AES Sparrows Point LNG, LLC v. Smith: The Fourth Circuit Ignores Ambiguities in the Coastal Zone Management Act and Imposes a Stringent Approval Requirement on State Coastal Management Plans

I. OVERVIEW OF THE CASE 159
II. BACKGROUND 160
III. THE COURT'S DECISION 163
IV. ANALYSIS 166
V. CONCLUSION 169

I. OVERVIEW OF THE CASE

In 2006, AES Sparrows Point LNG, LLC (AES) commenced prefiling process to obtain building authorization for a liquefied natural gas (LNG) terminal in an area of Chesapeake Bay known as Sparrows Point, located in Baltimore County.[1] In response, the Baltimore County Council (County) passed an ordinance effectively prohibiting LNG terminals in the bay.[2] AES challenged the ordinance in the United States District Court for the District of Maryland.[3] The district court concluded that the Natural Gas Act (NGA) preempted the ordinance and granted summary judgment in favor of AES.[4]

Unperturbed, the County passed another ordinance, Bill 9-07, prohibiting LNG terminals in the Chesapeake Bay Critical Area (Critical Area), and sought to add the ban to Maryland's coastal management plan.[5] AES challenged again, but this time the district court found that the NGA did not preempt Bill 9-07 because the ordinance was incorporated into Maryland's coastal management plan.[6] On appeal, the United States Court of Appeals for the Fourth Circuit reversed.[7] The Fourth Circuit *held* that the NGA preempted Bill 9-07 because Maryland could not amend its coastal management plan without approval from the

1. AES Sparrows Point LNG, LLC v. Smith, 527 F.3d 120, 124 (4th Cir.), *cert. denied*, No. 08-211, 2008 WL 3873802, at *1 (U.S. Oct. 6, 2008). AES Sparrows Point LNG, LLC, and coplaintiff Mid-Atlantic Express, LLC, are collectively referred to as AES.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

National Oceanographic and Atmospheric Administration (NOAA). *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 126 (4th Cir.), *cert. denied*, No. 08-211, 2008 WL 3873802, at *1 (U.S. Oct. 6, 2008).

II. BACKGROUND

Liquefied natural gas is a highly cooled, compressed form of natural gas that is typically received at coastal locations.[8] There, it can be decompressed and transported to residential, commercial, and industrial end users through vast pipeline systems.[9] New development of LNG infrastructure is desirable because natural gas is cheaper and cleaner-burning than coal.[10] The White House has strongly supported development of new LNG facilities amid rising crude prices.[11] Accordingly, the Federal Energy Resources Commission (FERC), the agency that oversees LNG development, has "approv[ed] applications for new pipelines in a swift and environmentally responsible way."[12]

Chesapeake Bay is the largest estuary in the United States.[13] Local groups and elected officials have decried the potential negative effects of an LNG facility on the estuary.[14] Construction of an LNG facility would require the dredging of 3.7 million cubic yards of sediment, disturbing oxygen levels and aquatic organisms' habitats.[15] Construction would impact water quality in both the Bay and the Patapsco River.[16] If not properly implemented, it would pose a danger to bog turtles, sea turtles, and other marine mammals.[17] The LNG facility and related marine traffic would also likely interfere with local boaters' and fishermen's use of the Bay and disturb its natural viewshed.[18]

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8. *Id.* at 123-24.
9. *Id.* at 124.
10. Irma S. Russel, *The Power Structure: Energy, Politics and the Public Interest in the LNG Debate*, 2 ENVT'L & ENERGY L. & POL'Y J. 49, 51 (2007).
11. *Id.* at 57; FED. ENERGY REGULATORY COMM'N, 2007 STATE OF THE MARKETS REPORT 3-6 (Mar. 20, 2008), http://www.ferc.gov/market-oversight/st-mkt-ovr/som-rpt-2007.pdf.
12. FED. ENERGY REGULATORY COMM'N, HIGH NATURAL GAS PRICES: THE BASICS 3 (2d ed. Feb. 1, 2006), http://www.ferc.gov/legal/staff-reports/high-gas-prices.pdf.
13. John Warren, *NOAA Official Says Bay's Health Is a Global Issue*, VA. PILOT & LEDGER-STAR, Aug. 1, 2008, at 5.
14. AES Sparrows Point LNG, LLC v. Smith, 539 F. Supp. 2d 788, 791 (D. Md. 2007), *rev'd*, 527 F.3d 120, 124 (4th Cir. 2008).
15. Fed. Energy Regulatory Comm'n, Docket Nos. CP07-62-000, CP07-63-000, CP07-64-000, CP07-65-000, AES Sparrows Point LNG Draft Environmental Impact Statement, at ES-3 (2008).
16. *Id.*
17. *Id.*
18. *Id.* at ES-3 to -4.

The Coastal Zone Management Act (CZMA) was designed "to encourage states to develop land-use planning programs that will preserve, protect, and restore the environment of their coastal zones."[19] Simultaneously, the CZMA encourages states to develop coastal management plans that provide for "orderly processes for siting major facilities related to . . . energy."[20]

To invoke its authority under the CZMA, a state must follow procedures the CZMA prescribes.[21] First, the state government must pass laws under a coastal management plan in accordance with CZMA requirements.[22] Second, it must submit the plan to the Secretary of Commerce for approval.[23] The Secretary of Commerce, in turn, has delegated this approval authority to NOAA.[24] NOAA must also approve subsequent changes to make them enforceable, but only if the changes are significant enough to qualify as "amendments."[25] The regulatory framework defines amendments as "substantial changes" in one or more enumerated coastal management program areas.[26]

The power granted to the states under the CZMA seems to overlap authority retained by the federal government under the NGA. To build an LNG facility, the NGA requires developers obtain authorization from FERC.[27] The NGA grants FERC the "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."[28] This provision alone would supervene states' authority to regulate LNG facilities, because when authority is explicitly reserved by the federal government, conflicting state law is preempted under the Supremacy Clause.[29] However, another provision in the NGA suggests otherwise.[30] It provides that "nothing in [the NGA] affects the rights of states under" the CZMA, the Clean Air Act, and the Federal

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19. Shanty Town Assocs. Ltd. P'ship v. EPA, 843 F.2d 782, 793 (4th Cir. 1988) (citing 16 U.S.C. § 1452 (2000)).

20. 16 U.S.C. § 1452(2)(D).

21. *Id.* §§ 1454-1455.

22. *See id.* § 1455(d)(8) (requiring that states "provide for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance").

23. *Id.* § 1455(e)(1).

24. AES Sparrows Point LNG, LLC v. Smith, 527 F.3d 120, 123 n.3 (4th Cir. 2008) (citing Dep't of Commerce Organizational Order 10-15, § 3.01(u) (May 28, 2004)).

25. *Id.* at 126.

26. 15 C.F.R. § 923.80(d) (2000).

27. 15 U.S.C. § 717(a) (2000).

28. *Id.* § 717b(e)(1).

29. *See, e.g.*, U.S. CONST. art. VI, cl. 2; Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (affirming that state law that is in conflict with federal law is void).

30. 15 U.S.C. § 717b(d).

Water Pollution Control Act.[31] Therefore, FERC retains exclusive jurisdiction, but it still must comply with the regulations of enforceable state coastal management plans under the CZMA.

The extent of the states' regulatory authority under the CZMA, on the other hand, is subject to debate. In *New Jersey v. Delaware*, the United States Supreme Court gave significant weight to Delaware's coastal management plan in an interstate boundary dispute.[32] The controversy arose when Delaware sought to regulate developers of an LNG facility on the New Jersey side of the Delaware River, which forms a tenuous boundary between the two states.[33] The Court noted that the common law of riparian rights allowed proprietors on the New Jersey side of the river to "wharf out" as far as necessary as long as the development did not obstruct marine traffic.[34] In this instance, however, the Court found that Delaware had the right to regulate the development pursuant to its coastal management plan because of the extraordinary nature of an LNG facility.[35] This holding conforms with Supreme Court precedent that states retain inherent authority to regulate matters related to public health and safety.[36]

Recent disputes over LNG terminal siting and state regulations under the CZMA have passed through an administrative process known as consistency review. In *California Coastal Commission v. Granite Rock Co.*, the Supreme Court explained how the contractor, the state government, and FERC must coordinate in consistency review.[37] When a developer applies for a federal license for an activity that affects land or water uses in a coastal zone, the developer must certify that the activity complies with the state's coastal management plan.[38] The applicant must provide the certification to the appropriate state official and the federal licensing authority.[39] The state must then notify the federal agency

31. *Id.*
32. 128 S. Ct. 1410, 1427 (2008).
33. *Id.* at 1414.
34. *Id.* at 1427 ("Delaware may not impede ordinary and usual exercises of the right of riparian owners to wharf out from New Jersey's shore.").
35. *Id.* at 1428 (explaining that Delaware could not rationally categorize a riparian facility transporting tofu and bean sprouts as an extraordinary riparian use, but the LNG facility goes well beyond the ordinary or usual); *cf.* Norfolk S. Corp. v. Oberly, 822 F.2d 388, 393-94 (3d Cir. 1987) (determining that in Dormant Commerce Clause analysis, the CZMA grants no authority to states and is solely a funding statute).
36. Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 718 (1985); Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1013-14 (2008).
37. 480 U.S. 572, 590 (1987).
38. 16 U.S.C. § 1456(c)(3)(A) (2000).
39. *Id.*

whether the state concurs or objects.[40] If the state duly objects to the certification, the federal agency must reject the application.[41] If, however, the Secretary of Commerce determines the application is consistent with CZMA policies or is in the interest of national security, the application may be approved.[42] At least one court has found that consistency review is a mandatory administrative remedy that must be exhausted before seeking redress in the courts.[43]

III. THE COURT'S DECISION

In the noted case, the Fourth Circuit reversed the district court's decision, finding that the NGA preempted the County's ban on LNG facilities in the Chesapeake Bay Critical Area.[44] The County argued that the ban was sanctioned under the CZMA as part of a coastal management plan and was therefore saved from preemption by the NGA's Savings Clause.[45] AES responded that even if Maryland had power under the CZMA to regulate the LNG facility, the law was not properly incorporated into Maryland's coastal management plan.[46] Because the prohibition of LNG facilities in the Critical Area was a substantial change to the plan, the Fourth Circuit found that it was not enforceable without approval by NOAA.[47]

The Fourth Circuit began by dismissing the County's argument that AES had failed to exhaust administrative remedies before bringing suit.[48] The court pointed out that the argument failed because the administrative remedies that were open to AES—FERC's licensing process and consistency review—were not mandatory.[49]

The court briefly stated the applicable preemption jurisprudence.[50] First, the court noted the presumption that state police powers should not

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40. *Id.*
41. *Id.*
42. *Id.*
43. Acme Fill Corp. v. S.F. Bay Conservation & Dev. Comm'n, 232 Cal. Rptr. 348, 352 (App. 1st Dist. 1986) (holding that a contractor must exhaust consistency review under the CZMA before bringing judicial action); Myers v. Bethlehem Shipping Corp., 303 U.S. 41, 50-51 (1938) ("No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."). *But see In re* Stoeco Dev., Ltd., 621 A.2d 29, 35 (N.J. Sup. Ct. App. Div. 1993) (allowing a state agency to bring a judicial action under the CZMA, despite failing to conclude consistency review).
44. AES Sparrows Point LNG, LLC v. Smith, 527 F.3d 120, 127 (4th Cir. 2008).
45. *Id.* at 126.
46. *Id.*
47. *Id.* at 127.
48. *Id.* at 125.
49. *Id.* (citing Woodford v. Ngo, 548 U.S. 81 (2006)).
50. *Id.*

be restrained without the clear intent of Congress.[51] It then stated the basic principle that when the intent of Congress to displace state law is explicitly stated in a federal statute, conflicting state law is preempted.[52] The court evaluated whether the NGA's grant of power to FERC exhibited congressional intent to displace state law.[53] Section 717b(e)(1) states FERC "shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."[54] The Fourth Circuit found that this language explicitly preempted state action.[55] Accordingly, it turned its inquiry to whether there was any indication elsewhere that Congress did *not* intend to displace state regulation.[56]

The court addressed the County's argument that because the ordinance was passed pursuant to a coastal management plan, it was saved from preemption under the NGA's Savings Clause.[57] However, the court did not give credit to this argument for two reasons.[58] First, the County did not properly pass the ordinance pursuant to the CZMA requirements.[59] Second, it was suggested in the majority opinion and directly expressed in Chief Judge Williams' concurring opinion that the court was skeptical of the very existence of states' rights under the CZMA.[60]

In reaching its conclusion that the County did not properly pass the ordinance pursuant to its coastal management plan, the court assessed the procedural requirements for such a plan under the CZMA.[61] Upon developing a plan or amending an existing plan, the state must notify NOAA and submit the plan for approval.[62] The submitted provisions of the plan are not enforceable until NOAA approves the plan or allows such time to pass that the provisions are constructively approved unless rejected.[63] The court observed that the State of Maryland did initially pass and approve its plan in 1978, and then in 1986 submitted an

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51. *Id.*
52. *Id.* (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)).
53. *Id.* (citing *Cipollone*, 505 U.S. at 516).
54. *Id.* (quoting 15 U.S.C. § 717b(e)(1) (2000)).
55. *Id.*
56. *Id.* at 125-26.
57. *Id.* at 126.
58. *Id.* at 127.
59. *Id.*
60. *See id.* at 127 n.9 ("[W]e might . . . be called upon to define the meaning of 'rights . . . under' the CZMA."); *id.* at 127 (Williams, C.J., concurring).
61. *Id.* at 126 (majority opinion).
62. *Id.*
63. *Id.*

amendment to include the Critical Area Protection Program.[64] However, the proposed change to prohibit LNG facilities in the Critical Area was neither submitted nor approved.[65]

The court then noted the district court's finding that the LNG ban was still enforceable even though it was not approved by NOAA.[66] The district court reasoned that the LNG ban was not an amendment to the plan, but only the "implementation" of the plan at a local level.[67] It was on this issue that the Fourth Circuit reversed.[68] The court examined language in the regulatory framework that defined amendments as "substantial changes" in certain enumerated areas of plan administration.[69] In determining that the ban effected a substantial change, the court isolated two of the enumerated areas.[70] One of the areas was "[u]ses subject to management."[71] The court did not establish an analytical framework to determine what constitutes a "substantial change" in uses subject to management.[72] It nevertheless concluded that a "categorical ban on LNG terminals" is sufficient for such a change.[73] The second area the court analyzed was "[c]oordination, public involvement and the national interest."[74] The court observed that the CZMA ascribes "greater than local significance" to energy facility siting.[75] The court implied that a regulation of energy-facility siting necessarily affects the national interest.[76]

As a result, the court determined that the ban was a bona fide amendment to Maryland's coastal management plan within the meaning of the CZMA.[77] Consequently, it required approval by NOAA in order to be enforceable.[78] Because NOAA did not approve the amendment, the ban was subject to the same preemption analysis as any state law.[79] The

64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* (quoting 15 C.F.R. § 923.80(d) (2000)).
70. *Id.*
71. *Id.*
72. *See id.* ("[W]e have no difficulty concluding the Bill 9-07 is an 'amendment' of Maryland's [coastal management plan] . . . .").
73. *Id.*
74. *Id.* (quoting 15 C.F.R. § 923.80(d)).
75. *Id.* (quoting 16 U.S.C. § 1455(d)(8) (2000)).
76. *See id.* ("It also implicates the 'national interest' in 'the siting of facilities such as energy facilities which are of greater than local significance.'" (quoting 16 U.S.C. § 1455(d)(8))).
77. *Id.*
78. *Id.*
79. *Id.* at 127.

court then returned to the explicit preemptory language of the NGA, which provided that FERC has "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."[80] This federal authority, the court concluded, nullifies the ban under the Supremacy Clause.[81]

IV. ANALYSIS

The noted case presented the Fourth Circuit with an apparent conflict between the NGA and the CZMA. Rather than balancing policy directives in an attempt to divine Congress's intent, the Fourth Circuit decided the case on a close reading of a federal regulation that imprecisely distinguishes a "substantial change" from a "routine change."[82] The court failed in three ways, however, to address this legislative ambiguity adequately. First, the court peremptorily dismissed the issue of whether AES exhausted its administrative remedies. Second, although the court reached a sound conclusion in finding that the ban of LNG facilities in the Critical Area was a "substantial change" to Maryland's coastal management plan, it provided no analytical method to distinguish between substantial and routine changes. Third, the majority ducked the pivotal question: whether the CZMA confers any real regulatory power on the states.

The Fourth Circuit found that AES exhausted its administrative remedies because it had no prescribed administrative remedies at its disposal.[83] This finding assumes that consistency review is not a prescribed remedy. The court's assumption, however, is at odds with the statute's own language.

Indeed, there is a regulation under the CZMA providing that a mediation process between states and federal agencies does not need to be exhausted in order to seek judicial review.[84] However, that mediation process is not the administrative remedy that AES would have utilized to resolve its dispute. Consistency review was the available administrative remedy.[85] It requires an applicant to go through the federal licensing procedure and certify that the activity is consistent with enforceable state regulations.[86] Ultimately, the Secretary of Commerce decides whether

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80. *Id.*
81. *Id.*
82. *Id.* at 126-27 (citing 15 C.F.R. § 923.80(d) (2000)).
83. *Id.* at 126 n.7 (citing Woodford v. Ngo, 548 U.S. 81 (2006)).
84. 15 C.F.R. § 923.54.
85. 16 U.S.C. § 1456(c)(3)(A) (2000).
86. *Id.* ("[A]ny applicant . . . *shall* provide in the application . . . a certification that the proposed activity complies with the state's approved program . . . ." (emphasis added)).

the proposed activity may go forward.[87] In *Acme Fill Corp. v. San Francisco Bay Conservation*, the California Court of Appeals found that a party could not seek a judicial remedy without exhausting this procedure.[88] The majority in the noted case failed to recognize this contrary authority in its cursory analysis.[89]

The regulations and the *Acme* decision do not firmly settle whether an LNG developer must go through consistency review before proceeding to the courts. However, in dismissing the issue so quickly, the Fourth Circuit neglected an opportunity to examine the relative efficiency accomplished by consistency review as opposed to judicial review.

Two reasons militate in favor of requiring the parties to resolve their disputes in consistency review. First, FERC constantly makes decisions regarding the environmental impact of new facilities in coastal zones and therefore is in a better position to make precise determinations about these matters.[90] Second, litigation may be more expensive and time-consuming than administrative proceedings.

On the other hand, there are benefits to judicial resolution as well. Recent court decisions evaluating LNG disputes have observed the tendency of state agencies to use dilatory tactics in consistency review to frustrate the development of LNG terminals.[91] Furthermore, federal courts are probably in a better position to make pronouncements about the congressional intent of the NGA and the CZMA. The Fourth Circuit should have examined these issues in determining whether consistency review is a mandatory administrative remedy.

Ultimately, the court's decision turned on its interpretation of the phrase "substantial change" under the CZMA. While the court determined that the ban on LNG terminals in the Critical Area constituted a substantial change, it did not provide any standard for determining when the threshold is met.[92]

The findings and reasons of the lower court with respect to what constitutes a substantial change were somewhat more substantive. The

87. *Id.*

88. 232 Cal. Rptr. 348, 352 (Cal. App. 1st Dist. 1986).

89. AES Sparrows Point LNG, LLC v. Smith, 527 F.3d 120, 126 (4th Cir. 2008).

90. *See* 15 U.S.C. § 717b(e)(2) (2000) (requiring FERC to receive applications and determine whether siting construction and operation are appropriate).

91. *See, e.g.*, Weaver's Cove Energy, L.L.C. v. R.I. Coastal Res. Mgmt. Council, C.A. No. 07-246 S, 2008 WL 4449852, at *1 (D.R.I. Oct. 2, 2008) (speculating that Rhode Island Resources Management Council excessively delayed its objection rather than proceed through consistency review).

92. *See AES*, 527 F.3d at 126 ("We have no difficulty concluding that Bill 9-07 is an amendment of Maryland's [coastal management plan] . . . .").

district court employed a functional analysis, reasoning that Congress could not have required states to seek approval from NOAA for every stage of implementation of its coastal management plan.[93] Such a requirement would present such frequent modification as to be unduly burdensome to NOAA.[94] There is support for this finding in the legislative record.[95] The Fourth Circuit, on the other hand, interpreted the language of the statute narrowly. Its finding that a categorical ban constitutes a substantial change provides little guidance for evaluating the implications of provisions in coastal management plans in other contexts.[96] For example, if Maryland's coastal management plan had instead prohibited construction of any LNG terminal requiring more than two million cubic yards of dredging, it is unclear whether that would constitute a substantial change. Additionally, the holding does not indicate whether the extent of existing regulations under the state's coastal management plan should be considered. In sum, the Fourth Circuit's determination provides little to no guidance on what constitutes a substantial change.

The most perplexing question that the court in *AES* failed to answer is whether the County can ban the LNG terminal if NOAA grants approval to do so. Chief Justice Williams was clear on this issue in her concurrence, stating that a ban on LNGs would not be saved if the amendment were approved by NOAA.[97] The majority preferred not to express any opinion as to whether NOAA's approval would give the ordinance effect.[98]

The Supreme Court's decision in *New Jersey* counsels against Williams' position. In *New Jersey*, the Court upheld a provision in Delaware's coastal management program, stating there were no viable locations for LNG terminals in Delaware.[99] The Fourth Circuit distinguished *New Jersey* from the noted case on a dubious point. In a footnote, the majority wrote that the County's ban of LNG terminals was

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93. AES Sparrows Point LNG, LLC v. Smith, 539 F. Supp. 2d 788, 797 (D. Md. 2007), *rev'd*, 527 F.3d 120, 127 (4th Cir.), *cert. denied*, No. 08-211, 2008 WL 3873802, at *1 (U.S. Oct. 6, 2008).

94. *Id.*

95. S. REP. No. 92-753 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4784 ("The Committee seeks to convey the importance of a dynamic quality to the planning undertaken in this Act that permits adjustments as more knowledge is gained, as new technology develops, and as social aspirations are more clearly defined.").

96. *AES*, 527 F.3d at 127.

97. *Id.* (Williams, C.J., concurring).

98. *Id.* at 126 (majority opinion).

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

enacted in 2007, after the 2005 amendments to the NGA.[100] Contrarily, the ban that was upheld in *New Jersey* was passed in 1979, before the amendments.[101] This distinction is probably not dispositive, however, because acts of Congress displace prior state law as well as subsequent state law.[102] Nevertheless, there is a more persuasive basis to distinguish the noted case from *New Jersey*. The Supreme Court in that case was not evaluating the Delaware regulation in the context of preemption.[103] New Jersey did not argue that Delaware's regulation was preempted by the NGA, and the Supreme Court did not express its holding with regard to preemption.[104] Thus, the decision in *New Jersey* is at best suggestive of the proposition that the CZMA creates states' rights to regulate coastal zones.

The contrary proposition, which is suggested in the legislative record as well as Supreme Court precedent, is that the CZMA merely "enhances" state authority and provides funding to states.[105] Although the majority did not express an opinion on the issue, it appeared to advance this restrictive view of the CZMA. The court's interpretation of when Maryland must seek approval from NOAA creates an authoritarian model for state interaction with the federal government. This may represent a retrenchment of prior jurisprudence that raised a presumption in favor of state control over matters pertaining to public health and safety.[106] At the least, it undermines Maryland's autonomy with respect to its coastal management plan.

V. CONCLUSION

In *AES*, the majority based its decision on a narrow issue, provided little support for its conclusion, and accordingly left ambiguities in the CZMA and NGA unresolved. Although the court determined that contractors may bypass consistency review in seeking a judicial remedy, it did not address contrary authority on the issue. Moreover, even with

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100. *AES*, 527 F.3d at 126 n.9.

101. *Id.*

102. *See, e.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 310 (1988) (holding NGA provisions pertaining to natural gas securities nullified Michigan State Public Service Commission's regulation of same).

103. *New Jersey*, 128 S. Ct. at 1419.

104. *Id.* at 1427; Brief of BP Am. Inc. & Crown Landing LLC, as Amici Curiae Supporting the State of New Jersey, New Jersey v. Delaware, 128 S. Ct. 1410 (No. 134), 2007 WL 4266843, at *3-4 (U.S. July 30, 2007).

105. Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 591 (1987) (quoting S. REP. NO. 92-753, at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4776).

106. Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 718 (1985); Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1013-14 (2008).

regard to the issue that the court did resolve—the meaning of a substantial change within the CZMA—it provided little to no criteria to determine what constitutes a substantial change. Courts that encounter similar disputes will be forced to adopt an ad hoc approach to this critical issue. Most importantly, the majority failed to analyze the controversy of whether and to what extent states are granted independent authority under the CZMA. Although the decision will have the likely effect of denigrating state authority under the CZMA, its only practical effect is to impose a highly formal requirement of approval for changes to coastal management plans. This is impractical because it forces NOAA to micromanage state coastal management programs.

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