



## State of New Jersey

THE PINELANDS COMMISSION

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### **Statement regarding the South Jersey Gas Matter:**

(April 12, 2019)

Members of the New Jersey Pinelands Commission voted to delay action on a [resolution](#) pertaining to South Jersey Gas' natural gas pipeline application today.

Commission members decided to delay action on the resolution to provide the Office of the New Jersey Attorney General with sufficient time to analyze information contained in a letter South Jersey Gas sent to the Commission early this morning. The letter is enclosed.

The Commission will consider the matter at a future meeting.

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April 12, 2019

**VIA FACSIMILE (609-894-7330)  
AND FIRST CLASS MAIL**

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The New Jersey Pinelands Commission  
PO Box 359  
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**Re: Proposed Resolution Invalidating Pinelands Resolution No. PC4-17-03**

Dear Commissioners:

This firm represents, South Jersey Gas ("SJG"), regarding the proposed resolution seeking to invalidate the Commission's February 24, 2017 approval of SJG's Application No. 2012-0056.001 (the "Application") because the repowering and conversion of BL England ("BLE") from coal to natural gas will not be moving forward—a decision made by RC Cape May Holdings, LLC ("RCCM") and not in the control of SJG. Our firm (currently representing SJG in the appeals concerning the subject resolution) was advised by Deputy Attorney General, Kristina Miles, on Wednesday, April 10, 2019 that the resolution would be considered Friday, April 12, 2019. We urge the Commission to consider the procedural and legal implications of its proposed course of action at this stage of the proceedings.

The Application sought to build a natural gas pipeline through the Forest Area (in addition to other areas) of the Pinelands, one segment to BLE within the Pinelands (the "Dedicated Line") and one as a second feeder line to customers in the Pinelands and Cape May County (the "Reliability Line") (the "Project"). The Project was supported by the Executive Director's February 17, 2017 Recommendation Report ("RR") as being consistent with the permitted use standards of the Comprehensive Management Plan ("CMP"), N.J.A.C. 7:50-1.1 et seq. That decision is currently on appeal to the Appellate Division of the New Jersey Superior Court and oral argument is scheduled for May 29, 2019.

RCCM determined, without consultation with SJG to terminate its plan to repower BLE, and advised the Appellate Division and SJG of the same. Although the matter was not before her, on March 6, 2019, the Executive Director advised the Commission that approval could no longer be justified given RCCM's decision regarding BLE. Reconsideration is now beyond the Executive Director's and the Commission's jurisdiction. Accordingly, any decision to revoke SJG's approval based upon the Executive Director's recommendation would be *ultra vires*. In addition, revocation without a full and formal hearing is procedurally improper under New Jersey's Administrative Procedure Act ("APA"), N.J.S.A. 52:14b-1 et seq.

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**A. The Commission No Longer Has Jurisdiction Over the Matter**

The Commission's February 24, 2017 approval is currently on appeal depriving the Commission of jurisdiction over the matter until the Appellate Division issues a determination—whether that be remand, affirmance on the findings of facts made by the Executive Director, or reversal. Rule 2:2-3 of the New Jersey Rules of Court explicitly grants the Appellate Division jurisdiction over “final decisions or actions of any state administrative agency or officer” as of right. N.J.S.A. 2:2-3(a)(2); see also N.J.S.A. 52:14B-12. Indeed, a special case bypassing need to seek lower court review is stated directly in the Pinelands Protection Act (“PPA”), N.J.S.A. 13:18A-1 et seq. See N.J.S.A. 13:18A-20 (“Any person aggrieved by any decision rendered by the commission pursuant to subsection c. of section 9 and sections 13 and 14 of this act may obtain judicial review thereof by the filing of a petition in the Appellate Division of the Superior Court of New Jersey within 45 days after the issuance of such decision.”); see also N.J.A.C. 7:50-4.92. The PPA explicitly gives the Appellate Division “power to grant such relief as it deems just and proper, and to make and enter an order enforcing, modifying and enforcing as so modified, remanding for further specific evidence or findings, or setting aside in whole or in part, such decision of the commission.” *Id.*

There can be no reasonable dispute that the February 24, 2017 approval was a final agency action that followed agency proceedings and public participation and is now on appeal. “The filing of an appeal generally divests the trial court or agency of jurisdiction to act in the matter under appeal, unless directed to do so by the appellate court.” *In re M/O Pet. of South Jersey Gas*, 447 N.J. Super. 459, 474 (App. Div. 2016). Reconsideration absent the jurisdiction to do so would be *ultra vires* and void. *D.S. v. Bd. of Educ. of East Brunswick Twp.*, 188 N.J. Super. 592 (“Administrative agencies have limited jurisdiction; actions of an agency beyond its jurisdiction are *ultra vires* and void.”). Indeed, in the past the Commission has recognized the jurisdictional limits after issuing a final approval. See *Carino v. Pinelands Comm'n*, 92 N.J.A.R.2d (EPC) 7 (OAL 1992). Thus, the Commission must wait for the appeal to conclude.

**B. Revocation Without a Hearing is a Clear Violation of the APA**

Without question, development determinations made by the Commission are subject to the APA. *In re App. of John Madin/Lordland Dev. Int'l*, 201 N.J. Super. 105, (App. Div. 1985). The APA is clear regarding revocations of prior agency decisions. The APA states, “**No agency shall revoke or refuse to renew any license unless it has first afforded the licensee an opportunity for hearing in conformity with the provisions of this act applicable to contested cases.**” N.J.S.A. 52:14B-11 (emphasis added). Licenses are defined broadly to include “the whole or part of any agency license, permit, certificate, approval, chapter, registration or other form of permission required by law,” thereby capturing the Commission’s February 24, 2017 determination. N.J.S.A. 52:14B-2.

Conformance with the APA is not only statutorily required, it embodies the constitutional protections applicable in agency proceedings, including federal and state due process protection. *Grimes v. N.J. Dep’t of Corr.*, 452 N.J. Super. 396, 404 (2017) (“An agency’s ability to select procedures it deems appropriate to accomplish its statutory mission is limited by the strictures of due process and of the [APA].” (internal quotation marks omitted and alteration in original)). In addition, “New Jersey’s doctrine of fundamental fairness protects against ‘unjust and arbitrary governmental actions, and specifically against governmental procedures that tend to operate arbitrarily.’” *Id.* (quoting *John Doe v. Poritz*, 142 N.J. 1, 108, 662 A.2d 367 (1995)). Conformance with the APA is a means to assure that due process protections are afforded to

those subject to agency actions. Revocation of February 24, 2017 approval without notice and a hearing would be a clear violation of this protection.

**C. Conclusion**

SJG appreciates the Commission's desire to reconsider its previous decision in light of the changed circumstances of the Project and the recent comments from the Executive Director. However, reconsideration is not proper at this time. Moreover, reconsideration without notice and a hearing is statutorily improper. If the Appellate Division determines remand is necessary, the Project can be reconsidered by the Commission at that time.

Please feel free to contact me with any questions.

Sincerely,

COZEN O'CONNOR, PC

  
By: Peter J. Fontaine

PJF

cc: Ira Megdal, Esquire  
Melissa Orsen, Senior Vice President and General Counsel, South Jersey Industries  
Steven Cocchi, Senior Vice President and Chief Strategy and Development Officer,  
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Nancy Wittenberg, Executive Director  
(all sent via email and first class mail)