

117 FERC ¶ 61,209
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Crown Landing LLC

Docket No. CP04-411-001

ORDER DENYING REHEARING AND ISSUING CLARIFICATION

(Issued November 17, 2006)

1. On September 16, 2004, Crown Landing LLC (Crown Landing) filed, in Docket No. CP04-411-000, an application under section 3 of the Natural Gas Act (NGA) requesting authority to site, construct, and operate a liquefied natural gas (LNG) terminal in Logan Township, Gloucester County, New Jersey. On September 17, 2004, in Docket No. CP04-416-000, Texas Eastern Transmission, LP (Texas Eastern) filed an application under NGA section 7(c) and subpart A of Part 157 of the Commission's regulations for authorization to construct and operate approximately 11 miles of 30-inch diameter pipeline from the outlet of Crown Landing's proposed LNG terminal to an interconnection with Texas Eastern's Chester Junction station in Delaware County, Pennsylvania.
2. On June 20, 2006, the Commission approved both applications with certain conditions.¹ The Delaware Department of Natural Resources and Environmental Control (DNREC) filed a timely request for rehearing and clarification of the June 20 Order with

¹ *Crown Landing LLC, Texas Eastern Transmission, LP*, 115 FERC ¶ 61,348 (2006) (June 20 Order). No party sought rehearing of the June 20 Order's approval of Texas Eastern's application in Docket No. CP04-416-000 to construct and operate approximately 11 miles of 30-inch diameter pipeline from the outlet of Crown Landing's proposed LNG terminal to an interconnection with Texas Eastern's Chester Junction station in Delaware County, Pennsylvania.

respect to the Commission's conditional authorization of Crown Landing's proposal.² The Commission will deny rehearing and clarify the June 20 Order as discussed below.

The June 20 Order

3. In the June 20 Order, the Commission conditionally approved Crown Landing's proposal to construct and operate an LNG terminal on the eastern shoreline of the Delaware River in New Jersey, near the border of Delaware and across the Delaware River from Pennsylvania, which will import, store, and vaporize foreign source LNG.³ The onshore portion of Crown Landing's LNG terminal will be located in Gloucester County, New Jersey, with the associated ship unloading facility extending into the New Castle County, Delaware portion of the Delaware River.

4. Among the conditions imposed by the June 20 Order is Ordering Paragraph G which requires Crown Landing to comply with the environmental conditions contained in Appendix A to the order. Of relevance to the DNREC's rehearing request, Environmental Conditions 19 through 22 require Crown Landing to provide the Commission with documentation of Crown Landing's compliance with the Coastal Zone Management Act (CZMA) and the Clean Air Act (CAA) prior to construction of the proposed facilities. These and other environmental conditions must be fulfilled prior to the initiation of construction, which can occur only upon written approval of the Director, Office of Energy Projects.

Procedural Issues

5. On August 4, 2006, Crown Landing filed a Motion to Dismiss, or Alternatively, Motion for Leave to Answer the rehearing request filed by the DNREC and Delaware. Crown Landing states that the Commission should dismiss the rehearing request because it fails to include the Statement of Issues required by Rule 713 of the Commission's

² As discussed more fully below, the rehearing and clarification request states that it is filed by DNREC, a party to this proceeding, and by the State of Delaware (Delaware), which is not a party.

³ Crown Landing is a wholly owned subsidiary of BP America Production Company. Crown Landing does not intend to import LNG or arrange for the delivery of LNG to the terminal. Instead, LNG will be supplied by one or more of Crown Landing's affiliates in the BP family, although Crown Landing states that it may periodically accept LNG imports from unaffiliated companies.

Rules of Practice and Procedure. Further, Crown Landing states that the rehearing request should be dismissed as to its filing by Delaware for lack of party status.

6. On August 14, 2006, the DNREC filed an Opposition to Crown Landing's Motion to Dismiss, noting that page 4 of its rehearing request states in seven separately numbered paragraphs the specific issues raised on rehearing, including the specific statutory provisions it alleges the June 20 Order violated. The DNREC states that the Commission should deny Crown Landing's alternative motion for leave to file an answer to the rehearing request,⁴ or allow the DNREC to do the same.

7. The Commission finds that the rehearing request complies sufficiently with Rule 713, and the Motion to Dismiss is denied in this regard. Since neither Crown Landing nor the DNREC has established any need for an exception to Rule 213 of the Commission's Rules of Practice and Procedure which prohibits answers to rehearing requests or to answers,⁵ neither party's answer will be accepted.

8. Also on August 14, 2006, Delaware, represented by the Attorney General, State of Delaware, filed a Motion to Intervene Out of Time. Delaware states that it will be directly affected by the Crown Landing proposal, that no disruption of these proceedings will occur, no new arguments will be added, no prejudice to any party will result, and that granting this motion will allow the State of Delaware to make clear that the positions taken by DNREC and the Delaware Attorney general are the positions of the State. To demonstrate its need to participate in this proceeding, Delaware cites with no analysis the pending action in the United States Supreme Court, *New Jersey v. Delaware*, No. 134, Original (U.S.) and describes the issue there as "Delaware's right to enforce its generally applicable laws against projects built within its territory."⁶

9. Delaware's argument to show good cause for failure to file a timely notice of intervention is that its lawyer, the Attorney General of Delaware, was already representing the DNREC and no need for a specific intervention by Delaware was discerned. Delaware claims no intention to inject any new argument beyond those offered by the DNREC. Rather, Delaware states its intervention would simply indicate to the Commission that its positions, identical with those of the DNREC, are approved by the State of Delaware.

⁴ Citing Rule 713(d)(1), 18 C.F.R. § 713(d)(1) (2006).

⁵ See Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2) (2006).

⁶ Motion of the State of Delaware to Intervene Out of Time at 2.

10. Crown Landing opposes Delaware's motion for untimely intervention, arguing that Delaware has attempted to block the Crown Landing project at every turn, has adopted a "wait and see" approach of almost two years' duration before seeking to intervene, and offers no sound reason showing good cause to grant the motion.⁷ Crown Landing also claims that prejudice to its interests may result from granting the motion, because the state will get two bites at the apple in every step going forward including "any further legal proceedings" that Delaware might implement. Further, in its Motion to Dismiss, Crown Landing notes that Delaware joined in the filing of the rehearing request, but is not an intervener in this proceeding. Therefore, Crown Landing requests that the rehearing request be dismissed with respect to Delaware.

11. Delaware does not identify any need for separate participation as a party in this proceeding. Delaware's citation to the pending action in the United States Supreme Court offers no support for Delaware's separate intervention. The DNREC is a cabinet-level agency whose director serves at the pleasure of the Governor,⁸ and Delaware states that the DNREC's arguments reflect the positions of the leadership of the state government. Delaware claims no intention to inject any new argument into this proceeding beyond those offered by DNREC. Rather, Delaware states it would simply indicate to the Commission that its positions, identical with those of DNREC, are approved by the State of Delaware.

12. The Commission will deny Delaware's untimely motion to intervene. Given its statement that its positions are identical to the DNREC's, Delaware's interests are well-represented by DNREC. Delaware's argument that it discerned no need for a specific intervention prior to issuance of the June 20 Order does not demonstrate good cause for its late motion to intervene. We have noted that a wait-and-see approach does not provide good cause under Rule 214.⁹ In addition to its failure to show good cause, we note that Delaware's participation as a party has been and remains unnecessary to the timely and appropriate disposition of the issues raised. Delaware may of course file by correspondence its approval of any of the arguments made by the DNREC, and the Commission welcomes such participation. Since we are denying Delaware's late motion to intervene, we will dismiss the request for rehearing and clarification only as to its

⁷ *Citing Florida Power & Light Co.*, 99 FERC ¶ 61,318 at P 9 (2002).

⁸ *See Delaware's Opposition to Crown Landing's Answer to Delaware's Motion to Intervene Out of Time* at 3.

⁹ *See, e.g., Florida Power & Light Co., supra.*

filing by Delaware. The Commission responds in full to the DNREC's arguments contained therein as follows.

Discussion

A. CZMA and CAA

13. As noted above, the June 20 Order included a number of conditions that must be fulfilled prior to Crown Landing's receiving approval to begin construction of its LNG project, which can occur only upon written approval of the Director, Office of Energy Projects. The conditions address environmental issues requiring further resolution, including the provision of state approvals required by the CZMA and the CAA. The DNREC states that the June 20 Order violated the CZMA and the CAA since, it argues, both statutes require finalization of certain state action before the Commission can authorize facilities pursuant to NGA section 3, and the relevant state actions have yet to be finalized.

14. The CZMA provides in pertinent part that "[n]o license or permit shall be granted by [a] Federal agency until the state or its designated agency has concurred with the applicant's certification" that "the proposed activity complies with the enforceable policies of the state's approved [coastal management] program and that such activity will be conducted in a manner consistent with the program."¹⁰ Similarly, section 176 of the CAA¹¹ 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."¹²

¹⁰ See 16 U.S.C. § 1456(c)(3)(A) (2000). Regulations discussed below implementing the CZMA have been issued by the National Oceanic and Atmospheric Administration (NOAA).

¹¹ 42 U.S.C. § 7506(c)(1) (2000). Regulations discussed below implementing the CAA have been issued by the Environmental Protection Agency (EPA).

¹² Each state has developed a State Implementation Plan under the CAA to bring areas that are not in attainment with the National Ambient Air Quality Standard back into attainment within a specified amount of time. EPA regulations state that federal agencies cannot "license or permit, or approve any activity which does not conform to an applicable implementation plan." 40 C.F.R. § 51.850(a) (2006).

15. The DNREC states that Crown Landing has not completed the process for the federal consistency certification for the LNG terminal. The DNREC argues that the CZMA requires the completion of that process prior to a federal agency's authorization of a project and therefore issuance of the June 20 Order violated the CZMA by failing to resolve issues of state certification before the order's issuance.¹³ The DNREC maintains that the Commission cannot, consistent with the CZMA, impose conditions requiring Crown Landing to demonstrate consistency with Delaware's and New Jersey's coastal zone management programs before starting construction. The DNREC states that *City of Grapevine, Texas v. Department of Transportation*,¹⁴ cited as supportive by the Commission in the June 20 Order, is inapposite.

16. Similarly, the DNREC states that Crown Landing has not shown conformity with the CAA and therefore the June 20 Order violates that statute's requirement that a project must show such conformity at the time of approval, not at some point thereafter.¹⁵ The DNREC thus challenges the June 20 Order with regard to the statutory terms of both the CZMA and the CAA on identical grounds: the June 20 Order should have been preceded by completed consultations and concurrences as required by those statutes.¹⁶

17. The Commission's exercise of its NGA section 3 authority approving the Crown Landing project subject to the conditions it has imposed is consistent with substantial case-law supporting the Commission's power to attach conditions to certificates it issues. Section 7(e) of the NGA grants the Commission the "power to attach to the issuance of the certificate and to the exercise of rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). This conditioning power has been characterized by the United States Court of Appeals

¹³ Citing *Mountain Rhythm Res. v. FERC*, 302 F.3d 958 (9th Cir. 2002).

¹⁴ 17 F.3d 1502 (D.C. Cir. 1994).

¹⁵ Citing *City of Alexandria v. Slater*, 198 F.3d 862, 869 (D.C. Cir. 1999).

¹⁶ None of the cases cited by the DNREC to support its interpretation of the CZMA and CAA involved the direct construction of these statutory terms with respect to procedural fact patterns similar to those presented here. Rather, the DNREC cites only to discussions in passing, *obiter dicta*, where the statutory terms are either merely cited or broadly described. See *Sierra Club v. EPA*, 129 F.3d 137 (D.C. Cir. 1997); *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999); *Distrigas Corp. v. FPC*, 495 F.2d 1057 (D.C. Cir. 1974).

for the District of Columbia Circuit as “extremely broad,”¹⁷ and the Commission has recognized its authority to impose, under NGA section 3, “the equivalent of Section 7 requirements.”¹⁸ With specific reference to the CZMA, the Commission has noted that it “routinely issue orders conditioning authorization of projects on the applicant’s obtaining a CZMA consistency determination.”¹⁹

18. In the orders underlying *Public Utility Commission of the State of California v. FERC*,²⁰ the Commission reviewed the non-environmental factors regarding a pipeline’s request for an Optional Expedited Certificate and found no non-environmental impediments to the construction and operation of the proposed pipeline, contingent upon completion of its review of all those environmental aspects of the proposal.²¹ The United States Court of Appeals for the District of Columbia Circuit approved such a procedural approach by the Commission, noting specifically that the “Commission’s non-environmental approval was expressly not to be effective until the environmental hearing was completed.”²² The court stated that, in accordance with earlier precedent,²³ while it is generally true that NEPA procedures must insure that environmental information is

¹⁷ *Transcontinental Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980).

¹⁸ *Sound Energy Solutions*, 107 FERC ¶ 61,263 at P 51 (2004), *clarified*, 108 FERC ¶ 61,155 at P 11 (“Our authorization will also be subject to any appropriate conditions, restrictions, requirements, and mitigation measures developed as a result of ongoing consultation with interested persons.”).

¹⁹ *Sound Energy Solutions*, 108 FERC ¶ 61,155 at P 8, n. 9 (2004), *citing AES Ocean Express LLC*, 106 FERC ¶ 61,090 at P 11 (2004); *see also Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at 61,131 (2003), *citing City of Grapevine*, 17 F.3d 1502, 1509 (D.C. Cir. 1994) (explaining that because agency’s approval of challenged runway was “expressly conditioned upon completion of the Section 106 [of the National Historic Preservation Act (NHPA)] process, we find no violation of the NHPA.”).

²⁰ 900 F.2d 269 (D.C. Cir. 1990).

²¹ *See Wyoming-California Pipeline Company*, 44 FERC ¶ 61,001, at 61,013, *order on reh’g*, 45 FERC ¶ 61,234, at 61,676 (1988).

²² 900 F.2d at 282 (1990).

²³ *Id.*, *citing Illinois Commerce Comm’n v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988).

available to public officials and citizens before decisions are made and actions are taken, an agency can make “even a final decision so long as it assessed the environmental data *before the decision’s effective date.*”²⁴

19. The similarity of that reasoning to the rationale used by the *City of Grapevine* court is striking.²⁵ There, petitioners challenged the Federal Aviation Administration (FAA’s) approval of an airport runway, conditioned on completion of the review process required by the National Historic Preservation Act (NHPA). Section 106 of the NHPA requires the head of any federal agency having approval authority over any activity subject to the act, “prior to the approval of the expenditure of Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking” in accord with the terms of the statute. Such taking into account includes consultation with appropriate state officers, assessment of adverse effect upon any historic property, and mitigation of adverse effects.

20. The court found that the FAA’s “conditional approval” of the runway did not violate the NHPA. Rather, the court noted specifically that, because the agency’s approval of a challenged runway was “expressly conditioned upon completion of the Section 106 [of the NHPA] process, we find no violation of the NHPA.”²⁶

21. These decisions construe the statutory terms with appropriate respect for the practical demands facing an administrative agency and the common sense necessary to accomplish disparate statutory goals, without doing violence to such terms. The approval we issued in the June 20 Order is expressly conditioned upon completion of Crown Landing’s remaining and unchallenged duties under these two applicable statutes. Our order is an incipient authorization without current force and effect, since it does not yet allow Crown Landing to begin the activity it proposes.²⁷ Crown Landing can do nothing

²⁴ 900 F.2d at 282 (emphasis supplied) (1990).

²⁵ *City of Grapevine*, 17 F.3d at 1509.

²⁶ *Id.*

²⁷ Conditional Commission orders have been described in the context of constitutional standing analysis as “without binding effect.” *See New Mexico Attorney General v. FERC*, No. 04-1398, slip op. at 3 (D.C. Cir. October 13, 2006), *citing DTE Energy Co. v. FERC*, 304 F.3d 954, 960-61 (D.C. Cir. 2005). Those words also apply to the June 20 Order.

to make the Commission's conditional approval operative or effective until it fulfills the conditions the DNREC challenges.

22. Applicable EPA and NOAA regulations are also reasonably construed to support this procedural approach. For instance, EPA regulations 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."²⁸ Here, the "action" referred to begins when and if Crown Landing's construction begins, not upon the issuance of the Commission's June 20 Order.

23. The EPA defines "Federal action" as an "activity."²⁹ As noted, the CAA conformity decision must be accomplished, pursuant to section 51.850(b), "before the action is taken." The construction and operation of the Crown Landing LNG project constitutes the "relevant activity" which is "the part, portion, or phase of the non-Federal undertaking" requiring the Commission's "permit, license, or approval."³⁰ Clearly, no construction/operation of the Crown Landing project has begun.

24. In 1993, the EPA issued final rules under the CAA to ensure that federal actions conform to the appropriate State Implementation Plan.³¹ EPA discussions therein are consistent with the conclusion that the Commission's conformity decision may be

²⁸ See 40 C.F.R. 51.850(b) (2006). EPA's discussion of 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 Fed. Reg. at 63,240.

²⁹ 40 C.F.R. § 51.852 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, license, 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."

³⁰ *Id.*

³¹ See *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63214 *et seq.* (November 30, 1993).

accomplished in accord with the June 20 Order. For instance, EPA noted the need for dealing with changed circumstances in the course of the completion of federal actions:

[m]itigation measures should generally be included by the Federal agency in enforceable documents such as permit conditions. Mitigation measures may need to be revised due to unforeseen circumstances that may arise as the action and/or related activity is completed. Where the revised mitigation measures are subject to public review and it is demonstrated that the revised measures continue to support the conformity determination, such revision would be acceptable.³²

25. Similarly, as to the CZMA, NOAA has made clear that “any form of federal authorization must have the required elements to be considered a ‘federal license or permit’ for CZMA purposes.”³³ One of the four elements stated is that it “authorizes an activity.”³⁴ No activity by Crown Landing has yet been authorized in this proceeding. Further, CZMA regulations support the Commission’s approach in this proceeding by imposing an affirmative obligation to preclude delay as much as possible. Specifically, federal agencies “should not delay processing applications pending receipt of a state agency’s concurrence.”³⁵

26. The Commission has routinely issued certificates for natural gas pipeline projects subject to the federal permitting requirements of, among other statutes, the CZMA and CAA as necessary and appropriate for some time.³⁶ As we have stated before, the

³² 58 Fed. Reg. at 63,235. Necessary revised mitigation measures may be identifiable only after construction starts.

³³ *Coastal Zone Management Act Federal Consistency Regulations*, 71 Fed. Reg. 788 at 795 (January 5, 2006).

³⁴ *Id.* “(1) Required by Federal law, (2) authorizes an activity, (3) the activity to be authorized has reasonably foreseeable coastal effects, and (4) the authorization is not incidental to a federal license or permit previously reviewed by the State.”

³⁵ 15 C.F.R. § 930.62(c) (2006).

³⁶ *See, e.g., Golden Pass LNG Terminal LP*, 112 FERC ¶ 61,141 (2005); *Freeport LNG Development, L.P.*, 107 FERC ¶ 61,278 (2004); *Transcontinental Gas Pipe Line Corp.*, 102 FERC ¶ 61,305 (2003); *Islander East Pipeline Co.*, 102 FERC ¶ 61,054 (2003); *Transcontinental Gas Pipe Line Corp.*, 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 Co.*, 72 FERC ¶ 61,167 (1995);

(continued)

practical reason underlying our approach is 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's issuance of its certificate without unduly delaying the project.³⁷

27. For all of these reasons, we conclude that neither the CZMA nor the CAA precludes the conditional approval we issued in the June 20 Order.³⁸ We believe there is no inherent conflict between the CZMA, the CAA, and the NGA given the Commission's multi-faceted duties regarding LNG importation, the flexibility provided by implementing regulations issued by other agencies, and the courts' practical and reasonable decisions allowing statutes to operate together successfully.³⁹

28. Finally, we have noted in other orders the difficulties inherent in reviewing large energy projects, the domestic need for which is clear:

[t]he practical reality of large projects . . . is that they take considerable time and effort to develop. Perhaps, more importantly, their development is subject to many significant variables whose outcome cannot be predetermined. The natural consequence of this is that some aspects of a project, particularly those not under the direct control of the project proponent, may remain in the early stages of planning even as other portions of the project become a reality. If every aspect of a project were required to be finalized before any part of the project could move forward, it would be very difficult, if not impossible, to construct such projects.⁴⁰

Tuscarora Gas Transmission Company, 71 FERC ¶ 61,225 (1995).

³⁷ *Georgia Strait Crossing Pipeline LP*, 107 FERC ¶ 61,065 at P 16 (2004).

³⁸ We note that in *City of Takoma v. FERC*, Nos. 05-1054 *et al.* (D.C. Cir. August 22, 2006), involving section 401 of the Clean Water Act (33 U.S.C. § 1341(a)(1)), the court analyzed what constitutes a state certification. As in the cases cited by the DNREC, the court's references in passing to the Commission's granting a license or permit within the meaning of the statute are not directly construed.

³⁹ The DNREC's citation to *Mountain Rhythm*, which involved a dispute whether potential projects were correctly and legally determined by NOAA to be in a coastal zone, provides no relevant analysis.

⁴⁰ *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at P 138 (2002).

29. For the Commission to deny NGA section 3 authorization to Crown Landing because a state's certification or concurrence under the CZMA and CAA is pending at the state level or on appeal in a state or federal court as the DNREC would have us do would require Crown Landing to begin again the complex, time-consuming, and expensive application process when and if the CZMA or CAA issues are resolved. This would be needlessly inefficient and contrary to the energy needs of our nation. Our practice of approving projects with conditions precluding construction pending the applicant's compliance with the CZMA and CAA is far more consistent with both Congressional expectations and relevant agency regulations.

B. NGA Section 3

30. The DNREC states that the June 20 Order's deferral of final resolution of various environmental issues for further consultations with federal or state agencies⁴¹ violates section 3 of the NGA. Section 3 requires the Commission to determine, after hearing, whether a proposed project is in the public interest, "after reasoned consideration and on the basis of substantial evidence."⁴² The DNREC states that reasoned consideration has yet to be performed, given the need for further consultations.⁴³ The DNREC also claims that interested parties will be precluded from participating in the future decision-making, which will be based on new information not subject to public comment. The DNREC states that notice and comment procedures should be provided for the various issues left open in the June 20 Order.

31. Under NGA section 3 we have identified and considered closely the evidence showing how the public interest in the development of new energy projects is served by our conditional approval of this project, and we find that the DNREC has raised no argument requiring the grant of rehearing. We have, in accordance with our longstanding

⁴¹ Citing June 20 Order, App. A, Environmental Conditions 12-16, 18, 24, 30, 58, 67.

⁴² Citing *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1066 (D.C. Cir. 1974).

⁴³ The DNREC also notes its right to consult with the Commission regarding an NGA section 3 application under the Energy Policy Act of 2005, and states that such consultation must occur "prior to issuing an order" pursuant to section 3. Request for rehearing and clarification at 10, citing 15 U.S.C. § 717b-1(b). The DNREC commented on Crown Landing's application on April 13, 2005, well in advance of the June 20 Order.

practice, considered the application of Crown Landing, and the public comments filed thereon, pursuant to a paper hearing.⁴⁴

32. No substantial opposition to the need for energy prompting this project was received. The Commission made extensive efforts to assure that operational issues, including particularly gas quality concerns, were resolved appropriately. We have analyzed and approved with comment as necessary the substantial and broad-ranging substantive discussions in the Final Environmental Impact Statement (FEIS). As a result, we have identified those limited National Environmental Policy Act⁴⁵ issues requiring further treatment, pursuant to our delegation of responsibility to the Office of Energy Projects.⁴⁶ That office's final resolution of those conditions will be subject to the further processes of Commission rehearing, which are also part of the paper hearing afforded to participants and which are responsive to the DNREC's concerns.

C. Air Quality Permits

33. The DNREC claims that the FEIS and the June 20 Order differ with regard to Crown Landing's obligation to obtain certain air quality permits from state regulatory authorities.⁴⁷ For example, the DNREC states that while the FEIS required approval of a lowest achievable emission rate (LAER) by both New Jersey and Delaware agencies,⁴⁸ the June 20 Order requires only a New Jersey LAER determination.⁴⁹ Further, the DNREC states that the FEIS finds that Crown Landing must obtain a Title V operating

⁴⁴ See, e.g., *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1425-26 (10th Cir. 1992) (holding that necessary facts may be adduced through written submission of evidence).

⁴⁵ 42 U.S.C. §§ 4321, *et seq.*, (2000).

⁴⁶ See, e.g., *Public Utilities Comm'n of the State of California v. FERC*, *supra*.

⁴⁷ Request for Rehearing and Clarification at 14-15.

⁴⁸ FEIS § 4.11.1, at 4-140.

⁴⁹ June 20 Order at P 67.

permit, but that the June 20 Order does not address such obligation.⁵⁰ The DNREC states the Commission should clarify, or grant rehearing and hold, that Crown Landing is obligated to obtain air quality permits, including but not limited to approval of a LAER and a Title V Clean Air Act operating permit, from both New Jersey and Delaware.

34. The Commission clarifies that Crown Landing must obtain state permits as required under the CAA. That is the meaning of the June 20 Order's adoption of Condition No. 21 in Appendix A, that Crown Landing "shall provide to the Commission a copy of the final manufacturer's emission guarantees and the NJDEP and DNREC final permits **prior to construction.**" Similarly, Condition No. 22 requires that Crown Landing shall, prior to construction, "provide a full air quality analysis identifying all mitigation requirements required to demonstrate conformance with the applicable state implementation plan and submit detailed information documenting how the project will demonstrate conformity in accordance with title 40 Code of Federal Regulations (CFR) Part 51.858."

35. The June 20 Order did not attempt to quote exhaustively from the FEIS but did speak in broad terms concerning such CAA responsibilities, as noted by the DNREC.⁵¹ The Commission clarifies that DNREC has stated, in submissions made part of the record here, that Crown Landing would be required to obtain a stationary permit for the dock facilities in Delaware.⁵² As to approval by the DNREC of an LAER and a Title V permit,⁵³ the record does not include information from the DNREC regarding the need for and terms of such approvals. However, Condition Nos. 21 and 22 of Appendix A require all necessary New Jersey and Delaware permits and the conformity demonstration to be provided prior to construction.

⁵⁰ The DNREC states that Title V of the CAA requires that each major stationary air pollution source obtain a state operating permit. Request for Rehearing and Clarification at 14.

⁵¹ June 20 Order at P 67.

⁵² See April 13, 2005 letter from DNREC.

⁵³ FEIS 4.11.1 at 4-142.

D. Alternatives

36. The DNREC states that the FEIS and the June 20 Order did not consider sufficient numbers of alternative sites within the five-state Mid-Atlantic region (Delaware, Maryland, New Jersey, New York, and Pennsylvania). Specifically, the DNREC states that the FEIS rules out all northern New Jersey ports but in doing so relied on evidence of problems that affected only some of those ports. The DNREC also claims that the FEIS did not weigh the alleged improvements necessary to qualify the northern New Jersey ports against those necessary to enable the proposed site to accept LNG tankers.⁵⁴

37. The DNREC's April 13, 2005 comments to the Commission regarding the DEIS (Draft Environmental Impact Statement) criticized the DEIS discussion of alternatives generally but addressed several alternatives specifically: two existing LNG terminals, offshore ports, and the port of Baltimore.⁵⁵ In response, the FEIS took into consideration these specific comments as reflected in its expansion of the discussion of each of the alternatives specified by the DNREC.⁵⁶ Since neither the DNREC nor any other commenter raised concerns with respect to the DEIS' analysis of the northern New Jersey ports, the discussion of those ports was not modified in the FEIS. Nevertheless, in response to the DNREC's rehearing request, we will expand upon the discussion of the New Jersey ports here.

38. The FEIS provides a lengthy and substantial discussion on various alternative sites for Crown Landing's proposed LNG terminal, including an evaluation of ports in the vicinity of the Mid-Atlantic Coast initially deemed potentially suitable for an LNG facility and transit of LNG vessels.⁵⁷ The FEIS' review of possibly suitable coastal areas used five major screening criteria: 1) a minimum channel depth of 40 feet, 2) a minimum channel width of 800 feet and a maneuvering area of 2000 feet to allow safe transit and

⁵⁴ *Citing Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 374 (D.C. Cir. 1999); 40 C.F.R. § 1502.14; *Davis v. Mineta*, 302 F.3d 1104, 1121 (10th Cir. 2002).

⁵⁵ *See* FEIS, App. J, SA1.

⁵⁶ FEIS, App. J, SA1.

⁵⁷ FEIS § 3, 3-1 through 3-74.

berthing, 3) a vertical clearance of 135 feet for transit under structures (*e.g.*, bridges), 4) a distance to natural gas pipeline systems of less than 50 miles, and 5) compatibility of existing land uses in the area with the proposed development of an LNG terminal.⁵⁸

39. With respect to the northern New Jersey ports, the FEIS identified Woodbridge, Carteret, Linden, Bayonne, Jersey City, Elizabeth, Newark, and Perth Amboy as ports that are close to the intended gas market as well as existing natural gas pipeline systems with ample nearby industrial property.

40. While preparing a response to the DNREC's rehearing request with respect to northern New Jersey ports, Commission staff discovered that the FEIS discussion of those ports was inaccurate with respect to the statement that bridges crossing the Kill Van Kull, a 5.3-mile long channel connecting New York Harbor to Newark Bay, did not have enough clearance to allow LNG ships to pass under them. In fact, only one bridge, the Bayonne Bridge, crosses the Kill Van Kull. The bridge has a channel clearance of 150 feet and thus is not an obstacle to LNG ship transit through the Kill Van Kull into Newark Bay.

41. The FEIS also states that northern New Jersey ports are designed for and typically serve only smaller vessels and thus the channel widths and turning basins are small and would require substantial improvement to accommodate LNG ships.⁵⁹ However, The Army Corps of Engineers has improved access to some of the ports in order to serve very large ships. Nevertheless, as discussed further below, all of the New Jersey ports would require extensive dredging to accommodate a new LNG terminal.

42. Woodbridge, Carteret, and Linden, New Jersey are located on the Arthur Kill, a 13.2-mile channel connecting Newark Bay and Raritan Bay. The channel width is 500 to 600 feet with no turning basins. Extensive dredging would be required to accommodate LNG ships at any of the three sites.⁶⁰

⁵⁸ FEIS § 3.3.2.3, at 3-33 and 3-34.

⁵⁹ FEIS § 3.3.2.3, at 3-35.

⁶⁰ See *Environmental Assessment on Consolidated Implementation of the New York and New Jersey Harbor Deepening Project*, U.S. Army Corps of Engineers, New York District, January 2004 at www.nan.usace.army.mil/harbor/lrr/2004 for descriptions of the navigation channels in the New York City and northern New Jersey area.

43. With the exception of Perth Amboy, access by large ships to the remaining New Jersey ports, Bayonne, Jersey City, Elizabeth and Newark, is through the New York Harbor. Bayonne and Jersey City are on the western side of the Upper Bay of New York Harbor with Newark Bay forming the western boundary of the two cities. Although the Army Corps of Engineers has an ongoing project to deepen and widen the navigation channels in New York Harbor to allow access by very large ships, the channels are designed to serve existing terminal and docking facilities. Newly developed terminals would be located outside of the deepened and widened channels and would require dredging of a channel, turning basin, and berth.

44. To access Elizabeth and Newark, large ships must go through the southern portion of New York Harbor to the Kill Van Kull and into Newark Bay. Newark Bay is approximately 5.5 miles long and varies in width from 0.6 to 1.2 miles. There are two large existing marine terminal facilities that dominate the west shore of Newark Bay, Port Elizabeth and, immediately to the north, Port Newark, which together occupy most of the west shore that could accommodate LNG ships.

45. The Army Corps of Engineers has widened the navigation channel in the Kill Van Kull to 800 feet and is deepening it to from 45 to 50 feet. It is also widening and deepening the turning basin where ships entering and leaving Newark Bay through the Kill Van Kull must negotiate a severe 126 degree bend at Bergen Point. With the exception of the maintained shipping channel, the turning basin at Bergen Point, and docking facilities at Port Elizabeth and Port Newark, the bay is very shallow. There are extensive shallow areas found throughout the eastern half (the western boundary of Bayonne and Jersey City) where depths range from 1 to 11 feet. Locations on the eastern shore of the bay therefore would require very extensive dredging to accommodate LNG ships.

46. With dredging of the channel beyond Port Newark to widen and deepen it, LNG ships could at best travel less than a mile farther north due to the narrow opening through the Lehigh Valley Draw Bridge, a railroad bridge that crosses Newark Bay. To enable LNG ships access to any sites beyond Port Newark would require dredging of the navigation channel, the required 2000-foot turning basin, and the berth. To the south of Port Elizabeth on the west shore of Newark Bay is an undeveloped area between Port Elizabeth and Jersey Gardens, a large shopping mall. The navigation channel is approximately 2,700 feet offshore of the site and dredging of a channel, a turning basin, and a berth would be required. In addition, the location of the Jersey Gardens shopping mall next to this site may preclude use of the site due to the 933 feet exclusion zones between LNG storage tanks and areas populated by fifty or more people.

47. The final northern New Jersey site is Perth Amboy which is located south of New York Harbor at the juncture of the Arthur Kill and the Raritan River where they run into

the Raritan Bay. The navigation channel from the Lower New York Bay through the Raritan Bay to Perth Amboy is 35 feet deep, 600 to 800 feet wide, and 12.5 miles long. Dredging would be required for the entire 12.5 miles long channel in addition to dredging a turning basin and berth at Perth Amboy.

48. As this expanded discussion of the northern New Jersey sites demonstrates, all of the sites would require considerably more dredging than will be required at Crown Landing's proposed site where dredging is required only for the berth. Therefore, the proposed site is environmentally preferable to any of the northern New Jersey sites.

E. Dredging

49. The DNREC states that the Commission has not appropriately addressed the disposal of the Delaware soil to be dredged from the Delaware River over the 30-year project life. Further, the DNREC states that the June 20 Order does not require Crown Landing to enter into agreements that ensure adequate capacity for disposal of dredged material for the life of the project. The DNREC requests such a condition be added to Appendix A of the June 20 Order.

50. The FEIS noted that about 1.24 million cubic yards of sediment would be dredged to construct a slip for LNG ships.⁶¹ Annual maintenance dredging will involve approximately 60,000 to 90,000 cubic yards.⁶² Weeks Marine, Inc., an available contractor, had 8 million cubic yards of permitted capacity at the time the FEIS was issued, including a 5.8 million cubic yard expansion then under construction. This capacity will be used to meet future capacity demands.⁶³ It is also reasonable to anticipate future development of similar dredge disposal sites to meet future demand. Crown Landing has also proposed reducing its need for dredge disposal by using suitable dredge material onsite as part of construction fill, or offsite for various beneficial use projects (*e.g.*, road fill). Necessary permits for beneficial use would be submitted as

⁶¹ FEIS at 2.4.1.3, pages 2-21 through 2-23.

⁶² FEIS § 2.9, at 2-37.

⁶³ The DNREC's claim that the FEIS acknowledges that Weeks Marine's capacity will be met during the operating period of the project is wrong. Request for Rehearing and Clarification at 21, *citing* FEIS § 2.9, at 2-38. The FEIS states that if this facility reaches its permitted capacity, other permitted sources of disposal capacity are anticipated.

necessary. Under the circumstances, it would be unreasonable to require a contractual commitment for the life of the project.

F. Recreation

51. The DNREC states that opportunities for recreational activities including boating and fishing on the Delaware River will be curtailed by construction/operation of the Crown Landing facility. The DNREC argues that it was arbitrary and capricious not to require Crown Landing to consult with the DNREC to develop a strategy to compensate for the reduction of public access to the Delaware River particularly in light of the statement in the FEIS that Crown Landing is engaged in such a consultation process with New Jersey (FEIS § 4.8.5.2, at 4-109). The DNREC asks the Commission to add a requirement regarding such consultation with the DNREC to Appendix A of the June 20 Order.

52. Crown Landing is consulting with the NJDEP because a New Jersey rule requires that coastal development adjacent to all coastal waters provide permanent access to the waterfront to the extent practicable. New Jersey Resource Rule 7:7E-8.11⁶⁴ Since the DNREC has not cited a comparable Delaware regulation, we will deny its request to require consultation by Crown Landing.

53. We note that the FEIS discusses impacts to recreational areas and recreational fishing and boating.⁶⁵ The Coast Guard, in its public Water Suitability Report, stated that the transit of the LNG vessel and the security measures it would implement, including a safety zone around the LNG ships, should not affect nor restrict the public's access to shoreside recreation sites or unreasonably impede recreational boating. The safety zone will be a moving zone around the LNG vessel, with the relevant impacts of short duration at any given point along the transit route of the vessel. A security zone would also be established around the moored LNG vessel when at the pier, but boaters could go around the zone and the Coast Guard could also give approval to specific vessels to transit through the zone.

⁶⁴ *Id.* at 4-109. To comply with the rule, Crown Landing evaluated eight options for providing public waterfront access in the vicinity of the proposed LNG terminal and, based on discussions with the NJDEP, is developing an enhancement plan for a site located just south of the Commodore Barry Bridge.

⁶⁵ FEIS 4.8.5.2, 4-105 through 4-109.

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The Commission orders:

(A) The DNREC's request for rehearing is denied, and clarification is granted, as explained in the text of the order.

(B) The untimely motion to intervene filed by the State of Delaware is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.