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**MEMORANDUM**

To: Members of the Sparrows Point LNG Task Force

Fm: M. Brent Hare, Assistant Attorney General

Re: Permitting Process for LNG Facilities And Applicable Statutes and Regulations

Date: September 1, 2006

**INTRODUCTION**

On March 24, 2006, AES Sparrows Point LNG and Mid-Atlantic Express (collectively, "AES Sparrows Point") filed a request with the Federal Energy Regulatory Commission ("FERC") to initiate a pre-filing review for the construction and operation of a Liquefied Natural Gas ("LNG") Terminal at Sparrows Point, Maryland, and an 87-mile natural gas pipeline running from the proposed LNG terminal to Eagle, Pennsylvania. The request was filed pursuant to Sections 3 and 7 of the Natural Gas Act ("NGA") which delegates primary jurisdiction to authorize the construction and operation of LNG facilities and associated gas pipelines to FERC. On April 3, 2006, FERC issued notice of its acceptance of the request and initiated a "pre-filing review process" for this proposed project.

AES' proposal and FERC's initiation of the pre-filing review process has lead to Gubernatorial<sup>1</sup> and legislative responses including the appointment of this Task Force to study designated concerns for a report to the General Assembly<sup>2</sup>. My office has been asked

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<sup>1</sup> Letter dated May 1, 2006 expressing concern over the safety of the citizens in the location of the facility and designating the Power Plant Research Program as the contact agency for the pre-filing review process. FERC Docket Number PF06-22, ascension number 20060512-0079.

<sup>2</sup> By Chapter 285, Laws of 2006, this Task Force has been asked to study the risks and hazards of LNG production, storage, and regasification; the kind and use of the proposed production, storage, and regasification facility; the current and projected population and demographic characteristics in the vicinity of the proposed facility; the current and proposed land use in the vicinity of the facility; the natural and physical aspects of the proposed location; the emergency response capabilities in the vicinity of the facility; the need and appropriate distance for remote siting the effect of the proposed facility location on recreational and commercial boating, fishing, and crabbing in the area; the impact on the environment, especially on water quality, due to the quantity of dredged material that is intended to be undertaken to accommodate the LNG tankers; and the

to prepare and present an overview of applicable statutes and regulations and to describe the FERC process. I have prepared the following overview of the most significant regulatory authorities and actions and a copy of applicable provisions of the Natural Gas Act.

## OVERVIEW

### The Federal Energy Regulatory Commission

The federal government regulates the natural gas industry in this country pursuant to the NGA<sup>3</sup>. FERC is the federal agency with the responsibility for carrying out the directives of the NGA. Section 3 of the NGA grants primary permitting authority over LNG facilities to FERC<sup>4</sup> and Section 7 grants it authority to issue a Certificate of Public Convenience and Necessity for associated pipelines. Nevertheless, other federal and state government agencies play an important role in evaluating the potential safety and environmental impacts of proposed facilities and may make decisions that affect FERC's determination whether the proposed facility is consistent with the public interest<sup>5</sup>.

### The Coast Guard and Corps of Engineers

The U.S. Coast Guard is responsible for matters related to navigation safety, vessel engineering and safety standards and all matters pertaining to the safety of facilities or equipment located in or adjacent to navigable waters up to the last valve before the receiving tanks. The Coast Guard also has authority for LNG facility security, and recommendations for siting as it pertains to the management of vessel traffic in and around the LNG facility. Among other things, it evaluates an applicant's "waterway suitability assessment" regarding the impacts of LNG tanker traffic and the safety and security of LNG tankers in transit and when docked. The U.S. Army Corps of Engineers issues dredge and fill permits under the Section 404 of the Clean Water Act and Section 10 of the River and Harbors Act of 1899<sup>6</sup>.

### State Agencies

State agencies exercising federal authority delegated to states pursuant to the Clean Air Act<sup>7</sup>, the Clean Water Act<sup>8</sup>, and the Coastal Zone Management Act<sup>9</sup> are responsible for insuring that the requirements of these statutes are fully complied with under the NGA<sup>10</sup>.

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impact on the residential property owners to retain access to waterways. The report is to be filed with the General Assembly by December 31, 2006.

<sup>3</sup> The Natural Gas Act is found in Title 15 of the U.S. Code, Chapter 15B.

<sup>4</sup> NGA Section 3 provides that "[t]he Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." 15 USC 717b(e)(1).

<sup>5</sup> NGA Section 3 also provides that "[e]xcept as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals." 15 USC 717b(e)(1) However, the NGA provides FERC with oversight of the exercise of federal authority delegated to states. See Section 15 of the NGA.

<sup>6</sup> Other federal agencies such as the Environmental Protection Agency, the Fish and Wildlife Service and the National Marine Fisheries Service also participate in the comment and review process.

<sup>7</sup> 42 USC §§7401 *et seq.*

<sup>8</sup> 33 USC §§ 1251 *et seq.* (The Clean Water Act is also sometimes referred to as the Federal Water Pollution Control Act.)

<sup>9</sup> 16 USC §§1451 *et seq.*

<sup>10</sup> The specific language granting equal weight to other federal laws is found in 15USC §717b(d)

The principal State agencies involved in commenting on, or issuing permits for, this project will include the Maryland Department of the Environment (for air, water, coastal zone consistency, dredging, water quality, and wetlands) and the Department of Natural Resources (for fisheries, wildlife, boating, and DNR police). Other State and local agencies as well as citizens also will review and comment to FERC on the proposed facility.

### The Pre-Filing Review Process

The pre-filing review process is intended to initiate a comprehensive exchange of information among the applicant, FERC, state and local agencies, and members of the public regarding the impacts and effects of proposed LNG facilities. The pre-filing review process extends for at least six months and incorporates a series of public informational meetings and comments in anticipation of the preparation of a draft Environmental Impact Statement (EIS) for the Project<sup>11</sup>. As part of the pre-filing review process, the applicant is obligated to prepare a series of “resource” reports that provide the detailed information to be used in the EIS<sup>12</sup>. This process and these reports must be completed before AES files its formal application for construction of the LNG facility and pipeline with FERC. Once the formal application is filed, FERC will complete a draft of the EIS for the project.

Both the pre-filing review process and the development of an environmental impact statement pursuant to the National Environmental Policy Act provide significant opportunities for comment. In addition, the provisions of the NGA provide for state agencies to identify state and local safety concerns which must be satisfactorily addressed by the applicant and accepted by FERC before any authorization to construct and operate an LNG facility may be granted. State and local safety concerns specifically identified in the NGA include: (1) the kind and use of the facility; (2) the existing and projected population and demographic characteristics of the location; (3) the existing and proposed use of the land near the location; (4) the natural and physical aspects of the location; (5) the emergency response capabilities near the facility location; and (6) the need to encourage remote siting<sup>13</sup>.

### Coordination of Safety Concerns

As part of the pre-filing review process, the Governor designated the Power Plant Research Program (“PPRP”) of the Maryland Department of Natural Resources as the State’s point of contact for the pre-application review process being conducted by FERC<sup>14</sup>. This pre-application review implements a requirement of the Energy Policy Act of 2005<sup>15</sup>. Section 311(d) of the Energy Policy Act also provides for the designated agency to consult

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<sup>11</sup> FERC issued its Notice of Intent to Prepare an EIS on May 15, 2006 and has conducted scoping meetings and tours of the facility.

<sup>12</sup> The resource reports are filed with the Commission in Docket PF06-22. Most are available on line. The thirteen reports will include: (1) Project Description, (2) Water Use and Quality, (3) Fish, Wildlife, and Vegetation, (4) Cultural Resources, (5) Socioeconomics, (6) Geological Resources, (7) Soils, (8) Land Use, Recreational, and Aesthetics, (9) Air and Noise Quality, (10) Alternatives, (11) Reliability and Safety, (12) PCB Contamination, and (13) LNG Engineering and Design.

<sup>13</sup> 15 USC 717b-1

<sup>14</sup> See footnote 1 above.

<sup>15</sup> Section 311(d) of the Energy Policy Act of 2005 (P.L.109-58, August 8, 2005) requires FERC to establish a pre-application review process at least six months prior to the filing of an application to construct an LNG facility. FERC’s regulations creating and implementing this process are found in 18 CFR §§152, 157 and 375.

with FERC regarding State and local safety considerations regarding the storage facility. At conclusion of the pre-application process and within 30 days of the filing of an application, the designated State agency may provide an advisory report to FERC regarding State and local safety considerations. Before issuing an order authorizing an applicant to site, construct, expand, or operate an LNG terminal, FERC must respond to the concerns raised in the advisory report<sup>16</sup>. In addition to responding to the advisory report, FERC will prepare a draft environmental impact statement (EIS) that will also be made available for comment prior to its finalization. Any comments on the draft will be addressed in FERC's decision on the project.

In conjunction with the EIS process, the Coast Guard will evaluate AES' risk assessment, known as a "waterway suitability assessment," that evaluates the safety and security of the proposed facility and its ship traffic and determines the protocols AES and the LNG tankers serving the facility will have to observe in transit and at the facility. This evaluation includes the assessment of risk of operation to people and property.

### The Approval Process

Once the comment and review process is completed, FERC may issue authorization to construct the terminal facility pursuant to NGA Section 3 if it determines that construction and operation of the proposed terminal will be consistent with the public interest. It will simultaneously issue a Certificate of Public Convenience and Necessity to construct the pipeline pursuant to NGA Section 7<sup>17</sup>.

In addition to the FERC Order, AES will also have to obtain applicable permits and approvals from the Corps of Engineers and appropriate air and water permits from Maryland's Department of the Environment as well as a consistency determination from MDE that the AES project meets Maryland's Coastal Zone Management Plan. FERC will condition its approval by requiring that all necessary federal and State approvals be obtained and filed with it prior to construction. However, pursuant to Section 15 of the NGA<sup>18</sup>, all State and federal agencies considering any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law in conjunction with an authorization under Section 3 or a CPCN under Section 7 are required to meet an administrative schedule established by FERC. Any failure of a state or federal agency to act within the prescribed time or any denial of an authorization required by federal law (air or water) is actionable under the NGA<sup>19</sup> and subjects the state or federal agency to the jurisdiction of the U.S. Court of Appeals for the District of Columbia for resolution. A state determination that a proposed project is inconsistent with an approved coastal zone management plan is subject to review by the Secretary of Commerce. The Secretary of

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<sup>16</sup> 15 USC 717b-1(c)

<sup>17</sup> FERC has issued several policy statements providing guidance explaining how it evaluates the costs and benefits of proposed pipelines. Among others, evaluated factors will include whether a project enhances competitive transportation alternatives, avoids overbuilding facilities, avoids subsidization by existing customers, avoids unnecessary disruption of the environment, and avoids the unnecessary use of eminent domain. See 88 FERC ¶61,227 (1999), 90 FERC ¶61,128 (2000), and 92 FERC ¶61,094 (2000). The CPCN authorizes the holder to use eminent domain if necessary to acquire property necessary to implement the proposed pipeline project.

<sup>18</sup> 15 USC §717n

<sup>19</sup> 15 USC 717r

Commerce can override Maryland's objection if the Secretary concludes that the project "is consistent with the objectives of the Natural Gas Act, or that the project "is otherwise necessary in the interest of national security."

THIS MEMORANDUM IS FOR YOUR INFORMATION. IT IS NOT A FORMAL  
OPINION OF THE ATTORNEY GENERAL