspension of existing contaminants in the sediment. AES will be required to comply with applicable laws regarding the processing and disposal of the processed dredge material, including the proposal for its beneficial reuse.

153. With respect to the AES terminal site, soil borings confirmed miscellaneous fill in the top 4.5 to 19.5 feet.¹⁶² Soils at the terminal site were sampled to determine the potential soil contamination present at the site and found to be below Maryland cleanup standards. Additional site soil testing and boring will be performed prior to completion of foundation site preparation and final design parameters. In addition, Environmental Condition No. 23 requires AES to file its amended Potentially-Contaminated Soils Management Plan. The EPA has not identified any additional protective measures required for construction at this site. Therefore, we believe the measures adopted to minimize impacts associated with handling potentially contaminated soils at the terminal site will be in compliance with applicable laws.

154. We will not be able to assess potential dredging impacts on waterfowl until consultations with the Maryland DNR and other appropriate agencies regarding potentially affected resources, including aquatic species, are complete. The final Consolidated Dredge Plan, in compliance with Environmental Condition No. 27, and the final Aquatic Resources Mitigation Plan, in compliance with Environmental Condition

necessary. Environmental Condition No. 89 requires Mid-Atlantic to work with appropriate authorities to develop site-specific traffic and safety plans wherever road closures or restrictions may be required during pipeline construction.

¹⁶² See final EIS at 4-2.

No. 33, will include any agency-determined dredging restrictions. We see no need to impose restrictions now, since no dredging can take place until appropriate constraints are developed and are specified in the Consolidated Dredge Plan.

6. Soil Contamination

155. Baltimore County objects to the Potentially-Contaminated Soils Management Plan, whereby sediment quality testing will only take place after construction has begun, and argues for using existing, available data to assess the soil.

Commission Response

156. The applicants conducted a database search for hazardous waste sites to review available data to assess soil contamination and identify areas of known contamination along the pipeline route. In addition, existing available data as well as site-specific samples at the LNG terminal site were evaluated for contaminants. As discussed in the January 2009 Order, due to these existing soil conditions, AES submitted a Potentially-Contaminated Soils Management Plan. Environmental Condition No. 23 requires AES to file an amended Potentially-Contaminated Soils Management Plan, developed in consultation with the appropriate agencies, to ensure that potentially contaminated soils are properly managed during construction.

7. Socioeconomic Impacts

157. Maryland contends the Commission's assessment understates the potential cumulative socioeconomic impacts from the project because it does not take into account increased ship traffic associated with the Constellation Power Source Generation, Inc. (CPSG) Brandon Shores Power Plant.

Commission Response

158. Cumulative impacts for the project were analyzed based on the best available information and the issues identified during public comments. The CPSG Brandon Shores Power Plant was not identified at any stage in our environmental review until Maryland mentioned it in passing in its February 2009 request for rehearing. Our environmental review included a detailed assessment of ship traffic, and our assessment did not indicate any significant socioeconomic impacts associated with ship transit. Maryland has provided us no reason to reconsider this result.

8. Environmental Justice

159. The LNG Opposition Team does not dispute the Commission's observation that the development of an LNG terminal is consistent with the location's longstanding use as an industrial and manufacturing site, but objects to continuing to use the site in this manner, claiming it degrades the quality of life for the nearby residents, many of whom

are African-American. The LNG Opposition Team asserts the Commission's "insensitivity to the issue of racial justice in America" constitutes "an environmental lynching," that is inconsistent with "the mission of Federal agencies to protect minority and impoverished populations."¹⁶³

Commission Response

160. The LNG Opposition Team overstates the Commission's mission and misstates the Commission's obligations in evaluating proposed projects' impacts on minority and/or low-income populations. While we may consider such impacts as part of our assessment of the socioeconomic aspects of proposed projects in the context of our NEPA review, we are not compelled to do so.¹⁶⁴ Nevertheless, we have previously stated, and here affirm, our support for national policies directed at the elimination of discriminatory treatment of persons based upon race, creed, color, religion, sex, or national origin.¹⁶⁵ Accordingly, as part of our NEPA review we examined the AES and Mid-Atlantic proposals to ensure there would not be disproportionately high and adverse human health or environmental effects on minority or low-income communities.

161. We found the project to be compatible and consistent with past, present, and long-range uses of the Sparrows Point peninsula and found it will have no negative impact on other projects or on redevelopment and revitalization efforts in nearby communities. We

¹⁶³ LNG Opposition Team's *Request for Rehearing* at 26 and 28, *citing*, Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority and Low-Income Populations*, 60 FR 6381 (Feb. 1, 1995).

¹⁶⁴ Executive Order 12898 applies only to the federal agencies specified in section 1-102 of that order, and this Commission is not among the agencies so specified; independent agencies, such as this Commission, are requested to, but are not compelled to comply with the provisions of the order. Hence, with respect to proceedings before this Commission, Executive Order 12898 is not binding and does not create any legally enforceable rights. *See, e.g., City of Tacoma, Washington*, 86 FERC ¶ 61,311, at 62,073 (1999).

¹⁶⁵ *See, e.g., The National Association for the Advancement of Colored People (NAACP)*, 56 FPC 299 (1976). *See also NAACP v. FPC*, 425 U.S. 662, 669-70 (1976), in which the Court found that the Commission's statutory mandate to act in the "public interest" does not constitute "a broad license to promote the general public welfare," and is thus "not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates."

noted that the *Baltimore County Master Plan* encourages reuse of Sparrows Point for redevelopment for new industrial purposes. We expect the project will result in positive cumulative economic benefits, with taxes from the project contributing to the local tax base and wages of project employees benefiting personal income of the local population. But for the LNG Opposition Team's general, albeit strenuous, comments opposing our approval of the project, they offer no specific refutation of these findings. Therefore, we reaffirm our conclusion that the construction and operation of the terminal facility will not disproportionately result in adverse human health or environmental effect on minority or low-income communities.

9. Modifications to Mid-Atlantic's Pipeline Right-of-Way

162. The Brandywine Conservancy urges the Commission to enforce Environmental Condition No. 5 to preclude Mid-Atlantic from increasing the size of the pipeline to accommodate future needs or to acquire a right-of-way that would permit a pipeline to transport a commodity other than natural gas. The Brandywine Conservancy adds that in approving the pipeline route, the Commission should have acted to diminish its impact by limiting the width of the temporary workspace and permanent right-of-way and reducing the width of the right-of-way corridor.

Commission Response

163. Environmental Condition No. 5 does no more than restate the constraints on Mid-Atlantic's NGA section 7(h) authority to acquire property rights by eminent domain.¹⁶⁶ Mid-Atlantic can only obtain property rights by eminent domain as needed for the project as described, it cannot increase the size of its pipeline or acquire a right-of-way for a pipeline to transport a commodity other than natural gas without filing an application for a separate project authorization. We assure the Brandywine Conservancy that the Commission will police and enforce this provision.

¹⁶⁶ Environmental Condition No. 5 states, in relevant part, that:

Mid-Atlantic's exercise of eminent domain authority granted under section 7(h) of the Natural Gas Act (NGA) in any condemnation proceedings related to the Commission order must be consistent with these authorized facilities and locations. Mid-Atlantic's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas pipeline to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

164. The width of the construction right-of-way, including temporary workspace, was established to accommodate the safe operation of construction equipment during installation of the pipeline. Permanent right-of-way is established to protect the installed pipeline from accidental third-party damage. Having determined the minimum width necessary for safe and secure construction and operation of the pipeline, we conclude it would be imprudent to reduce this width.

10. Columbia's Adjoining Pipeline Right-of-Way

165. A portion of Mid-Atlantic's approved route is near or adjacent to existing Columbia gas pipeline rights-of-way. Columbia is concerned that the construction and operation of the Mid-Atlantic pipeline could interfere with Columbia's ability to use its own rights-of-way for routine replacement, emergency actions, and looping. Thus, Columbia asks that Mid-Atlantic be required to file a plan with the Commission addressing Columbia's encroachment concerns in detail prior to commencing construction. Columbia notes that it intends to meet with Mid-Atlantic and expects these matters can be resolved by minor routing realignments.

Commission Response

166. While we recognize that the companies will share overlapping temporary and permanent rights-of-way along portions of the planned route, we do not believe it is necessary to impose the requested reporting requirement on Mid-Atlantic. Given that it is in both companies' best interest to ensure that their construction activities, as well as day-to-day operations, do not interfere with neighboring pipelines, we expect Columbia and Mid-Atlantic will reach agreement on such matters. Further, we find the information we currently require from pipelines regarding operations, maintenance, and planned construction is sufficient to ensure thorough Commission oversight. In response to Columbia's concern that Mid-Atlantic may interfere with its ability to make full use of its existing right-of-way, we state that Mid-Atlantic must acquire property rights sufficient to construct and operate its own pipeline without impinging on Columbia's existing property rights.

11. Conservation Easements

167. The Brandywine Conservancy complains that Environmental Condition No. 83, designed to protect resources on properties with conservation easements, directs Mid-Atlantic to consult with landowners and then file a summary of these consultations with the Commission, but does not require Mid-Atlantic to commit to, and the Commission to approve, any mitigation measures. The Brandywine Conservancy comments that because the Commission has acted in advance of knowing the type and cost of mitigation measures that will be required, it cannot know if these measures will prove practical and financially feasible. The Brandywine Conservancy proposes modifying Environmental Condition No. 83 to require Mid-Atlantic to identify properties with conservation

easements within 30 days of issuance of an order approving the project to provide sufficient time to evaluate potential impacts, and to require that Mid-Atlantic consult with the Brandywine Conservancy, which holds a legal interest in the easements, as well as the landowner.

Commission Response

168. In Environmental Condition No. 83, we require Mid-Atlantic to submit the results of consultations with landowners whose properties are subject to conservation easements and describe agreed-upon mitigation measures to enable us to review, in advance of construction, whether construction, as mitigated, would be consistent with the terms of the conservation easements. This offers us the opportunity to seek changes to the mitigation measures where warranted and to monitor compliance with the measures.

169. We agree that the sooner properties with conservation easements are identified, the sooner discussions may begin among the landowners and Mid-Atlantic. Given that it is in Mid-Atlantic's self-interest to commence and complete this process promptly, since it will not obtain authorization to construct until the process has been completed, we find no need to impose the requested time limit. Similarly, we find no need to compel consultation with the conservation easement holder (be it the Brandywine Conservancy, the Rural Legacy Program, or a local municipality). If the terms of the conservation easement require the conservation easement holder's participation in discussions, then Mid-Atlantic will need to include the conservation easement holder in the discussions. Therefore, we do not believe that modifying Environmental Condition No. 83 of the Commission order is warranted.

12. Water Crossings – Horizontal Drilling v. Trenching

170. Maryland and the COE fault the final EIS for not including complete evaluations and plans for horizontal directional drilling (HDD) crossings at a number of locations, including Back River, Deer Creek, Big and Little Gunpowder Falls, Little Gunpowder Falls, Octoraro Creek, White Marsh Run, Wild Cat Branch, and Winters Run. Maryland complains the final EIS does not adequately describe Mid-Atlantic's pipeline's impacts on lands protected under Maryland's Rural Legacy Program and whether its construction and operation will be consistent with the terms of agricultural and conservation easements.

171. Maryland believes the Commission should require that HDD be used to cross Big Gunpowder Falls, Deer Creek and White Marsh Run. NOAA Fisheries states its preference for employing an HDD at these sites, as well as the Octoraro Creek crossing.

Commission Response

172. As recommended in the EIS, HDD crossings will be required for Back River, Little Gunpowder Falls, the Susquehanna River, and Winters Run. Further, Mid-Atlantic will be required to provide further details to assess the merits of using HDD for crossing Octoraro Creek, West Branch Brandywine Creek, and the first White Marsh Run crossing. As indicated by Maryland and the COE, the final site plans for some of these crossings have not been completed. However, as indicated in the EIS, prior to construction, Mid-Atlantic must file final geotechnical data to support the feasibility of HDD crossings at these sites. Once this information is completed, the final site plans will be provided to the Commission and the appropriate permitting agencies for review and approval.

173. The applicants' assessment of employing an HDD crossing at Big Gunpowder Falls, Deer Creek, and White Marsh Run was submitted to the Commission in a data response¹⁶⁷ and is reflected in the final EIS.¹⁶⁸ In its March 5, 2009 response to NOAA Fisheries, AES compares the impacts of an HDD versus trenching for pipe installation at these crossings. We have reviewed AES's reply and affirm our determination that, on balance, an HDD is not merited at these crossings in view of timing restrictions and other mitigation measures we have imposed. In addition, in-stream construction of all waterbodies is subject to compliance with any additional restrictions placed on the crossing method by the COE, the Maryland Department of the Environment, the Pennsylvania Department of Conservation and Natural Resources, or FWS during the permitting process. Upon completion of the permits/approvals, the applicants must provide revised alignment sheets and crossing plans, as needed, to be compliant with the permit requirements.

174. We have reviewed the additional data provided regarding the feasibility of an HDD crossing of Big Gunpowder Falls. We find that regardless of the method employed, crossing Big Gunpowder Falls will directly impact commercial and residential property use. In view of seasonal constraints on trench activities imposed to protect spawning anadromous fish, and given HDD's more significant land use and noise impacts, we find a trenched crossing of Big Gunpowder Falls to be preferable.

¹⁶⁷ AES and Mid-Atlantic *Data Response* of September 2, 2008; response to comment GEN 13.

¹⁶⁸ See final EIS, section 4.3.2.5, HDD and Dry Crossings, pages 4-66 through 4-70.

175. For Deer Creek, an HDD would decrease the impacted forested acreage by approximately 0.88 acre. Further, while a trenched crossing would require clearing to expand an existing Columbia right-of-way by 25 feet, an HDD would require clearing at entry and exit points that would have a significantly greater impact on the landowners at those sites than would widening the already cleared right-of-way. In view of these considerations, as well as the noise and traffic impacts of an HDD and the seasonal restriction on trench activities to protect fish spawning, we do not find HDD to be a significantly better option than trench installation for crossing Deek Creek.

176. For Octoraro Creek, we find HDD to be preferable. The applicants state their intent to conduct geotechnical testing in order to assess the risks of an HDD under the creek. The applicants ask that the Commission and NOAA Fisheries remain open to reconsidering the crossing method. We have required additional coordination with the Chester Water Authority, along with the results of the geotechnical investigation of the site, before finalizing the crossing technique for Octoraro Creek and remain open to reconsideration of the crossing method at this location.

177. For White Marsh Run, the final EIS recommends an HDD crossing (for the first crossing only; the distance for the second and third crossings make an HDD impractical). AES and Mid-Atlantic maintain that the EIS did not properly assess the comparative impacts of an HDD versus trenched crossing – e.g., by not taking into account restrictions on construction in and along the Baltimore Gas and Electric Company (BGE) corridor. While AES and Mid-Atlantic conclude that an HDD crossing at White Marsh Run is feasible, they believe it would cause a net increase in adverse impacts. Therefore, they advocate instead using a trenched crossing. We find that further consultation between the applicants and BGE is needed before we can eliminate the alignment presented in the EIS for the laydown areas required for this crossing. The recommendation for an HDD alignment of White Marsh Run may be reconsidered based on additional safety information, geotechnical results, and revised environmental data. Therefore, we affirm the crossing design as identified in the EIS, pending information from BGE regarding corridor location requirements or restrictions across their property.

178. In support of its position that the Commission should require the use of HDD to cross Big Gunpowder Falls, Deer Creek and White Marsh Run, Maryland refers to section 305(b)(4)(B) (2006) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act),¹⁶⁹ which states:

Within 30 days after receiving a recommendation under subparagraph (A), a Federal agency shall provide a detailed

¹⁶⁹ 16 U.S.C. § 1855(b)(4)(B) (2006).

response in writing to any Council commenting under paragraph (3) and the Secretary regarding the matter. The response shall include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on such habitat. In the case of a response that is inconsistent with the recommendations of the Secretary, the Federal agency shall explain its reasons for not following the recommendations.

179. We note this refers to recommendations, not requirements. However, if the federal agency does not agree with the recommendations of the Secretary of Commerce, the agency must explain its reasons for not following the recommendations. Section 305(b)(2) of the Magnuson-Stevens Act requires federal agencies to consult with the Secretary of Commerce regarding any action or proposed action authorized, funded, or undertaken by the agency that may adversely affect Essential Fish Habitat (EFH) identified under the Act. Under section 305(b)(4)(A) of the Magnuson-Stevens Act, NOAA Fisheries provides EFH conservation recommendations, and under section 305(b)(4)(B), an agency must describe the actions it proposes taking to avoid, mitigate, or offset the effects of the agency's activity on the EFH. These described actions have been followed in this proceeding. Consultations with NOAA Fisheries, however, are still ongoing as additional coordination and site-specific data are being finalized regarding the water bodies for which HDD crossings are still under consideration.

180. Impacts on rural, natural, or agricultural lands, such as those resources that would be protected by the Rural Legacy Program, were discussed in the EIS under various headings (including section 4.2.3.1, *Prime Farmland Soils*; 4.5.2, *Vegetation Management Programs*; 4.8.1.3, *Conservation Easements and Agriculture*; 4.8.5.1, *Agricultural Land*). The compliance with specific terms of agricultural and conservation easements would be settled by the landowner and/or easement holder and Mid-Atlantic during easement negotiations. As stated in our January 2009 Order, Environmental Condition No. 84 requires that before commencing construction, Mid-Atlantic must develop and file with the Commission an *Agricultural Impact Mitigation Plan* with measures to safeguard the fertility of the soil, protect and repair drain tiles, restore fields, and monitor future crop success. Also, Environmental Condition No. 83 requires Mid-Atlantic to consult with all landowners with property in conservation easements to identify mitigation to protect the land.

13. Pipeline Route Variation 9

181. The Bradford Glen Homeowners assert the Commission did not give adequate consideration to, and conduct a site visit to assess, an alternative route proposed by the Bradford Glen Homeowners. The Bradford Glen Homeowners urge the Commission to reassess the comparative impacts of Variations 9, 9A, and 9-HOA. In particular, the Bradford Glen Homeowners highlight the disadvantages of the selected route to two

homeowners, with residences that are currently about 50 feet from the existing Columbia pipeline, which will be about 25 feet from Mid-Atlantic's pipeline, with the construction right-of-way coming within about three feet of houses. Further, the Bradford Glen Homeowners contend the approved route traverses the length of the Victoria Crossing subdivision's storm water drainage system, and that there are no construction or restoration methods that can avoid upsetting the subdivision's drainage patterns and adversely impacting downstream water retention basins.

182. Dawn and David Cassel object to Variations 9 and 9-HOA on the grounds that the pipeline's proximity to their residence will adversely impact their property value and the risk of a pipeline rupture poses a danger to them, to wildlife, and to the Bradford Elementary School. Dodie S. Preston objects to both Variation 9 and 9-HOA and others through Victoria Crossing, expressing concerns with respect to safety, security, construction noise, deforestation and resulting water runoff, and the project's impact on property values and future development.

Commission Response

183. In the EIS, we acknowledge we were unable to identify a reasonable route around Victoria Crossing, and that all of the potential routes through Victoria Crossing presented problems due to "the number of pipelines and other utilities within the existing right-of-way and the proximity of the residences to the existing right-of-way."¹⁷⁰ We elected to adopt the proposed route, which parallels an existing Columbia pipeline right-of-way, because none of the route variations proved environmentally preferable. We affirm that finding. We summarize the rejected variations and their comparative impacts below.

184. Route Variation 9 appears to reduce impacts to residences; however, it would impact the forested buffer of Beacon Hill Park and impact a different group of residences, including one that would lose all tree screening between the residence and the neighbors.¹⁷¹ Route Variation 9A would minimize impacts to residences, but it would clear more forest and create a new corridor affecting a new group of residences that are not currently impacted by a pipeline easement.¹⁷² Route Variation 9-HOA relies on narrowing the width of the construction right-of-way, an alternative we reject because it would reduce the right-of-way to less than the minimum distance necessary for the safe

¹⁷⁰ Final EIS at 3-71.

¹⁷¹ *Id.* at 3-69

¹⁷² *Id.* at 3-71.

operation of construction equipment; in addition, Variation 9-HOA would require removing a garage, a significant adverse impact to the garage owner.¹⁷³

185. The requests for rehearing repeat concerns we have previously addressed and responded to regarding deforestation and water runoff, noise, safety, security, storm water drains, and wildlife. We note that in addition to the construction and operation requirements that will apply along the length of the Mid-Atlantic pipeline, we have imposed Environmental Condition No. 57 to reduce impacts on forested common areas in the segment through Victoria Crossing. In the EIS, we commented that “the pipeline may result in an adverse impact on property values if the potential buyer places value on such items. In addition, restrictions on the property caused by pipeline easements may be off-putting to some potential buyers depending on their plans for the property.”¹⁷⁴ We add that property owners that believe a temporary or permanent right-of-way will diminish the present or future value of their property may seek compensation for this loss in negotiations with Mid-Atlantic or in an eminent domain court proceeding.

14. Pipeline Route Variation 10A

186. The Downing Forge Home Owners Association and the Township of Cain state that in considering Variation 10A, the issue of storm water management was overlooked, and worries that the clearing required along this route will increase runoff and “cause flooding in any moderately severe rain event.”¹⁷⁵ The parties point out that the center of the right-of-way passes 15 feet from a footbridge and are concerned construction could have a “devastating” effect on it. Mr. McQueen, a property owner along Variation 10A, posits that the pipeline’s placement could interfere with his operation of a stainless steel plate and plate product business.

187. Liam J. O’Rourke lives in a house along Variation 10A that he contends may have been owned by the founding family of Dowingtown, PA. He states he has found “unusual historic items in the soil” on his property, and on this basis, requests that a detailed historic survey of his property be conducted. Mr. O’Rourke objects to the removal of trees that the Mid-Atlantic pipeline’s construction would require, stating this would diminish the privacy and esthetic pleasure the trees currently provide, degrade wildlife, and increase risks associated with surface water run off, such as erosion. Mr. O’Rourke proposes either returning to the initially-proposed route or moving the pipeline

¹⁷³ See 126 FERC ¶ 61,019 at P 64.

¹⁷⁴ Final EIS at 5-16.

¹⁷⁵ Downing Forge Home Owners Association’s *Comments*, at 1 (Jan. 21, 2009)

20 to 30 yards to the south to ensure no construction occurs within 40 feet of his property and enable him to retain a 20-foot tree veil. Mr. O'Rourke seeks certain assurances, such as indemnification in the event that Mid-Atlantic's construction results in flooding below the O'Rourke property and commitments from Mid-Atlantic regarding the actions it will take to restore the affected ground.

Commission Response

188. The impacts of Variation 10A on tree clearing, drainage and flood runoff were examined in the EIS, and to address these matters we imposed Environmental Condition No. 18. Regarding the impact of construction on the footbridge near the right-of-way, we believe that this issue can be addressed through easement negotiations between the applicant and the landowner, as well as through development of the site-specific construction and restoration plan for the Downing Forge Community, as required in Environmental Condition No. 18.

189. Mr. McQueen states that he moves and stores heavy loads of steel and uses high temperature plasma cutters to fabricate steel products. In view of this, he questions the safety of placing the pipeline on his property. It is not unusual for pipelines to be routed through heavy industrial areas. As discussed in sections 4.8.1.1 and 4.9.5 of the EIS, as part of the easement negotiation process, Mid-Atlantic will work with landowners to determine whether additional design or engineering considerations are warranted, such as making minor changes in the alignment, placing concrete pads over the pipeline, or increasing the burial depth of the pipeline. These or similar modifications may be used to resolve issues regarding high temperature steel cutting near the pipeline, the passage of commercial trucks and construction vehicles over the pipeline, and storing heavy loads on top of the pipeline. In addition, Mid-Atlantic and Mr. McQueen may arrange an appropriate construction time window to minimize construction-related impacts to his business operations and employees. We note that during pipeline construction and restoration, Commission staff will maintain a compliance monitoring program to ensure the project is constructed in accordance with the environmental conditions of Mid-Atlantic's certificate authorization. Two of these conditions are specifically designed to promote public involvement. Environmental Condition No. 6 requires Mid-Atlantic to develop and implement an environmental complaint resolution procedure that provides landowners with clear and simple directions for identifying and resolving their environmental mitigation problems or concerns during construction and restoration of the right-of-way. Environmental Condition No. 11 requires Mid-Atlantic to file weekly status reports that include, among other things, a description of any landowner/resident complaints and the measures taken to satisfy their concerns. Finally, as is the case with all jurisdictional pipelines, the Mid-Atlantic pipeline must be constructed and operated in accordance with the Department of Transportation's safety regulations. In view of the foregoing, we expect the pipeline can be safely constructed and operated on its approved route.

190. In response to Mr. O'Rourke's concern about historic items that might be buried on his property, we note that to the extent the Mid-Atlantic pipeline corridor and ancillary use areas intrude on portions of his property, those areas will be surveyed in accord with Environmental Condition No. 21, which requires that prior to construction, Mid-Atlantic must complete outstanding cultural resources surveys of the pipeline corridor and ancillary use areas, and file with the Commission, for review and written approval by the Director of OEP, the results of the surveys and any treatment plans, including the Maryland and Pennsylvania SHPOs' comments on all reports and plans. Additional concerns of Mr. O'Rourke are addressed by Environmental Condition No. 18, which requires that prior to construction of the portion of the pipeline proximate to Mr. O'Rourke's property, Mid-Atlantic must file with the Commission, for review and written approval by the Director of OEP, a site-specific construction and restoration plan that addresses, among other things, limiting tree clearing, erosion control, restoration, and revegetation.¹⁷⁶

191. Environmental Condition Nos. 54 and 55¹⁷⁷ require Mid-Atlantic to develop individual site-specific residential plans for the owner of each residence located within 50 feet of construction work areas, to provide one month for the owner to review and comment on these plans, and to offer to monitor the foundation of every permanent structure within 50 feet of the construction work area for damage from construction. Mid-Atlantic must file these plans, along with any comments presented by property owners, with the Commission for review and written approval by the Director of OEP.¹⁷⁸

¹⁷⁶ Prior to construction, Mid-Atlantic must also complete and submit any outstanding wetland surveys and threatened and endangered species surveys.

¹⁷⁷ See n. 37 and n. 38, respectively.

¹⁷⁸ Each site-specific residential plan includes: (1) the location of the residence in relation to the new pipeline and any other existing gas or oil pipelines or utilities (including water, sewer, and septic systems); (2) the boundaries of all permanent and temporary construction work areas; (3) other nearby structures and residential features (including decks, pools, swings, fences, driveways, etc.), indicating which will be removed and which will be subject to restrictions after construction; (4) trees and other landscaping, identifying the vegetation that will be removed, and indicating where trees will not be allowed after construction; (5) the location of topsoil and subsoil storage piles; (6) equipment travel lanes; (7) safety fencing and other safety features; (8) the distances between construction work areas and permanent structures; (9) a detailed description of the construction techniques that will be used (such as reduced pipeline separation, centerline adjustment, use of stove-pipe or drag-section techniques, working over existing pipelines, pipeline crossover, bore, utility crossing, etc.); (10) an estimation of the

(continued...)

If Mr. O'Rourke's residence is within 50 feet of any Mid-Atlantic work area, a site-specific plan will be developed, Mr. O'Rourke will have the opportunity to review and comment on the plan, and Mid-Atlantic will not be able to exercise authority under NGA section 7(h) to acquire property rights or start construction until it the Director of OPR approves the plan.

192. We reaffirm the reasoning in our prior order and the EIS describing our preference for adopting Route Variation 10A over the initially-proposed route.¹⁷⁹ We reject Mr. O'Rourke proposal to relocate the approved pipeline route to the south in order to preclude tree removal, since doing so would impact residences to the south of the approved route. It is unclear whether any trees that may be removed come within Mr. O'Rourke's property line; if any do, Mr. O'Rourke will be compensated for this loss, with compensation determined by negotiation or in an eminent domain proceeding.

15. Pipeline Route Variation 11

193. Byers is a company that owns property that is part of a large-scale, largely residential development where Mid-Atlantic's pipeline will end in Chester County, Pennsylvania. Byers asks the Commission to review its rationale for rejecting proposed Variation 11 on the grounds that it would shift impacts "to adjacent residents on Dartmouth Road, trail users, and vehicular traffic along Graphite Mine Road."¹⁸⁰ Byers contends this description of the rejected rerouting does not describe Variation 11 (as set forth in revised Table 10.6.4-1 and in Resource Report 10 Addendum 2), but refers to a previously proposed alternative variation. Byers maintains that Variation 11, which would include an HDD, "eliminates *any impact* to any landowners,"¹⁸¹ but the Commission failed to consider this option.

Commission Response

194. Byers advocates a route variation in a similar location to Variation 11 that would place the Mid-Atlantic pipeline on the west side of Pottstown Pike to avoid the Byers'

amount of time required for construction; (11) a description of restoration and revegetation measures and procedures for the property; and (12) a detailed description of the measures Mid-Atlantic will implement to ensure public safety during construction activities and to minimize and mitigate impacts from dust, noise, and vibration.

¹⁷⁹ 26 FERC ¶ 61,019 at P 74 and final EIS at 3-75 to 3-77.

¹⁸⁰ *Id.* at P 78 and at 3-77, respectively.

¹⁸¹ Byers *Request for Rehearing* at 7.

currently undeveloped property. This variation was submitted by the applicants and discussed in the EIS. Although Byers claims that this route eliminates any impact to any landowners, Commission staff's site visit and review of more recent aerial photography indicate that several new homes in a high density residential community would be located directly adjacent to this route along a steep hillside. The noise from the HDD involved with Byers' suggested modified Variation 11, as well as the potential for a drill failure near the homes, also persuaded us that Byers' alternative route would not offer environmental advantages over the approved route, which traverses a presently undeveloped and cleared property.

195. Therefore, we found that the Variation 11 alternative that would avoid the Byers property did not merit a more in-depth analysis than was presented in the EIS. We affirm our conclusion that this rejected variation would shift the construction impacts from a presently undeveloped property to a developed area. We also affirm that impacts to the Byers property may be mitigated through minor alignment changes on the property, without affecting new landowners, as provided for by Environmental Condition No. 19.

16. Pipeline Route Variation 12C

196. Hankin, a company that owns land in Upper Uwchlan Township in Chester County, Pennsylvania, maintains the Commission erred in adopting Route Variation 12C to avoid residences on or near Red Tail Circle in the Hunters Ridge development in Upper Uwchlan Township without studying the feasibility of retaining the originally proposed route and employing an HDD to diminish impacts to residents.¹⁸² Alternatively, Hankin indicates that even without an HDD along the originally proposed route, this route, which lies along an existing pipeline right-of-way, would result in fewer adverse impacts on residences than the approved Variation 12C route.

197. In response to Hankin, Richard J. and Victoria S. Channell comment that an HDD along the proposed route would, even if feasible, be detrimental to residences near the HDD entry and exit sites, result in the loss of forested areas, place the new pipeline within 50 feet of one residence, and have a greater impact on Upper Uwchlan Township park property.

¹⁸² Environmental Condition No. 4 in the appendix to the January 2009 Order states that Mid-Atlantic shall adopt all of the Commission staff's recommended route variations described in section 3.3.3 of the EIS, which include: Route Variations 1B, 1C, 1D, 2A, 6, 10A, 12C, 13, and 14; the Kirk Mills Variation A; the Romansville Road Variation B; and the Chesaco Avenue Variation.

198. In response to the Channell's comments, Andrew Durkin insists an HDD along the originally proposed route would be feasible, and would have a lesser impact on a less congested route than Variation 12C. Mr. Durkin states that (1) an HDD will eliminate surface construction within 100 feet of any residence, as opposed to Variation 12C, which will require construction within 105 feet of seven residences; (2) the impact of expanding an existing easement on the proposed route is less than establishing a new easement along the Variation 12C route; (3) an HDD will eliminate any risk to septic systems and wells located along Variation 12C; (4) Variation 12C will not necessarily have a lesser impact on Upper Uwchlan Township property; and (5) avoiding Variation 12C will have a lesser impact on forested areas and move construction away from roadways.

199. Mr. Durkin complains that the majority of residents impacted by Variation 12C did not receive notice of the proposed route until after the Commission's site visit and after its last public meeting. Further, Mr. Durkin identifies Roy and Sue Stewart, William and Jennifer Nast, and Rafal and Agmieszaka Ambroziak as affected property owners along the Variation 12C that did not receive notice from the applicants or the Commission regarding this variation.

200. In response to Mr. Durkin's comments, Steve and Joanne McNaughton argue that: all affected landowners received adequate notice of the proposed project; Mr. Durkin misidentified the nature of certain existing wells; Mr. Durkin's claim that the project will interfere with his use of his property is unsupported; expanding an exiting pipeline right-of-way to add a new pipe will diminish the commercial and residential property values of affected landowners and result in the loss of forested acreage; HDD impacts would be more extensive than stated; and Mr. Durkin's preferred route requires crossing a stream and wetland, would have as great, or greater, an adverse impact on the Lakeridge Wastewater Treatment Facility and would also have adverse traffic and recreational impacts.

Commission Response

201. Our alternatives analysis of potential routes in the congested Hunters Ridge subdivision attempted to place the pipeline where it would have the least impact on resources in this area. The EIS describes the numerous route variations that were considered in an effort to assess and diminish impacts on residential and commercial development, property values, septic systems and water wells, wetlands, waterbodies, forested habitat, recreational use, safety, and constructability. The final EIS evaluated route variations that were put forth during pre-filing, scoping, and in comments on the draft EIS, including options developed by Commission staff; we concluded that there was no route through Hunters Ridge that would not temporarily impact the interests of landowners, business owners, developers, or others. In selecting Variation 12C, we sought to place the new pipeline along property lines, roads, and utility corridors to reduce the impacts on future commercial development and on congested residential areas.

The Variation 12C HDD crossing will further limit surface disturbances near residential areas.

202. On rehearing, the option of employing an HDD along the originally proposed route is raised. The use of an HDD in this area would avoid direct impacts on landscaping, mature vegetation, and many residential properties in Hunters Ridge. While this alternative was not evaluated in the final EIS, our review of the Hunters Ridge area leads us to conclude that an HDD would not alleviate all of the issues of constructing within the congested residential area and adjacent to several existing pipelines. Several large workspaces would be required for the HDD exit and entry locations and for pipe stringing. In addition, a new permanent easement would still be required outside of the HDD portion in an area planned for residential subdividing, within the Lakeridge Wastewater Treatment Facility property, within forested areas, and through a public park's ball field. These permanent easements would be similar to the proposed crossing plan and restrict property owners' future use of the land more so than the route approved along Variation 12C.

203. We believe that the conditions imposed in conjunction with the required use of Variation 12C (Environmental Condition Nos. 16¹⁸³ and 20¹⁸⁴) adequately address the concerns regarding the approved route, as well as concerns about commercial development and the Lakeridge Wastewater Treatment Facility associated with Variation 12C. Thus, we find Variation 12C to be environmentally preferable to the use of an HDD along the originally proposed route. In view of the breadth of Hunters Ridge routing alternatives we have previously reviewed, and our determination that the Variation 12C

¹⁸³ Environmental Condition No. 6 in the appendix to the January 2009 Order provides that, prior to construction of Route Variations 1B, 1C, 1D, and 12C, Mid-Atlantic shall file final site-specific plans for crossing the developed commercial tracts near each of these route segments. The plans shall include depictions of all roads, parking lots, and utilities (water, sewer, storm sewer, electric service, and telecommunications cables) that will be crossed, and describe how Mid-Atlantic will ensure safe access to businesses by the employees and the public during construction.

¹⁸⁴ Environmental Condition No. 20 provides that, prior to construction of Route Variation 12C, Mid-Atlantic must develop for the Lakeridge Wastewater Treatment Facility site, a plan in consultation with Upper Uwchlan Township and the Pennsylvania Department of Environmental Protection to reduce/mitigate compaction on the site during and after construction so that the area can be recertified as a community drip field. If the area cannot be recertified, Mid-Atlantic must provide a replacement disposal method for the residents of Lakeridge. The plan and all associated correspondence must be filed with the Commission.

route will be acceptable, we do not believe it is necessary to induce delay by, in effect, reopening the record to review this suggested revision to a route already examined. We consider our analysis of routing alternatives through the Hunters Ridge subdivision area to have been adequate and to now be complete.

204. In response to Mr. Durkin's assertion that not all landowners along the Variation 12C alternative route received notice that this alternate route could affect their property, we expect landowners along Variation 12C may have received notice later in time than landowners along the originally proposed route. However, this does not mean that landowners along Variation 12C did not receive adequate notice. Section 157.6(d) of our regulations requires that notice be provided to all potentially "affected landowners," i.e., those whose land will be crossed or used by the proposed project, or whose property abuts either side of a proposed right-of-way or facility.

205. Thus, not all landowners in proximity to the Variation 12C route come within our regulations' description of affected landowners that are to receive notice of a proposal. For example, many landowners along Kendra Lane, Auburn Drive, North Milford Road or Township Line Road, where some of the parties named by Mr. Durkin reside, do not qualify as affected landowners. Some of these residences, such as the Stewarts, are across the street from an area that will be used for construction activities; because the residents' land will not be crossed or used, and because the residents' property line does not abut the boundary of the area to be used for construction, these residents are not affected landowners.

206. We find that the applicants have met the requirements of our regulations, in that they have made a good faith effort to provide timely notice to landowners along Variation 12C and the other alternative routes. Accordingly, we conclude that all affected landowners along the approved pipeline route, including those along Variation 12C, received adequate notice and have had a reasonable amount of time to state objections to the proposed route. We discussed timely responses in the final EIS, we discussed late-filed responses in our January 2009 Order, and we discuss responses submitted shortly before or after issuance of the January 2009 Order herein.

17. Cumulative Impacts

207. The Brandywine Conservancy asserts the Commission's cumulative impacts analysis is deficient as it does not identify all of the existing and planned pipelines in the affected area and does not provide quantified and detailed information for the full range of cumulative impacts. Specifically, the Brandywine Conservancy states the Commission did not discuss (1) the possible impact of two pipelines crossing the same water basins or streams in different locations, thereby creating the potential for damage at two different sites, and (2) the prospect that construction will take place on future pipeline projects (the Williams Companies, Inc. Sentinel Expansion Project and Rockies Connector Pipeline and the Dominion Resources, Inc. Dominion Keystone Project) during the same time

frame, leading to cumulative impacts from noise from blasting, increased traffic from construction vehicles, and effects on wetlands, farmlands, and individual properties.

Commission Response

208. The Brandywine Conservancy asserts the Commission erred in assessing cumulative impacts by only considering proposed and approved pipeline projects without also taking into account the 25 existing pipelines in Chester County, Pennsylvania. In our discussion of cumulative impacts related to the Mid-Atlantic pipeline in section 5 of the EIS, we identified several relevant proposed and approved pipeline projects and considered their impacts in conjunction with the impacts of the Mid-Atlantic pipeline. We did not identify and review the existing pipelines in the cumulative impacts section of the EIS, since impacts of the existing and Mid-Atlantic pipelines were analyzed based on current land use. Current land use for the pipelines' rights-of-way is primarily open space or agricultural land. Impacts of the Mid-Atlantic pipeline on areas where pipelines are already in place are discussed throughout our review of the Mid-Atlantic pipeline in section 4 of the EIS.

209. In response to the Brandywine Conservancy's contention that we neglected to review the cumulative impact of two pipelines crossing the same water basins or streams in different locations, we repeat:

Within Chester County, Pennsylvania, Transco's Sentinel Expansion Project would affect some of the same water basins or streams as the Mid-Atlantic Express Pipeline construction. But since the Sentinel Expansion Project would cross these streams at locations different than that of the Mid-Atlantic Express Pipeline and both Transco and Mid-Atlantic Express would implement measures to mitigate the impacts, we believe that if approved, cumulative impacts to the watershed(s) and streams crossed by both projects would be minor.¹⁸⁵

210. We expect that with the mitigation measures required for construction of the pipeline, impacts to waterbodies will be limited to the immediate vicinity and slightly downstream of the construction site, and will endure for no more than a short time after construction, after which the waterbody will return to its previous conditions. Therefore, we reaffirm that temporary impacts from pipeline construction at other locations on a waterbody would, in most cases, not result in a significant cumulative impact.

¹⁸⁵ Final EIS at 4-342.

211. With respect to the prospect of simultaneous pipeline construction projects, we took into account the pipeline project closest to Mid-Atlantic -- i.e., the Sentinel Expansion Project -- and found that because there is no direct overlap in the projects' footprints, there is no prospect of cumulative impacts on wetlands, farmlands, or individual properties.¹⁸⁶ We observed, and affirm, that although there may be other projects or activities involving significant construction in the vicinity of the AES and Mid-Atlantic project which we have not identified and considered, because there are not now any known proposals or approvals for such projects or activities, such projects or activities would be unlikely to get underway until after the applicants' time frame for construction.¹⁸⁷

18. Groundwater Contamination

212. Baltimore County objects that the Commission only requires a report on groundwater wells after construction, and argues for imposing additional measures applicable before construction to prevent contamination.

Commission Response

213. In addition to standard construction practices intended, among other things, to prevent groundwater contamination, we require the applicants to implement a *Spill Prevention, Control and Countermeasure Plan*. We expect these construction practices will be adequate to avoid groundwater contamination.

19. Wells and Septic Systems

214. Baltimore County claims the Commission has not supported its assumptions that mitigation measures will be adequate to protect residents' wells and septic systems.

Commission Response

215. Wells or septic systems along the construction work area will be tested before and after construction, and any damages must be repaired or the well or septic system will have to be replaced. In addition, Environmental Condition No. 26 specifies that within 30 days of placing its pipeline in service, Mid-Atlantic must file a detailed report with the Commission identifying all water supply wells/systems damaged by construction and

¹⁸⁶ See section 4.13 of the final EIS.

¹⁸⁷ Projects that are merely contemplated, in contrast to projects that have been proposed, need not be included in a cumulative impact review. See *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 20 (1976).

how they have been repaired. These measures should ensure that the condition of residents' wells and septic systems after Mid-Atlantic's construction activities will be the same, or better.

20. National Historic Preservation Act

216. The Advisory Council on Historic Preservation, the COE, the Pennsylvania Bureau for Historic Preservation, and Safety, Agriculture, Villages and Environment, Inc. point out that certain surveys of historic and archaeological resources and consultations that are needed to comply with NHPA section 106 remain incomplete.

Commission Response

217. We recognize that certain necessary surveys and certain consultations remain outstanding. In response, we have imposed Environmental Condition Nos. 91 and 92, which preclude the applicants from beginning construction until these surveys and consultations are complete.

21. Threatened and Endangered Species

218. The Pennsylvania DES, U.S. Fish and Wildlife Service, and the COE express concerns regarding the impact of the project on the federally listed endangered Indiana bat and the threatened bog turtle and northeastern beach tiger beetle. The COE asks that HDD be evaluated in the vicinity of 949WA1, 949WA2, and 949WA3, stating these areas are potential bog turtle habitat.

Commission Response

219. The project cannot go forward until the potential impacts on the species of concern are found to be acceptable. Environmental Condition Nos. 46, 47, and 52 require the applicants to complete unfinished surveys and consultations concerning the Indiana bat, bog turtle, and northeastern beach tiger beetle, respectively, before beginning construction. In response to COE, we note Environmental Condition No. 46 specifically requires the completion of bog turtle "surveys at all previously unsurveyed sites." If bog turtles are determined to be present, Mid-Atlantic will be required to avoid the habitat area or cross it in compliance with a bog turtle management plan developed in consultation with FWS, the Maryland DNR, and the Pennsylvania Fish and Boat Commission. Mid-Atlantic will be required to incorporate measures identified in the final plan, which may include HDD, to comply with the ESA.

22. Wetlands

220. The LNG Opposition Team asserts the project will damage wetlands, and objects in particular to (1) using vegetative debris as an equipment matting, which it claims will disrupt the infrastructure, flow patterns, and wetlands' biological function; and (2) using

rye grass for restoration planting, as it is an agricultural cover crop that is not native to wetlands.

Commission Response

221. The use of vegetative debris is a temporary option for equipment matting that may or may not be approved by the regulating agencies, including the COE. Rye grass is intended to temporarily stabilize the soils to allow the return of native cover, which may be slower to reestablish.

23. Wildlife Impacts

222. Baltimore County questions the Commission's conclusion that impacts on aquatic wildlife due to construction will be acceptable.

223. The Waterfowlers assert the Commission has not addressed concerns they raised in comments on the draft and final EIS, and add in requesting rehearing that they are concerned with the lack of protection afforded the federally and state protected migratory waterfowl staging and concentration areas at the AES terminal site. They ask the Commission to clarify the observation in the final EIS that the licensing process for hunting birds will provide adequate oversight of the terminal's impacts on waterfowling. The Waterfowlers maintain that pages 4-93 and 4-94 of the final EIS neglect to specify species of waterfowl utilizing the project area,¹⁸⁸ and add that a group of Osprey nest approximately 1600 yards from the terminal site.

224. The final EIS found that the project should not significantly impact the waterfowl hunting community in view of the extent of waterfowl habitat and the availability of alternative blind locations. The Waterfowlers dispute this, characterizing the loss of existing blinds as "a catastrophic loss of public assets, heritage and culture."¹⁸⁹ They explain that blinds lost due to the project cannot be relocated, and ask what compensation will be provided for this loss. They complain that Figure 4.6.1-1 on page 4-95 of the final EIS does not show all licensed offshore waterfowl blind sites and affected hunting areas.

¹⁸⁸ Waterfowlers identify these omitted species as the Great Scaup, Lesser Scaup, Northern Shoveler, Common Goldeneye, Old Squaw, Surf Scoter, Green Winged Teal, Rudy Duck, and American Coot.

¹⁸⁹ Waterfowler's *Comments on Final EIS*, at 3 (January 15, 2009).

Commission Response

225. We expect the risk to aquatic wildlife from exposure to contaminants in the dredged sediments during construction will be acceptable due to applicants' obligations to take measures to minimize suspended solids and turbidity during dredging and construction in conformity with Maryland and COE permit requirements.

226. We believe our environmental review has addressed the concerns raised by the Waterfowlers, although in so doing, we have not necessarily identified the Waterfowlers as the party presenting certain issues. Sections 4.6.1 and 4.8.4.2 of the draft EIS describe issues raised by the Waterfowlers; Appendix P, P1-203 to P1-207 of the final EIS, reproduces and responds to a May 5, 2008 letter of the Waterfowlers commenting on the draft EIS; Appendix P, P1-292 to P1-293, of the final EIS reproduces and responds to a Sept. 24, 2008 letter of the Waterfowlers commenting on the draft EIS; and section 4.8.4.2 of the final EIS, titled *Waterfowl Hunting*, addresses this resource.

227. We expect appropriate protections for federally and state protected species to be ensured by the applicants' obligation to comply with the environmental conditions in the January 2009 Order. Environmental Condition No. 37 requires AES to consult with the Maryland DNR to develop final best management practices to minimize harm to waterfowl and protect waterfowl habitat within the vicinity of the project area. We note that, to date, no agency-recommended habitat mitigation plans or surveys have been identified by the Maryland DNR; none of the additional species identified by the Waterfowlers as present at the project area have additional federal or state protection beyond protection required for migratory birds. We clarify that our comment regarding habitat protection and licensing was no more than an observation that the regulations already in place could provide a means to monitor and approximate the impact of the project on the waterfowl population in the area.

228. We identified, through consultation with the Maryland DNR, approximately 35 licensed offshore blind sites around Sparrows Point during the 2007-2008 hunting season, and anticipated a similar number for the next season. While the Waterfowlers fault us for not identifying the location of existing blinds more precisely, they do not dispute our count. Although there is no guarantee that hunters will be able to continue using all existing hunting blinds, we affirm our finding that the "overall impacts to the larger waterfowl hunting community would be minimal and largely due to minor relocation of hunting blind locations."¹⁹⁰ If a blind cannot be relocated because there is not another available and comparable site, we expect this will lead to a more intense usage of the remaining blinds. If a person suffers a blind-associated property loss as a result of the

¹⁹⁰ Final EIS at 4-219.

construction or operation of the AES terminal, that person may seek to negotiate compensation with AES or seek compensation in any eminent domain proceeding. We affirm our determination that in view of “the extent of available waterfowl habitat and blind locations in the area surrounding Sparrows Point, we do not find it likely that there would be a significant impact on overall hunting opportunities associated with construction and operation of the LNG terminal.”¹⁹¹

The Commission orders:

(A) Environmental Condition No. 55 is modified to permit Mid-Atlantic to submit a site-specific residential plan based on the best available information when a property owner refuses to allow access to survey. In such instances, Mid-Atlantic still must submit its construction plans, along with property owners’ comments on those plans, for review and written approval by the Director of OEP, and Mid-Atlantic cannot employ eminent domain authority with respect to a residential property until it has obtained such written approval from the Director of OEP for the site-specific residential construction plan.

(B) Environmental Condition No. 55 is further modified so that in any instance where Mid-Atlantic cannot obtain and submit evidence of a property owner’s concurrence on a site-specific plan where the work area will be within 10 feet of the residence, Mid-Atlantic may file the plan with the Secretary, along with any owner comments on the plan which the Director of OEP will consider in determining whether to approve the plan. In all respects, the provisions of Environmental Condition No. 55 continue to apply.

(C) Environmental Condition No. 170 is added to require that AES examine provisions to minimize any effects from flashing or jetting on the downwind dispersion distance of vapor from a release from pressurized piping. Measures to be considered may include, but are not limited to: vapor fencing; installation of spray shielding; or increasing the distance between leak sources and the plant property line. Prior to initial site preparation, AES shall file final drawings and specifications for these measures with the Secretary for review and written approval by the Director of OEP.

(D) Environmental Condition No. 171 is added to provide that, prior to initial site preparation, AES shall file revised modeling which demonstrates that the vapor dispersion exclusion zones at the LNG terminal stay within areas under legal control of AES Sparrows Point. This information shall include an evaluation which addresses the scientific assessment and verification of the source term model used to determine pool

¹⁹¹ *Id.*

spread and vaporization.

(E) The late motions to intervene filed by Londonderry Township, Chester County, Pennsylvania; West Marlborough Township, Chester County, Pennsylvania; East Fallowfield Township, Chester County, Pennsylvania; Villages and Environment, Inc. Safety, Agriculture, Villages and Environment, Inc.; Chester County, Pennsylvania; Lisa and Joseph Gallick; Bob and Jill Holly; Cliff and Nancy Pollack; the Oscar F. Senn Trust; Caln Township, Chester County, Pennsylvania; and Newlin Township, Chester County, Pennsylvania are denied.

(F) Except as provided in Ordering Paragraphs (A) through (E) above, the requests for rehearing, reconsideration, clarification and stay are denied.

By the Commission. Chairman Wellinghoff dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

AES Sparrows Point LNG, LLC

Docket No. CP07-62-001

Mid-Atlantic Express, LLC

Docket Nos. CP07-63-001
CP07-64-001
and CP07-65-001

(Issued December 17, 2009)

WELLINGHOFF, Chairman, dissenting:

This order addresses rehearing requests filed by several parties in response to a Commission order issued on January 15, 2009.¹ In the January 15 Order, the Commission authorized under section 3(a) of the Natural Gas Act (NGA), and Parts 153 and 380 of the Commission's regulations, to site, construct, and operate a liquefied natural gas (LNG) marine import terminal and associated facilities in Baltimore County, Maryland. I dissented.

In that dissent, I stated that an analysis of relevant factors indicates that the Sparrows Point Project is not needed to serve the energy needs of the Mid-Atlantic and South Atlantic regions.² Further, I found that the future energy needs of these regions can be better met with alternative resources, such as domestic natural gas infrastructure and renewable and distributed energy resources. Finally, environmental and community concerns had not been fully and fairly evaluated.

Several developments over the past year reinforce my concerns about these issues. With respect to other natural gas alternatives improvements in our ability to produce and deliver gas from shale has led to a dramatic increase in recoverable domestic gas supply. The Commission's Winter 2009/2010 Energy Market Assessment showed that domestic gas resources now total over 2 quadrillion cubic feet, one-third more than its previous level and almost 100 years of gas production at current consumption levels.³

¹ *AES Sparrows Point LNG, LLC, et al.*, 126 FERC ¶ 61,019 (2009).

² The Mid-Atlantic region includes New York, New Jersey, and Pennsylvania. The South Atlantic region includes Maryland, Delaware, Virginia, and the District of Columbia.

³ The Winter 2009/2010 Energy Market Assessment is available at <http://www.ferc.gov/EventCalendar/Files/20091119102759-A-3-final.pdf> (last visited December 15,

(continued...)

In light of my continuing concern regarding these issues, I respectfully dissent from today's order.

Jon Wellinohoff
Chairman

2009).