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## NOTE

### CONTROLLING LNG *AES SPARROWS POINT LNG, LLC V. SMITH,* 527 F.3D 120 (4TH CIR. 2008).

*James C. Erdle, Jr.\**

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#### I. INTRODUCTION

In *AES Sparrows Point LNG, LLC v. Smith*, the United States Court of Appeals for the Fourth Circuit determined that the Natural Gas Act (NGA) preempted a zoning amendment that would have prevented the construction of a liquefied natural gas (LNG) facility.<sup>1</sup> The court found that the zoning amendment was not part of Maryland’s Coastal Management Program (MCOMP) and therefore could not fall into one of the exceptions for state legislation in the NGA.<sup>2</sup> The Fourth Circuit reversed the District Court of Maryland,<sup>3</sup> which had (1) held the zoning amendment was not preempted by the NGA because it fell into one of the three categorical exceptions for the states in the NGA,<sup>4</sup> and was (2) not an undue burden on interstate commerce.<sup>5</sup>

#### II. CASE OVERVIEW

This dispute was before the Maryland District Court twice, and is further complicated by the Maryland governmental authorities’ actions in mid-suit. On November 3, 2005, plaintiff AES Sparrows Point LNG, LLC (AES) leased a site at 600 Shipyard Road in Baltimore County, Maryland with the intention of building a LNG facility.<sup>6</sup> On March 24, 2006, AES started the requisite process of filing an application with the Federal Energy Regulatory Commission (FERC)

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1. *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120 (4th Cir. May 19, 2008).

2. *Id.* at 127.

3. *Id.* at 124

4. *AES Sparrows Point LNG, LLC v. Smith*, 539 F.Supp.2d 788 (D. Md. June 22, 2007).

5. *Id.* at 788

6. *Id.* at 791.

for permission to construct the LNG at the leased site.<sup>7</sup> The news of AES's plans to build the LNG provoked some public concern and in reaction to this concern, the Baltimore County Council approved bill 71-06.<sup>8</sup> This ordinance, which would have prevented AES from building the LNG facility, stipulated a LNG terminal "could only be constructed with a 'special exception' and had to be at least [five] miles from residential zones and 500 feet from business zones."<sup>9</sup>

On September 22, 2006, AES filed a lawsuit seeking declaratory and injunctive relief against the County Executive of Baltimore, the Zoning Commissioner for Baltimore County, and Baltimore County.<sup>10</sup> The suit claimed the NGA preempted the Baltimore County bill under the Supremacy Clause of the United States Constitution.<sup>11</sup> AES subsequently filed a motion for summary judgment, and the defendants filed a motion to dismiss on the grounds of ripeness and subject matter jurisdiction.<sup>12</sup> Although the district court found the zoning restriction violated the Supremacy Clause, and granted AES's motion for summary judgment on January 10, 2007,<sup>13</sup> Baltimore County was undeterred.

Thirty-six days later, on February 5, 2007, Baltimore County passed Bill 9-07 (an effort to amend Baltimore County Zoning Regulation Article 105)<sup>14</sup> to prevent AES from constructing the LNG because it would have been one of the prohibited uses in Baltimore County's Chesapeake Bay Critical Areas.<sup>15</sup> The next day, AES filed the present suit seeking injunctive and declaratory relief, because this new bill would also prevent construction of the LNG facility.<sup>16</sup> On February 9, 2007, AES was granted a temporary restraining order until the court could rule on the motions for declaratory and injunctive relief.<sup>17</sup>

On this same day in February, Baltimore County tried to get the County's Critical Area Protection Program to include a restraint on LNG siting in coastal areas.<sup>18</sup> Even as the District Court was conducting a hearing on the motions for declaratory and injunctive relief, the Critical Area Commission adopted the zoning amendment.<sup>19</sup> Maryland never presented Bill 9-07 to the National Oceanic and Atmosphere Administration (NOAA) for approval as required by

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. The Baltimore County Zoning Regulations Article 1-105 lists the "Prohibited uses in Chesapeake Bay Critical Area" and included in this restrictive list is "[t]he establishment or expansion of the following uses is prohibited in all Chesapeake Bay Critical Areas: C. Liquefied natural gas facility. [Bill No. 9-07]." Baltimore County Zoning Regulations, Article 1-105 (1988) (updated 2007).

15. AES, 539 F.Supp.2d 788, at 791

16. *Id.* at 792.

17. *Id.*

18. *Id.*

19. *Id.* at 793.

the procedures of the Coastal Zone Management Act (CZMA) for amending a state's CMP.<sup>20</sup>

The District Court concluded that Bill 9-07 was not preempted by the NGA, because when Maryland adopted Bill 9-07 into the County's CAPP, it also incorporated the bill into its CMP.<sup>21</sup> The district court further concluded that Bill 9-07 was an exercise of Maryland's delegated authority under the CZMA and, therefore, was not preempted by the NGA.<sup>22</sup> AES's request for declaratory and injunctive relief was denied and this appeal followed.<sup>23</sup>

### III. LEGAL BACKGROUND LEADING UP TO THIS CASE

The NGA requires authorization from the FERC before constructing a LNG terminal.<sup>24</sup> There are two requirements:

[1] [a]pplicants must submit all pertinent information about the proposed site and building plans, any state and local agencies with permitting authority, the applicant's plans to receive input from the public, and additional matters.<sup>25</sup>

[2] Applicants must also comply with the requirements of the National Environmental Policy Act of 1969...by examining the impact the facility would have on the environment.<sup>26</sup>

The Energy Policy Act of 2005 (EPA 2005) clarified that: (1) the FERC's approval authority is exclusive;<sup>27</sup> and (2) state's rights under the CZMA, the Clean Air Act, and the Federal Water Pollution Control Act were not affected by the NGA.<sup>28</sup>

The CZMA was enacted in 1972 to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations...."<sup>29</sup> To accomplish this, the CZMA authorizes states to create their own Coastal Management Programs (CMP) which they can use to set for their "objectives, polices, and standards to guide public and private uses of lands and waters in the coastal zone."<sup>30</sup> To receive federal funding to implement the programs, the state must first submit the CMP to the NOAA<sup>31</sup> for approval.<sup>32</sup> Once the state has received approval of the CMP from the NOAA, it must follow the procedures in the CZMA in order to amend its CMP.<sup>33</sup>

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20. *AES*, 527 F.3d 120, at 125.

21. *Id.*

22. *Id.*

23. *Id.*

24. 15 U.S.C. § 717b(a) (2006).

25. 18 C.F.R. § 157.21 (2007).

26. 15 U.S.C. § 717b-1(a) (2006).

27. 15 U.S.C. § 717b(e)(1) (2006).

28. 15 U.S.C. § 717b(d) (2006).

29. 16 U.S.C. § 1452 (2006).

30. 16 U.S.C. § 1453(12) (2006).

31. The Secretary of Commerce was granted this approval authority by the CZMA but has delegated it to the NOAA. Dep't. of Commerce Organizational Order 10-15, § 3.01(u) (May 28, 2004).

32. 16 U.S.C. § 1455 (2006).

33. *Id.*

Maryland, trying to exercise this authority, enacted and gained approval for the MCMP in 1978.<sup>34</sup> Under this program, Maryland used several different agencies and mechanisms to develop and implement land use decisions in its coastal zones, two of which the District Court found relevant to its second decision.<sup>35</sup> One mechanism is the Coastal Facilities Review Act (CFRA) and the other mechanism is the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program (CAPP).<sup>36</sup>

#### A. *Coastal Facilities Review Act*

The CFRA requires that a company wanting to build a “facility”<sup>37</sup> within the state’s coastal area first obtain a permit from the Maryland Department of the Environment.<sup>38</sup> The registry company was required to complete a lengthy application and have a third party, designated by the Department of the Environment, research and report concerning the potential economic, fiscal, and environmental impacts of the facility.<sup>39</sup> Individual counties were empowered to certify whether a project will be approved or denied.<sup>40</sup>

#### B. *Critical Area Protection Program*

The CAPP was enacted to curb the negative effects of human activity and to “minimiz[e] damage to water quality and natural habitats” on the Chesapeake Bay and its tributaries.<sup>41</sup> The CAPP created a Critical Area Commission within the Maryland Department of Natural Resources to review the protection program developed by local jurisdictions.<sup>42</sup> Though the local jurisdictions were required to include various elements,<sup>43</sup> one element found critical to this case was section 8-801(c) that states “a local jurisdiction’s... [z]oning ordinances or regulations’ in order to achieve” the goals of the CAPP.<sup>44</sup>

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34. *AES*, 539 F.Supp.2d 788, at 794.

35. *Id.*

36. *Id.*

37. “Facility means: (1) Any pipeline carrying crude oil or natural gas ashore from offshore sources [and] (4) Any facility for the processing, transmission, or storage of natural gas . . . .” MD. CODE ANN., [ENVR.] § 14-501(e)(1), (4) (2007).

38. *AES*, 539 F.Supp.2d 788, at 794.

39. MD. CODE ANN., [ENVR.] § 14-506(a)-(b) (2007).

40. COMAR 26.22.01.06(C) (2007).

41. MD. CODE ANN., [NAT. RES.] § 8-1801 (2005).

42. *Id.* § 8-1803.

43. The Maryland Code specifies what elements are to be considered:

(b) A program shall consist of those elements which are necessary or appropriate:

(1) To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;

(2) To conserve fish, wildlife, and plant habitat; and

(3) To establish land use policies for development in the Chesapeake Bay Critical Area or the Atlantic Coastal bays Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts.

MD. CODE ANN., [NAT. RES.] § 8-1808(b)(1-3) (2005).

44. *AES*, 539 F.Supp.2d 788, at 795 *citing* MD. CODE ANN., [NAT. RES.] § 8-1808(c) (2005).

*C. Analysis of Issues, Rationale and Holding*

AES based its appeal on the theory that the Baltimore County Zoning Amendment was preempted by the NGA.<sup>45</sup> The District Court had found that the NGA did not preempt the zoning amendment because Bill 9-07 was part of Baltimore County's CAPP and was incorporated into Maryland's CMP, thus saving it from preemption by the NGA.<sup>46</sup> In this appeal, AES argued the court should find this zoning amendment preempted based on the same reasoning.<sup>47</sup>

The NGA gives the FERC the "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."<sup>48</sup> Therefore, the Fourth Circuit Court stated that unless the state law which would ban the siting of LNG terminals is exempted from the NGA's preemptive effect, it is unenforceable under the Supremacy Clause.<sup>49</sup> The court here recognized that under the CZMA, the states' rights under the Savings Clause are exempt from the FERC's preemptive authority to site LNG terminals.<sup>50</sup> The court further states, that in order for a state to exercise these rights under the CZMA, the states must accomplish this through a federally approved CMP.<sup>51</sup> Thus, the court in this case shifted its focus from whether the NGA preempts Bill 9-07 to whether Bill 9-07 had been incorporated into Maryland's CMP.<sup>52</sup>

In order for a state to amend its CMP, it must notify the NOAA of any proposed change and submit it for the NOAA's approval.<sup>53</sup> An amendment or change only becomes effective after the NOAA's approval of it or the NOAA's failure to take action on it within the prescribed time.<sup>54</sup> A coastal state cannot implement an amendment to its CMP until it has been approved by the NOAA.<sup>55</sup> Unless the proposed amendment has been approved, it is not considered an enforceable policy of a state's CMP.<sup>56</sup>

The court here found that because Baltimore County never presented Bill 9-07 to the NOAA, the bill was never part of Maryland's CMP.<sup>57</sup> The court further states that until Bill 9-07 is approved by NOAA and becomes part of Maryland's CMP, it cannot be saved from preemption by the NGA Savings Clause.<sup>58</sup>

The Fourth Circuit did not to address the issue of whether or not, if Bill 9-07 was approved by the NOAA and adopted into Maryland's CMP, the

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45. AES, 527 F.3d 120, at 125.

46. *Id.*

47. *Id.*

48. 15 U.S.C. § 717b(e)(1) (2006).

49. AES, 527 F.3d 120, at 125-6.

50. *Id.* at 126.

51. *Id.*

52. *Id.*

53. 16 U.S.C. § 1455(e)(1) (2006).

54. AES, 527 F.3d 120, at 126.

55. 16 U.S.C. § 1455(e)(3)(A) (2006).

56. 16 U.S.C. § 1455(e)(3)(B) (2006).

57. AES, 527 F.3d 120, at 126.

58. *Id.*

amendment would be preempted by the NGA, simply holding that Bill 9-07 was not part of Maryland's CMP. The ultimate issue of whether a LNG facility is going to be allowed to be constructed in an area that falls into a states coastal zone seems to have been left up to the NOAA to decide. The NOAA does shed some light on whether they will approve bill which would ban LNG terminals in a states CMP in the *Coastal Zone Management Act Federal Consistency Regulations*.<sup>59</sup> In their response to Comment 108, the NOAA stated they will not approve policies that are preempted by federal law.<sup>60</sup>

While this statement, when read by itself, might lead the public to believe the NOAA will not use its power granted under the CZMA to ban LNG terminals, because this would be preempted by the NGA, the NOAA states that because both the NGA and CZMA are federal laws, they are on equal footing.<sup>61</sup> The NOAA goes on to state that “[c]onsistency with State enforceable policies does not violate any preemptive effect of the NGA because the State review, pursuant to federally approved State enforceable policies, is part of the federal CZMA scheme and is not an intrusion upon FERC’s authority under the NGA.”<sup>62</sup> The NOAA has approved amendments which banned LNG facilities in the past.<sup>63</sup> In *New Jersey v. Delaware*, the Supreme Court noted that Delaware’s CMP reported there was not anywhere in the state that was suitable for a LNG facility.<sup>64</sup> Delaware’s CMP in that case had been adopted before the NGA gave FERC the exclusive authority to cite LNG facilities.<sup>65</sup>

The court in this case sheds some light on how powerful the states are under the CZMA. As the concurring opinion points out, while “Bill 9-07’s express liquefied natural gas terminal ban, although ‘preempted’ today, might be ‘saved’ from preemption tomorrow if approved by the [NOAA].”<sup>66</sup> The Fourth Circuit Court here seems to agree with the District Court who said under the CMP, which is implemented by the CZMA, it is going to be the “primary responsibility” of the local government to make sure these plans are implemented and carried out.<sup>67</sup> Giving states responsibility to institute these plans insures the coastal areas in the state will be protected, but does not guarantee the good of the nation will be protected when the states make their decision. Here the CMP did not include LNG facilities in its list of prohibited activities until someone tried to build one in these areas.

This is not the first time the courts have recognized the states authority under the CZMA. In *Connecticut v. United States Department of Commerce*, Islander East Pipeline Company (Islander) wanted to build a gas pipeline, and, in order to do so, was required to obtain a permit from the FERC pursuant to the CZMA.<sup>68</sup> Connecticut, as well as the Commissioner of the Connecticut

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59. *Coastal Zone Management Act Federal Consistency Regulations*, 15 C.F.R. Part 930 (Jan. 5, 2006).

60. *Id.* at 823.

61. *Id.*

62. *Id.*

63. *AES*, 527 F.3d 120, at 127.

64. *New Jersey v. Delaware*, 128 S.Ct. 1410, 1426 (2008).

65. *AES*, 527 F.3d 120, at 127.

66. *Id.*

67. *AES*, 539 F.Supp.2d 788, at 796.

68. *Connecticut v. Dept. of Commerce*, No. 3:04cv1271, 2007 WL 2349894 (D. Conn.

Department of Environmental Protection, objected to Islander receiving the permit.<sup>69</sup> Islander then appealed to the Secretary of Commerce who overturned the objection because he felt Islander's project was consistent with the CZMA.<sup>70</sup> The United States District Court of Connecticut found the Secretary of Commerce's decision did not "demonstrate a reasoned connection between the evidence and his determination" and therefore was arbitrary and capricious.<sup>71</sup> Due to this determination, the court granted the state of Connecticut summary judgment.<sup>72</sup>

The Third Circuit, in *Norfolk Southern Corporation v. Alberly*, stated that Congress developed the CZMA with the idea in mind that the nation's coastal zones were an important resource and the regulation that existed at the time was inadequate to protect these areas.<sup>73</sup> Congress wanted to give the states the ability to exercise their full authority to develop their coastal zones in a way that would "that would achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and aesthetic values as well as the need for economic development."<sup>74</sup> In *Shanty Town Associates, LP v. EPA*, the Court recognized the power the states possess under this act when it stated that the legislative history of the CZMA showed the intent of Congress was to give the states the ultimate authority to regulate the use of their coastal zones.<sup>75</sup>

This rationale seems to allow a state to select who will be able to build an LNG facility in its state. AES wanted to build a LNG facility, but because Baltimore County did not want the facility, it passed an amendment to stop the construction.<sup>76</sup> This means the state can decide where and when a LNG facility is constructed within the states CMP. If, in the future, the state wants a LNG facility built, all it has to do is amend the zoning restrictions to allow for LNG terminals, which is within its power under the CZMA.

AES also argued that the zoning restriction at issue in this case must be approved by the Secretary of Commerce because the CZMA requires any changes to the CMP receive approval by the NOAA.<sup>77</sup> Although the District Court did not agree with this argument because it did not consider the zoning amendment to be a change to the CMP, but "rather the implementation of it at the local level,"<sup>78</sup> the Fourth Circuit reversed finding that Bill 9-07 was an amendment to Maryland's CMP<sup>79</sup> and that it was in fact a "substantial change" requiring formal approval by the NOAA.<sup>80</sup> The court stated that if they followed

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Aug. 15, 2007).

69. *Id.* at \*1.

70. *Id.*

71. *Id.* at \*5.

72. *Id.* at \*16.

73. *Norfolk Southern Corp. v. Aberly*, 822 F.2d 388 (3rd Cir. 1987).

74. *Id.* at 393.

75. *Shanty Town Associates, LP v. EPA*, 843 F.2d 782 (Md. 1988).

76. *AES*, 527 F.3d 120.

77. *AES*, 539 F.Supp.2d 788, at 797.

78. *Id.*

79. *AES*, 527 F.3d 120, at 126.

80. *Id.*

the reasoning of the district court, a state could amend its CMP in violation of the CZMA's requirement of federal approval.<sup>81</sup>

#### IV. EFFECTS OF THIS DECISION

The court seemingly wanted to give the benefit-of-the-doubt to states when it comes to one of the three acts mentioned as exceptions to the NGA. With this decision, as long as the public or private use of a state's land would fall under the CZMA, the Clean Air Act, or the Federal Water Pollution Control Act, the state will be able to decide to allow the use no matter the effect. Maryland passed an amendment to include LNG facilities on the list of restricted uses, and the court then decided to not discuss the major issue of preemption by determining the amendment was not properly adopted into Maryland's CMP.<sup>82</sup>

This decision seems to propose the idea that the only way one could construct a LNG facility is to try to build it in an area that was not under the control of the CZMA. The court even seems to hint that this case would have been decided differently if the state had properly adopted the bill into its CMP.<sup>83</sup> The court acknowledges that the issue of preemption where the CZMA and NGA conflict, but declines to decide this problem.<sup>84</sup> Although the court acknowledged the issue of preemption might arise, preference in this case is given to the state's objectives.

It is conceivable that this deference to a state might create a problem. If courts start to lean towards this rationale in deciding every case with similar facts, then what could happen if Congress broadened the CZMA? If Congress expanded this act's reach to include a greater area of land along the coastline of the states, then this decision could allow states unchecked control over laws affecting what kind of facilities could be constructed there. This becomes a greater concern when considering the court acknowledges the ability of the NOAA to approve a ban on LNG facilities under the CZMA.

#### V. CONCLUSION

The court in this case held the NGA preempted the zoning regulation permitting the construction of LNG facilities in the Chesapeake Bay area of Baltimore County. This case revolved around whether the new zoning regulation was properly adopted into Maryland's CMP. This decision acknowledges state authority to control their coastal areas. In arriving at this decision, the court demonstrates a willingness by the courts to concede decisions normally reserved for the federal government to the states because it determined the states would be better served protecting their own interests.

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81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 127.