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Not On My Coastline The Jurisdictional Battle over the Siting of LNG Import Terminals Note

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NOTE

NOT ON MY COASTLINE: THE JURISDICTIONAL BATTLE OVER THE SITING OF LNG IMPORT TERMINALS

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I. INTRODUCTION

The price of natural gas in the United States has reached record levels.¹ This is especially disconcerting given the fact that it once had the lowest natural gas prices in the industrialized world.² The increase in the cost of natural gas to up to \$7.00 per thousand cubic feet in the past year from \$1.50 per thousand cubic feet just five years earlier is glaring.³ Presently, the cost of natural gas in Europe is less than half of the cost in the United States.⁴ Natural gas prices in places such as Venezuela and Africa are even lower than those in

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1. Press Release, Senator Lamar Alexander, Alexander Introduces Natural Gas Legislation (Apr. 6, 2005), [http://alexander.senate.gov_\(follow "Press"; then follow "Press Releases"\)](http://alexander.senate.gov_(follow%20%22Press%22;%20then%20follow%20%22Press%20Releases%22)) [hereinafter Alexander Introduces Natural Gas Legislation].

2. Press Release, Senator Lamar Alexander, Statement of Senator Alexander – Senate Energy Bill (Apr. 1, 2004), [http://alexander.senate.gov \(follow "Press"; then follow "Press Releases"\)](http://alexander.senate.gov_(follow%20%22Press%22;%20then%20follow%20%22Press%20Releases%22)).

3. 151 CONG. REC. H2384 (daily ed. Apr. 20, 2005) (statement of Rep. Terry).

4. *Id.*

Europe.⁵ Since 1998, natural gas prices in the United States have risen over 300 percent.⁶

Used by more than half of the businesses and households in the country, natural gas comprises nearly a quarter of the American energy supply.⁷ Even as the price of natural gas soars, American consumption of natural gas is projected to grow in the next twenty years.⁸ Adding complexity to the situation, the domestic production of natural gas is declining at a rate of one percent per year.⁹ To meet this growing need, America must look to foreign sources of natural gas.¹⁰

To satiate the needs of its citizens, America has begun to look to liquefied natural gas (LNG) as a way of supplying the country with the quantity of natural gas it needs. However, increased shipments of LNG can not be imported into the United States until the country has established the infrastructure necessary to receive it.¹¹ Such importation requires additional terminals; there are currently too few to meet projected demand. The need for additional terminals has sparked an intense debate between the States and the federal government regarding which entities should have the authority to choose where to construct new terminals to receive LNG.

The parties on each side of this debate have valid concerns; both state and federal groups cite the safety of residents, the desire to maintain control over the state economy, and the need to ensure that all States have equal access to natural gas to justify their position for jurisdiction over the siting of LNG terminals. These concerns, coupled with the undeniable need for additional sources of natural gas, create a conundrum. Systems must be in place to determine which locations are suitable for new LNG import facilities in terms of economics, ease of transportation, and safety. The federal government feels that the Federal Energy Regulatory Commission

5. *Id.*

6. 151 CONG. REC. H2433 (daily ed. Apr. 21, 2005) (statement of Rep. Murphy).

7. 151 CONG. REC. H2384 (daily ed. Apr. 20, 2005) (statement of Rep. Terry).

8. *Id.*

9. *Id.*

10. 151 CONG. REC. H2385 (daily ed. Apr. 20, 2005) (statement of Rep. Terry).

11. Alexander Introduces Natural Gas Legislation, *supra* note 1.

(FERC) is best positioned to ensure that both state and federal concerns are taken into consideration in the siting of new terminals. At the same time, States feel that they alone understand the unique concerns of their residents and the issues created by the topography of their land. For those reasons, States feel they can weigh concerns that would be looked over by a federal agency, ensuring a safer system than that which FERC would implement.

As this debate has progressed, many states have begun to question FERC's jurisdiction over the approval of siting new LNG import facilities. FERC has continued to contend that it has exclusive jurisdiction over such siting. This ever-growing debate brings with it the possibility that construction of necessary terminals may be slowed, and that additional terminals will not be operational in time to bring the necessary quantity of LNG to America.

One of the most publicized jurisdictional debates taking place has its focal point in California. Sound Energy Solutions (SES) has proposed to build an LNG import terminal on a twenty-seven acre site located on Terminal Island, which is in the Port of Long Beach, California.¹² On March 24, 2004, FERC asserted exclusive jurisdiction over the Port of Long Beach terminal.¹³ The California Public Utilities Commission (CPUC) has challenged this assertion of exclusive jurisdiction, contending that it has the authority to approve such terminals in the State of California. The debate was an impetus for the Energy Policy Act of 2005 (EPAAct), which was signed into law on August 8, 2005.¹⁴

The EPAAct contains a provision which directly addresses jurisdiction over the siting of new LNG import and export facilities.¹⁵ In the course of Congress' consideration of this bill, both an amendment and additional legislation attempted to better address the jurisdictional situation surrounding LNG import facilities — the

12. Notice of Intent to Prepare a Joint Environmental Impact Statement and Environmental Impact Report, Application Summary Report for SES' Proposed Long Beach LNG Import Project, 68 Fed. Reg. 56,285 (Sept. 30, 2003) [hereinafter Notice of Intent].

13. Sound Energy Solutions, Declaratory Order Asserting Exclusive Jurisdiction, 106 F.E.R.C. 61,279, 62,018 (2004).

14. Energy Policy Act of 2005, Pub. L. No. 109-058, 119 Stat. 594 (2005).

15. *Id.* at § 311, 119 Stat. 686.

Castle-Markey Amendment¹⁶ and the Natural Gas Price Reduction Act (NGPRA).¹⁷

This Note examines the debate between the States and the federal government over the siting of LNG import terminals, and analyzes the changes proposed in the version of the EPAct introduced in the House of Representatives, the Castle-Markey Amendment, the NGPRA, and the version of the EPAct which has been signed into law. First, Part II of this Note provides a brief background of the LNG industry. Part III introduces the controversy over the proposed import terminal in the Port of Long Beach, California. Part IV of the Note discusses the regulation of natural gas and the role that FERC has played in that regulation. Parts IV, V and VI analyze the debate between the States and the federal government, using the proposed Long Beach, California terminal as an example. Part VII analyzes the EPAct, the Castle-Markey Amendment, and the NGPRA, and the impact each piece of legislation could have on jurisdiction over LNG import facilities. Finally, the Note proposes alterations to these pieces of legislation which would ensure that they create the necessary infrastructure for the increased import of LNG into the United States, while taking into account concerns of those States that may need to house such facilities.

II. THE HISTORY OF THE LNG INDUSTRY

A. *What is LNG?*

LNG is natural gas that has been cooled to its liquid state.¹⁸ To reach this state, the gas must attain a temperature of negative 260 degrees Fahrenheit.¹⁹ The result of liquefaction is that the volume of the gas reduces by more than 600 times, making storage and transportation practical.²⁰

16. H.R. 6, 109th Cong. §320 (2005) (rejected Apr. 21, 2005).

17. Natural Gas Price Reduction Act of 2005, S. 726, 109th Cong. (2005).

18. Federal Energy Regulatory Commission, LNG Overview <http://www.ferc.gov/for-citizens/lng.asp> (last visited Dec. 27, 2005).

19. *Id.*

20. *Id.*

Natural gas is primarily used as a fuel to generate electricity.²¹ Local electric power and gas companies often use LNG to store gas until peak demand times, when it is not possible to meet customer demand using pipeline sources alone.²² During peak demand times, LNG is converted back to its gaseous form, and supplements the natural gas supplied through pipelines.²³

The liquefaction of natural gas is not a new concept. During the nineteenth century, British chemist Michael Faraday began to experiment with the liquefaction of a variety of gases - among them natural gas.²⁴ The first LNG plant was constructed in West Virginia in 1912, and was operational in 1917.²⁵ Cleveland, Ohio saw the first commercial liquefaction plant in 1941.²⁶ This plant liquefied natural gas and stored it in tanks until it was revaporized for use during peak demand periods.²⁷

For more than forty-five years, LNG has traveled across oceans for delivery around the world.²⁸ The Methane Pioneer was the world's first LNG tanker, making its first voyage from Lake Charles, Louisiana to Canvey Island, United Kingdom in 1959.²⁹ The Pioneer became the first ship to carry LNG across the Atlantic Ocean, and its voyage made the United Kingdom the world's first

21. CENTER FOR ENERGY ECONOMICS, INTRODUCTION TO LNG: AN OVERVIEW OF LIQUIFIED NATURAL GAS (LNG), ITS PROPERTIES, THE LNG INDUSTRY, SAFETY CONSIDERATIONS 4 (2003), http://www.beg.utexas.edu/energyecon/lng/documents/CEE_INTRODUCTION_TO_LNG_FINAL.pdf [hereinafter INTRODUCTION TO LNG].

22. *Id.*

23. *Id.* at 5.

24. *Id.* at 10.

25. *Id.*

26. *Id.*

27. MIKE HIGHTOWER ET AL., SANDIA NATIONAL LABORATORIES, GUIDANCE ON RISK ANALYSIS AND SAFETY IMPLICATIONS OF A LARGE LIQUEFIED NATURAL GAS (LNG) SPILL OVER WATER, 26 (2004), http://www.fe.doe.gov/programs/oilgas/storage/lng/sandia_lng_1204.pdf.

28. INTRODUCTION TO LNG, *supra* note 21, at 5.

29. *Id.*

importer of LNG.³⁰ Today, many countries import and export LNG.³¹

It was not long before the United States climbed aboard the LNG importation bandwagon, constructing four marine terminals between 1971 and 1980.³² These terminals reached a peak import volume of 253 billion cubic feet in 1979, at the time constituting 1.3 percent of the total gas demand of the United States.³³ LNG did not continue to flow into the United States at this rate for long, however. A gas surplus in North America, paired with price disputes with the world's largest LNG supplier, Algeria, resulted in a decline in LNG imports into the United States, causing two of the four terminals in the country to be "mothballed" in 1980.³⁴ The two remaining terminals continued to operate, but were significantly underutilized.³⁵

The United States has not only been an importer of LNG, but also has exported LNG for many years. In 1969, the first exports of

30. *Id.*

31. Today, there are seventeen LNG export terminals and forty LNG import terminals around the globe. Approximately 120 million tons of LNG is transported between these facilities each year. HIGHTOWER, *supra* note 27, at 26.

32. These terminals are located in Lake Charles, Louisiana; Everett, Massachusetts; Elba Island, Georgia; and Cove Point, Maryland. *Id.* Today, the United States receives most of its LNG from Trinidad and Tobago, Qatar, Algeria, Nigeria, Australia, and Indonesia. The Center for LNG, FAQ, <http://lngfacts.org/faq/index.html> (last visited Apr. 2, 2005). It should be noted that import terminals are not the same as peaking terminals, where natural gas is liquefied and stored for use during times when demand increases. HIGHTOWER, *supra* note 27, at 26. There are a total of 113 LNG facilities in the United States, including those used for production, transport, and storage of LNG. The Center for LNG, FAQ, <http://lngfacts.org/faq/index.html>

33. http://www.energy.uh.edu/LNG/LNG_introduction_06.asp (last visited Apr. 2, 2005).

34. *Id.*

35. *Id.*

American LNG traveled to Japan from Alaska.³⁶ Like the United States, Japan has an extensive history with LNG, and currently relies on LNG alone to satisfy its natural gas needs.³⁷

In recent years, the United States has developed a renewed interest in LNG. This interest has emerged from a number of factors, including an increased demand for natural gas throughout the country, an increase in natural gas prices, and the 1999 introduction of a new LNG liquefaction plant in Trinidad.³⁸ As a result, the two mothballed LNG terminals were reactivated in 2001 and 2003.³⁹ In addition, FERC Chairman Pat Wood announced that as many as eight additional LNG terminals could be built in the United States by 2010.⁴⁰

LNG currently comprises one percent of the natural gas used in the United States, but this percentage is expected to rise in coming years.⁴¹ Although only one of the four LNG terminals currently in operation in the United States operates near capacity, companies have already reserved the capacity of all four terminals, and the proposed expansion capacity.⁴² If the United States hopes to rely on

36. This liquefaction facility, located on the Kenai Peninsula, is still in operation, and is now one of the oldest continuously operated LNG plants in the world. HIGHTOWER, *supra* note 27, at 26.

37. The Center for Liquefied Natural Gas, LNG Vessel Safety, http://www.lngfacts.org/marine_information/vessel_safety.html (last visited Apr. 2, 2005).

38. http://www.energy.uh.edu/LNG/LNG_introduction_06.asp (last visited Apr. 2, 2005).

39. *Id.*

40. *FERC Chairman Wood Sees Eight New Terminals by 2010*, GREENWIRE, Feb. 17, 2005.

41. The Energy Information Administration has estimated that this percentage could rise to three percent by 2020. The Center for LNG, Quick Facts, http://www.lngfacts.org/quick_facts/lng_future.html (last visited Apr. 2, 2005). Other groups have estimated that LNG could comprise as much as eleven percent of the gas supply in the United States by 2010. It has been estimated that LNG consumption in the U.S. could rise from under five million tons a year (the amount consumed during 2002) to between twenty five and fifty million tons a year in 2010. *LNG Gets Ready for Second U.S. Coming* (2004), available at <http://www.energyintel.com>.

42. *LNG Gets Ready for Second U.S. Coming*, *supra* note 41.

LNG for a larger percentage of its natural gas needs, additional facilities must be built to accommodate an increased amount of imported LNG to be imported. Various companies have already proposed many new facilities.⁴³ On September 11, 2003, FERC granted Cameron LNG final certificate authorization, allowing the company to site, construct, and operate an onshore LNG import facility in Hackberry, Louisiana.⁴⁴ This was the first new terminal constructed in the lower forty-eight states in twenty-five years.⁴⁵

B. Safety Concerns Regarding LNG

There are three characteristics of LNG that may cause hazards while it is being handled: its cryogenic temperature, its flammable nature, and the characteristics of its vapor dispersion.⁴⁶ LNG vaporizes quickly when exposed to heat sources such as water.⁴⁷ The vapor is composed of methane; it is colorless, odorless, and non-toxic.⁴⁸ When vaporization occurs, each cubic foot of liquid

43. Approximately thirty new terminals have been proposed in North America, including terminals on the East and West Coasts, the Gulf of Mexico, and Baja California. It is estimated that two to four new terminals will be required on the East Coast and Gulf of Mexico, and that two or three will be required on the West Coast of the United States. *Id.* More than fifty sites, including onshore and offshore sites, have been listed by developers as possible LNG terminal sites. *Proposed Terminals, Greater Demand, Foretell Dramatic Shift Over Next Decade*, GREENWIRE, Dec. 14, 2004.

44. ABA Section of Public Utility, Communications and Transportation Law Annual Reports, 2004.

45. *Id.* For additional background on the LNG industry, see INTRODUCTION TO LNG, *supra* note 21, at 10-12.

46. FED. ENERGY REG. COMM'N, CONSEQUENCE ASSESSMENT METHODS FOR INCIDENTS INVOLVING RELEASES FROM LIQUEFIED NATURAL GAS CARRIERS 5, (May 13, 2004) available at <http://www.ferc.gov/industries/gas/indus-act/lng-model.pdf> [hereinafter Consequence Assessment].

47. *Id.*

48. The Center for LNG, FAQ, <http://www.lngfacts.org/faq/index.html> (last visited Apr. 2, 2005).

produces 620 to 630 standard cubic feet of natural gas.⁴⁹ Due to the fact that an LNG spill on water would quickly vaporize, environmental cleanup is not required in cases of LNG leaks or spills on bodies of water. A spill during the transportation of LNG is of less environmental concern than, for example, an oil spill.⁵⁰

In its liquid state, natural gas is not flammable or explosive.⁵¹ LNG vapor is flammable when it occurs in a five percent to fifteen percent concentration in air.⁵² With less air, there is not enough oxygen to sustain a flame. More air will dilute the vapor, preventing it from igniting.⁵³ When the proper conditions are present, and an LNG spill ignites, the result may be a flash fire, causing the flame to burn back toward the site of the spill, if the vapor concentration is high enough to allow for continued burning.⁵⁴ In an unconfined environment, LNG vapor is not explosive.⁵⁵ Confined spaces where LNG could explode might be found within ships that transport LNG, in LNG storage facilities, and in areas containing equipment for the liquefaction and storage processes.⁵⁶ This explosive potential is one of the frequently cited concerns when an LNG terminal is proposed for an area near residential neighborhoods.⁵⁷

As a whole, the LNG industry has an impressive safety record.⁵⁸ Throughout the years, deliveries of LNG have been made without

49. ABA Section of Public Utility, Communications and Transportation Law Annual Reports, 2004.

50. The Center for LNG, FAQ, *supra* note 48.

51. *Id.*

52. FEDERAL ENERGY REGULATORY COMMISSION, LNG OVERVIEW, <http://www.ferc.gov/for-citizens/lng.asp> (last visited Dec. 27, 2005).

53. *Id.*

54. A flash fire is “a short duration fire burning the vapors already mixed with air in flammable concentrations.” Consequence Assessment, *supra* note 46, at 3.

55. Federal Energy Regulatory Commission, LNG Overview, <http://www.ferc.gov/for-citizens/lng.asp> (last visited Dec. 27, 2005).

56. Consequence Assessment, *supra* note 46, at 5.

57. *See, e.g.* 151 CONG. REC. H2181 (daily ed. Apr. 20, 2005) (statement of Sen. McGovern).

58. The safety record of the LNG industry is good both for LNG transport vessels and onshore facilities. In the past twenty-five years, no death or serious accident has occurred at any onshore LNG

significant accidents or safety problems while transport ships are at sea or in port.⁵⁹ Currently, over 150 ocean tankers are used to transport more than 110 million metric tons of LNG each year to ports around the world.⁶⁰ Even with such a high number of ships transporting large volumes of LNG, the U.S. Department of Energy (DOE) reported that “[o]ver the life of the industry, eight marine incidents worldwide have resulted” involving accidental spillage of LNG.⁶¹ In these cases, the result has been minor hull damage.⁶² No cargo fires have occurred.⁶³ Seven other marine-related incidents have taken place – none of which have resulted in significant cargo loss.⁶⁴ In addition, no fatalities or explosions have resulted from the transport of LNG.⁶⁵

However, a number of concerns remain about transporting natural gas across oceans.⁶⁶ Many fear that terrorists might target ships carrying LNG or LNG import and export terminals. The actions taken by the federal government in the months following the terrorist attacks on the United States on September 11, 2001 should allay these concerns. Following those attacks, the Coast Guard established safety and security zones for LNG carrier vessels and the

facility in the United States. There has never been a fire, significant spill, or accidental death on an LNG vessel due to a LNG release in the history of the industry. The Center for LNG, FAQ, *supra* note 48.

59. The Center for LNG, Marine Information, http://www.lngfacts.org/marine_information/vessel_safety.html (last visited Apr. 2, 2005).

60. *Id.*

61. HIGHTOWER ET AL., *supra* note 27, at 28.

62. The Center for LNG, LNG Vessel Safety, *supra* note 37.

63. *Id.*

64. HIGHTOWER ET AL., *supra* note 27, at 28; *id.*

65. The Center for LNG, LNG Vessel Safety, *supra* note 37..

66. The ships used to transport LNG are called “double-hulled ships,” and have been designed in an effort to prevent leakage or rupture in the event that an accident occurs. The LNG is stored in specially designed inner hulls or spherical tanks aboard the ships. If a tank was to fail and a leak occurred, there is the possibility that a fire may result. However, a fire would only occur if the appropriate concentration of LNG vapor was present in the air and if this vapor met an ignition source. *Id.*

LNG facility located near Boston, Massachusetts.⁶⁷ Fears also exist about the ramification of a natural disaster, such as an earthquake, in an area where numerous LNG terminals have been constructed.⁶⁸

In response to these fears, the government has implemented a number of safeguards.⁶⁹ For example, Code of Federal Regulations provides that LNG transfer systems must have an emergency shutdown system that can be activated manually or automatically when certain conditions occur,⁷⁰ and that LNG containers and transfer systems have both thermal exclusion zones⁷¹ and a dispersion exclusion zone in place⁷² to protect area residents in the event of an accident. In addition, the Maritime Transportation Security Act of 2002 required all LNG terminals and LNG transporting vessels to provide the federal government with security plans prior to the end of 2003.⁷³ This Act also required the authorization of security zones for all ports, vessels, harbors, and waterfront facilities in an attempt to protect such areas from terrorism.

These concerns, coupled with the undeniable need for additional sources of natural gas, create a conundrum. Systems must be in place to determine what locations are suitable for new LNG import facilities in terms of economics, ease of transportation, and safety. At the same time, any system implemented for approving new LNG terminals must account for safety concerns before

67. Safety and Security Zone; Liquefied Natural Gas Carrier Transits and Anchorage Operations, Boston, Marine Inspection Zone and Captain of the Port Zone, 33 C.F.R. § 165.110 (2001).

68. Although some have said that an earthquake or fire could result in a “catastrophic chain reaction,” it has also been noted that the LNG terminals in Japan have sustained insignificant damage, and at times suffered no damage at all, from major earthquakes in that country. *Proposed Terminals, Greater Demand, Foretell Dramatic Shift Over Next Decade*, *supra* note 43.

69. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (2002).

70. Emergency Shutdown, 33 C.F.R § 127.205 (2005).

71. Thermal Radiation Protection, 49 C.F.R § 193.2057 (2005).

72. Flammable Vapor-Gas Dispersion Protection, 49 C.F.R. § 193.2059 (2005).

73. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (2002).

granting approval. Both state and federal agencies exclusively want to decide which sites are suitable for these terminals. As a result, many States have begun to question the jurisdiction of FERC over the siting of new LNG import facilities, while FERC has continued to contend that it has exclusive jurisdiction over such siting. The ever-growing debate brings with it the possibility that construction of new terminals may slow, and that these terminals may not be operational in time to bring LNG into the country before it is necessary.

III. THE CONTROVERSY OVER LONG BEACH, CALIFORNIA

To meet the anticipated growth in LNG imports to the United States, the country needs to construct new import terminals along its shores. The need for new terminals has brought with it a plethora of proposals for their construction. Many of the new terminals are expected to differ from the four already in use, creating some interesting siting proposals.⁷⁴ This need has also incited state and federal agencies, both of which feel they deserve the ability to exercise exclusive jurisdiction over the siting of the proposed import terminals.

Recently, the issue of federal versus state control over siting decisions arose in discussions over the EPAct.⁷⁵ This debate resulted in large part from a battle being waged in California over the siting of a proposed LNG import terminal in Long Beach.⁷⁶ This battle has become one of the most publicized jurisdictional debates presently taking place in America.

The company Sound Energy Solutions (SES) has proposed to build an LNG import terminal on a twenty-seven acre site on Terminal Island, located in the Port of Long Beach, California.⁷⁷ This

74. Proposals have included offshore locations for Gulf of Mexico terminals, and terminals that involve storage in underground salt caverns, as opposed to the above ground tanks used currently. *LNG Gets Ready for Second U.S. Coming*, *supra* note 41.

75. Energy Policy Act of 2005, P.L. No. 109-058 (2005). For further discussion, see *infra* Part VII.

76. *Senate Energy Panel Takes up LNG as Hearings Continue*, GREENWIRE, Feb. 14, 2005.

77. Notice of Intent, *supra* note 12. The Port of Long Beach, California is located on the southern edge of metropolitan Los

terminal is expected to provide “700 million standard cubic feet of natural gas per day to the local transmission and distribution systems,” and would provide gas to local LNG-powered vehicles.⁷⁸ In its proposal, SES requested that approval be given in time for construction to begin in 2004, which would allow the terminal to begin operating in 2007 or 2008.⁷⁹ On January 26, 2004, SES filed an application pursuant to Section 3(a) of the NGA requesting authorization to site, construct, and operate this terminal.⁸⁰

On March 24, 2004, FERC asserted exclusive jurisdiction over the Port of Long Beach terminal.⁸¹ In this statement, FERC claimed jurisdiction under Section 3(a) of the Natural Gas Act (NGA).⁸² The California Public Utilities Commission (CPUC) argued that the EPAct removed such authority from FERC.⁸³ FERC relied on its Order in *Dynergy LNG Production Terminal*⁸⁴ in rebuking this argument.⁸⁵ FERC also cited *Distrigas Corporation v. FPC*⁸⁶ as further support of its position that it has exclusive jurisdiction over the siting of LNG import facilities.⁸⁷ Finally, FERC noted that the energy needs of the United States are best served by “a uniform national policy applicable to LNG imports,” and that such a policy could only be achieved through federal jurisdiction over siting of LNG terminals.⁸⁸

FERC has indicated that it intends to work closely with CPUC and other California agencies in reviewing the SES

Angeles, California, and is within two miles of residential neighborhoods. *FERC Strikes Down Calif.'s Claim to Terminal Licensing*, GREENWIRE, June 14, 2004.

78. Notice of Intent, *supra* note 12.

79. *Id.*

80. Notice of Application, 69 Fed. Reg. 6277 (Feb. 10, 2004).

81. Sound Energy Solutions, *supra* note 13, at 62,020.

82. *Id.* at 62,015.

83. *Id.*

84. *Dynergy LNG Production Terminal, L.P.*, 97 F.E.R.C. 61,231, 62,048 (2001). For further discussion of the case, see *infra* Part IV.C.4.

85. Sound Energy Solutions, *supra* note 13, at 62,016.

86. *Distrigas Corp. v. Federal Power Comm'n.* 95 F.2d 1057, 1058 (D.C. Cir. 1974).

87. Sound Energy Solutions, *supra* note 13, at 62,016.

88. *Id.* at 62,018.

proposal.⁸⁹ To date, the Port of Long Beach and FERC have worked together to review the potential environmental impacts of the project.⁹⁰ FERC has also been supportive of the idea that a single project may be subject to regulatory requirements of federal, state, and local agencies, and requires applicants seeking approval of LNG terminals to provide the state and local approvals required for the project.⁹¹ However, FERC has stated that where there is an “irreconcilable conflict” between state and federal requirements, “the federal law will preempt state and local law.”⁹²

It should not come as a surprise that CPUC initiated a battle against FERC in this matter. CPUC, which has authority to regulate all natural gas facilities located in California under the Hinshaw exception of the NGA, has an extensive history of jurisdictional battles with FERC over electricity and natural gas issues.⁹³

CPUC discussed the proposed project at great length in its Order Instituting Investigation into the Proposal.⁹⁴ CPUC put forth a

89. *Id.*

90. *Id.* at 62,020.

91. Sound Energy Solutions, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, 107 F.E.R.C. 61,263, 62,158 (2004).

92. *Id.* at 62,168.

93. In 1954, Congress added the Hinshaw exception to the Natural Gas Act which stated that § 717 “shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission.” 15 U.S.C. § 717(c). Such pipelines were deemed to fall under state jurisdiction. *Id.* However, even Hinshaw pipelines may find themselves under FERC jurisdiction if they participate in “activities that go beyond the intrastate transport of gas.” Consumers Energy Co. v. FERC, 226 F.3d 777, 779 (2000).

94. Order Instituting Investigation into the Proposal of Sound Energy Solutions, Inc. to Construct and Operate a Liquefied Natural Gas Terminal at the Port of Long Beach, 2004 Cal. PUC LEXIS 189, 4 (Apr. 22, 2004).

number of arguments attempting to bolster the claim that it has been granted exclusive jurisdiction over the siting of LNG import terminals. CPUC is listed as a “responsible agency” under the California Environmental Quality Act, and argues that as such, it has statutory authority over the siting and safety of LNG facilities.⁹⁵ Additionally, SES qualifies as a public utility under the California Public Utilities Code, placing it under the jurisdiction of CPUC under Section 701 of that Code, which states that “[CPUC] may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”⁹⁶

CPUC also discussed a number of policy issues created by the proposed terminal, including the potential for a terrorist attack and the fact that the proposed site is on a landfill and located within a “liquefaction hazard zone,” a region known to have a large amount of seismic activity.⁹⁷ The proposed site would also place the terminal within two miles of residential and commercial neighborhoods, concerning area residents.⁹⁸ CPUC also justified its opposition to the proposed site in outlining safety risks associated

95. California Environmental Quality Act, CAL. PUB. RES. CODE § 21069 (2005).

96. CAL. PUB. UTIL. CODE § 701 (2005). (CPUC argues that because SES would sell natural gas into the California natural gas market were this facility to be approved, it is a public utility under the California Public Utilities Code. News Release, California Public Utilities Commission, PUC Orders Sound Energy Solutions to Obtain State Approval for LNG Project; Seeks Rehearing of FERC’s Sole Jurisdiction Ruling (Apr. 22, 2004), *available at* http://www.cpuc.ca.gov/word_pdf/NEWS_RELEASE/35956.pdf [hereinafter News Release].)

97. There are twenty-seven active earthquake faults located within 100 miles of the proposed site for this LNG facility. Three of the twenty-seven are within five miles of the proposed location. Order Instituting Investigation into the Proposal of Sound Energy Solutions, Inc. to Construct and Operate a Liquefied Natural Gas Terminal at the Port of Long Beach, *supra* note 94.

98. These areas contain “schools, major transportation corridors and tourist destinations, including the Queen Mary, numerous hotels, the Aquarium of the Pacific, and a marina.” *Id.*

with the amount of ethane and propane that the terminal would contain.⁹⁹

Finally, CPUC argued that creating this new terminal would potentially “affect the operation of natural gas markets in California,” noting that the proposed amount of LNG imported to this facility would constitute as much as ten percent of the daily natural gas requirements of California.¹⁰⁰ CPUC also argued that allowing a single natural gas company to control such a large portion of the natural gas supply, as Sound Energy Solutions would if this terminal is approved, would place that company in a position to impact prices during times when supply and demand are not equal.¹⁰¹

Regardless of FERC’s Statement of Exclusive Jurisdiction, CPUC ordered SES to file an application for a Certificate of Public Convenience and Necessity on April 22, 2004.¹⁰² In August 2004, the State of California sued FERC over this jurisdictional issue in the U.S. Circuit Court of Appeals for the District of Columbia.

There exist no LNG import facilities on the west coast of the United States.¹⁰³ Even though the creation of such facilities would help the region meet its growing demand for natural gas, environmentalists and area residents have strongly opposed the creation of a facility in the area.¹⁰⁴

While it is true that California is not the first state to question FERC’s jurisdiction over the siting of LNG import terminals, and it certainly will not be the last if the situation remains as it is, the California debate is unique. The gas imported into the terminal would be used within the state of California alone. This is an important aspect, as it is one that could change the way a court ultimately decides the California matter.¹⁰⁵

CPUC argues that there is nothing in the NGA that gives FERC jurisdiction over the siting, operation, or construction of LNG

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*; *see also*, News Release, *supra* note 96.

103. *Facilities Battle Heats up in Northeast California*, GREENWIRE, Jan. 24, 2005.

104. *Id.*

105. James Erwin, *Rhode Island Delegation Prepares Challenge to FERC Authority*, NAT. GAS WK. Mar. 14, 2005.

terminals or other natural gas facilities that do not transport or sell natural gas in interstate commerce.¹⁰⁶ Because SES has not proposed to sell gas interstate, CPUC alleges that it has exclusive jurisdiction over the proposed facility, including the approval of its proposed site.

CPUC further explains that it has jurisdiction over the regulation of siting for natural gas facilities in California, including the siting of LNG import terminals.¹⁰⁷ Under the Natural Gas Pipeline Safety Act,¹⁰⁸ CPUC has been a certified state agency for a number of years, and in this capacity enforces federal pipeline standards promulgated by the Department of Transportation for intrastate facilities.¹⁰⁹ Nothing included in FERC's Statement of Exclusive Jurisdiction explains where it derives jurisdiction over a strictly interstate LNG terminal, as this proposed terminal would be. However, this does not mean that federal jurisdiction over such facilities is inappropriate, as discussed in Part IV.

IV. THE BASIS FOR FEDERAL JURISDICTION

A. *A Brief History of Liquefied Natural Gas Regulation*

At the beginning of the twentieth century, the natural gas industry was predominately free from federal government regulation.¹¹⁰ A free market existed, allowing purchasers to gather natural gas at wellheads through pipelines, and then process, transport, store, and

106. Order Instituting Investigation into the Proposal of Sound Energy Solutions, Inc. to Construct and Operate a Liquefied Natural Gas Terminal at the Port of Long Beach, *supra* note 94.

107. *Id.*

108. 49 U.S.C. § 60105 (2003).

109. Order Instituting Investigation into the Proposal of Sound Energy Solutions, Inc. to Construct and Operate a Liquefied Natural Gas Terminal at the Port of Long Beach, *supra* note 94.

110. CENTER FOR ENERGY ECONOMICS, INTERSTATE NATURAL GAS – QUALITY SPECIFICATIONS & INTERCHANGEABILITY 9 (2004), available at http://www.beg.utexas.edu/energyecon/lng/documents/CEE_Interstate_Natural_Gas_Quality_Specifications_and_Interchangeability.pdf [hereinafter QUALITY SPECIFICATIONS & INTERCHANGEABILITY].

sell to distribution companies.¹¹¹ Because distribution companies were local, there was no need for federal government regulation.¹¹² Additionally, there was no feasible way for a federal agency to claim jurisdiction over the natural gas industry.¹¹³ The landscape changed, however, when industrial developments allowed gas transportation between states. Although public utilities had been subject to state regulation since 1907,¹¹⁴ the advent of interstate pipelines brought the need for federal regulation.¹¹⁵

In 1938, federal regulation of the natural gas industry became more firmly grounded with passage of the NGA.¹¹⁶ The NGA provided for federal regulation of natural gas companies involved in interstate commerce, and also for the regulation of pricing by the natural gas industry.¹¹⁷ The Federal Power Commission (FPC), now FERC, was authorized to regulate gas supply issues and new sales, but was not given the power to regulate the production or gathering of natural gas.¹¹⁸ The states retained the authority to regulate local distribution companies.¹¹⁹

Perhaps the largest player in the federal regulation and siting of LNG import facilities is FERC. FERC is an independent agency charged with regulating and overseeing the energy industries in the “economic, environmental, and safety interests of the American public.”¹²⁰ Many of the tasks FERC undertakes relate to the natural gas industry. FERC regulates the sale of natural gas for resale in interstate commerce, oversees environmental matters related to natural gas, and approves the siting of, and abandonment of, interstate natural gas facilities.¹²¹ FERC is also entrusted with the

111. *Id.*

112. *Id.*

113. *Id.*

114. 1907 saw New York and Wisconsin establish the United States’ first public utility commissions. *Id.*

115. *Id.*

116. Natural Gas Act, 15 U.S.C. §§ 717-717z (2005).

117. *Id.*

118. *Id.*

119. *Id.*

120. Federal Regulatory Energy Commission, About FERC, <http://www.ferc.gov/about/about.asp> (last visited Dec. 28, 2005).

121. Federal Energy Regulatory Commission, What FERC Does, <http://www.ferc.gov/about/ferc-does.asp> (last visited Dec. 28, 2005).

authority to regulate the interstate transmission of natural gas, and to regulate natural gas projects.¹²² Even with this amount of involvement by FERC in the natural gas industry, there are a number of industry sectors in which FERC does not play a role, including development and operation of natural gas vehicles, regulation of local natural gas distribution pipelines, and regulation of retail natural gas sales to consumers.¹²³

Section 3 of the NGA requires authorization before natural gas may be imported to or exported from the United States.¹²⁴ It provides that:

[N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.¹²⁵

Exclusive jurisdiction under Section 3 was originally vested in the FPC.¹²⁶ All issues relating to the import and export of natural gas were for the FPC to decide, including the ability to authorize its import or export, and the power to authorize the construction and operation of necessary corresponding facilities.¹²⁷

In 1977, with the passage of the Department of Energy Organization Act, the authority previously vested in the FPC over the import and export of natural gas was transferred to the Secretary

122. *Id.*

123. *Id.*

124. 18 C.F.R. § 153.6 (1997).

125. 15 U.S.C.A. § 7176 (West 2005).

126. 18 C.F.R. § 153.

127. *Id.*

of Energy.¹²⁸ The Secretary of Energy would have power over such issues unless he chose to assign those functions to FERC.¹²⁹ In February 1984, Congress issued a new delegation order in an attempt to minimize the problems that resulted from coordination on import and export issues.¹³⁰ In this order, Congress vested regulatory authority over the import and export of natural gas in FERC and the DOE/Economic Regulatory Administration (ERA). These organizations continue to share responsibility for natural gas issues.¹³¹

In the 1984 delegation order, FERC was given exclusive authority over a number of natural gas import and export issues. These include “the authority to approve or disapprove proposals for the construction, operation, and siting of facilities, and when the construction of new domestic facilities is involved, the place of entry for imports or place of exit for exports.”¹³² This delegation includes authority over the authorization of facility and siting aspects of importation and exportation.¹³³ In addition, FERC has jurisdiction over the construction of “new domestic facilities related to the import and export of natural gas.”¹³⁴

128. Department of Energy Organization Act, 42 U.S.C. § 7151 et seq. (2005).

129. *Id.*

130. 18 C.F.R. § 153 (1997).

131. 49 Fed. Reg. 6,684 (Feb. 22, 1984). “Between October 1, 1977 and February, 1984, the DOE and [FERC] shared responsibility over natural gas import and export issues pursuant to DOE delegation orders (which have since been rescinded). The Secretary of Energy administered his authority over natural gas import and export issues pursuant to FPC rules in place on September 20, 1977, until DOE issues its own final regulations.” 18 C.F.R. § 153 (1997).

132. The delegation orders gave the Administrator of ERA authority under section 3 of the NGA to regulate the import and export of natural gas, including the places of entry and exit. 18 C.F.R. § 153 (1997).

133. *Id.*

134. Gearold L. Knowles, *Liquefied Natural Gas: Regulation in a Competitive Natural Gas Market*, 24 ENERGY L. J. 293, 305 (2003).

The Energy Policy Act of 1992 amended Section 3 of the NGA in an effort to ensure that approved LNG terminals have been deemed to be in the public interest.¹³⁵ Today, Section 3 of the NGA states that FERC “shall issue an order upon an application, unless it finds that the proposed exportation or importation will not be consistent with the public interest.”¹³⁶ What is considered to be in the public interest is determined through the consideration of all relevant factors, which have included the necessity of the proposal for access to natural gas supplies, to provide a more economic source of natural gas, or to enhance competition.¹³⁷

Aside from FERC, a number of other federal agencies play a role in siting LNG import facilities, including the Environmental Protection Agency, the Fish and Wildlife Service, the Minerals Management Service, the U.S. Coast Guard, and the Army Corps of Engineers.¹³⁸ Many of these agencies work together in siting LNG import terminals. For example, as the regulatory framework exists today, FERC and the U.S. Coast Guard have authority to approve and site on-shore and off-shore LNG import terminals.¹³⁹ Many duties of the Coast Guard are complementary to those designated for FERC. FERC has responsibility for on-shore facilities, while the U.S. Coast Guard has authority over off-shore facilities and is responsible for the safety of marine operations at United States LNG

135. *House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, H. Comm. on Government Reform* (June 22, 2004) (Testimony of Pat Wood, III, Chairman, Federal Energy Regulatory Commission) [hereinafter *Testimony of Pat Wood, III*].

136. 15 U.S.C.A. 7171b (West 2005).

137. 18 C.F.R. § 153 (1997).

138. Letter from John F. Tierney, et al., Members of the United States Congress, to the Honorable Patrick Wood, Chairman, Fed. Energy Regulatory Com. 2 (Oct. 18, 2004), available at <http://www.house.gov/tierney/press/LNG10182004.shtml>.

139. *Hearing on Siting of Liquefied Natural Gas Imp. Facilities Before the House Subcomm. on Energy Policy, Natural Res. and Regulatory Affairs Comm. on Gov't Reform, 108th Cong.* (2004) (statement of Donald F. Santa, Jr., President, Interstate Natural Gas Association of America), available at http://www.lngfacts.org/newsroom/donald_santa.html [hereinafter *Hearing on Siting of LNG Imp. Facilities*].

terminals.¹⁴⁰ The Coast Guard also oversees the safety to tankers in the coastal waters of the United States.¹⁴¹

The Research and Special Programs Administration (RSPA) also plays a role in the regulation of LNG facilities, which dovetails with the duties of FERC. RSPA “promulgate[s] and enforce[s] safety regulations and standards for transportation and storage of LNG in or affecting interstate or foreign commerce under the pipeline safety laws.”¹⁴² This responsibility includes siting and installation of LNG facilities.¹⁴³ In 2004, FERC, the Coast Guard, and RSPA entered into an interagency agreement to help ensure they continue to cooperate in the review of LNG terminals.¹⁴⁴ This agreement names FERC as the agency responsible for authorizing the siting and construction of proposed onshore LNG terminals.¹⁴⁵ The agreement also provides that FERC will conduct environmental, safety, and security reviews of these terminals, and act as the lead agency in the preparation and analysis of any decisions required under the National Environmental Policy Act (NEPA) before it approves facilities.¹⁴⁶

Because FERC must comply with NEPA when authorizing the construction of an LNG facility at a particular site, it considers other federal, state, and local agencies “participating agencies” for the purposes of NEPA.¹⁴⁷ Outside of complying with NEPA, these agencies participate in FERC’s siting proceedings to represent the interests of their constituents.¹⁴⁸ In addition, “proposed LNG

140. Center for LNG, Marine Information, http://www.lngfacts.org/marine_information/vessel_safety.html (last visited Mar. 13, 2005).

141. *Id.*

142. *Id.*

143. Interagency Agreement Among the Federal Energy Regulatory Commission, United States Coast Guard, and Research and Special Programs Administration for the Safety and Security Review of Waterfront Import/Export Liquefied Natural Gas Facilities (Feb. 11, 2004), available at <http://www.ferc.gov/industries/lng/safety/reports/2004-interagency.pdf> [hereinafter Interagency Agreement].

144. *Id.*

145. *Id.*

146. *Id.*

147. *Hearing on Siting of LNG Imp. Facilities*, *supra* note 139.

148. *Id.*

projects are subject to some state and local regulations” and offshore terminals must be “approved by each adjacent coastal state.”¹⁴⁹ As such, it is clear that the process of regulating LNG import facilities is not exclusionary, as it provides numerous opportunities for state and local governments to participate. It is true, however, that FERC plays the most significant role in the siting process.

B. The Siting Process

In analyzing proposed LNG terminals, FERC examines a variety of aspects of the project – potential environmental impacts, safety issues, and security concerns.¹⁵⁰ To this end, before a company files an application to construct an LNG facility, it is common for its representatives to meet with members of FERC’s Office of Energy Projects, where they can explain the project and request input from FERC.¹⁵¹ FERC also encourages companies filing applications for new LNG terminals to participate in the NEPA pre-filing process, a process of environmental review before the application is even filed.¹⁵² Participation allows additional opportunities for state and local communities to become involved in the approval process, as it contains a number of opportunities for public comment.¹⁵³

After an application has been filed, FERC begins the process of filing an environmental impact statement, fulfilling its obligations under both NEPA and the implementing regulations under Title 18, Code of Federal Regulations, Part 380.¹⁵⁴ As with the pre-filing process, the environmental review that takes place under NEPA provides a number of opportunities for public comment.

While FERC finalizes its EIS, it prepares a Cryogenic Design Review.¹⁵⁵ This document includes a review of the proposed design,

149. Letter from John F. Tierney, *supra* note 138.

150. *Testimony of Pat Wood, III, supra* note 135.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* For a detailed explanation of how the NEPA process applies to proposed LNG import terminals, see FERC Regulatory Approval Process for an Onshore LNG Facility, <http://www.lngfacts.org/multimedia/FERC.pdf> (last visited Apr. 2, 2005).

155. *Testimony of Pat Wood, III, supra* note 135.

detailed technical information about the proposal, and conclusions and recommendations based upon review of the proposal.¹⁵⁶ The goal of this step in the approval process is to ensure that the proposed facility meet the needs of America's natural gas infrastructure both by being safe by design and by being reliable.¹⁵⁷

There are a number of Acts that provide state agencies authority to approve LNG import terminals – principally the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act.¹⁵⁸ Where any of these Acts apply, States can intervene to prevent FERC from granting approval to a proposed LNG import facility.

Because Section 3 does not provide FERC, or any other federal agency, with the power of eminent domain, applicants must comply with state and local requirements to acquire property for a project.¹⁵⁹ This provides another avenue by which non-federal agencies may have input into the LNG terminal approval process, even if informally.

As projects enter the construction process and near completion, members of the FERC staff periodically visit the facility, conducting inspections to determine if there are any deviations from the design that the Commission approved.¹⁶⁰ FERC's involvement with the terminals continues after completion of the facility. FERC must file semi-annual reports regarding the operation of the terminals and any abnormal activities that have taken place since its last report.¹⁶¹

C. Major Decisions Affecting FERC's Jurisdiction over the Siting of LNG Import Facilities

A number of court decisions and agency orders have discussed the jurisdiction of FERC in relation to siting LNG import facilities.¹⁶²

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 4.

160. *Id.*

161. *Id.*

162. As discussed above, the powers currently vested in FERC were originally vested in the FPC. As such, decisions regarding jurisdiction over LNG import facilities discussing the FPC apply to FERC today.

In 1948, the Court of Appeals for the District of Columbia held that interstate commerce and foreign commerce are distinct ideas.¹⁶³ This decision was one of the first among many involving differences of opinion between FERC and other groups as to who and what FERC can regulate under the NGA.

1. Border Pipe Line

The FPC issued the first order involving the regulation of LNG in 1972. In this order, the FPC held that “Liquefied natural gas is natural gas as defined by Section 2(5) of the [Natural Gas] Act . . .” and that for that reason the FPC has jurisdiction over the transportation and sale of LNG as it does over the sale and transportation of other types of natural gas.¹⁶⁴ The agency also held that it had authority to approve or disapprove the import of LNG into the United States.¹⁶⁵

In addition to these initial holdings, the FPC stated that the “[s]torage of LNG, its regasification, the sale of either the liquid or regasified LNG in the state of importation and the facilities and activities related thereto are neither in foreign or interstate commerce and are therefore outside of Commission jurisdiction.”¹⁶⁶ As the debate over authority to site new LNG import facilities escalates between state and federal agencies, this holding lends much support to the States’ argument that they should have exclusive jurisdiction over any terminals that receive LNG to be used solely within the state.

2. Distrigas

Just one year later, in 1973, the FPC issued another order that helped define the LNG arena in the United States. Distrigas, which operated an LNG terminal located in Everett, Massachusetts, submitted an application under Section 3 of the NGA, wherein it requested permission to increase the amount of LNG that it could import into the terminal, and sought permission to increase LNG

163. *Border Pipe Line Co. v. Federal Power Comm’n*, 171 F.2d 149, 150 (D.C. Cir. 1948).

164. *Opinion and Order Granting Authorization to Import Liquefied Natural Gas*, 1972 FPC LEXIS 49, 18 (1972).

165. *Id.* at 21.

166. *Id.* at 21-22.

sales.¹⁶⁷ When the FPC originally granted authorization for this terminal in 1972, it did so under Section 3, and did not require Distrigas to file a certificate under Section 7.¹⁶⁸ In response to the application to increase the amount of LNG imported and to increase the amount of sales from the Everett terminal, the FPC alleged that it had jurisdiction over such matters under Section 7 of the NGA, and as such authorization under Section 7 was required for this import facility.¹⁶⁹ Section 7 grants the FPC the power to issue Certificates of Public Convenience and Necessity which allow the construction and operation of natural gas pipelines running interstate, as well as of LNG storage facilities.¹⁷⁰ Thus, this section grants FERC the power to decide whether an applicant may construct an LNG facility.¹⁷¹

The D.C. Circuit Court of Appeals reviewed the order from the FPC.¹⁷² On review, the court held that Section 7 of the NGA is applicable to interstate commerce, but does not explicitly speak to foreign commerce.¹⁷³ Explaining that what the FPC was authorized to do under Section 7 was “at once plenary and elastic,” the court clarified that the FPC has power to authorize the importation of natural gas with or without conditions regarding the facilities or the use of the imported gas, and that it may deny the authorization to import natural gas entirely.¹⁷⁴ In the alternative, the FPC may choose to grant authorization to import LNG only so long as certain terms and conditions, deemed to be necessary and appropriate to the public interest, are met.¹⁷⁵ The only static requirement with which the Commission must comply is that its decisions be reasonable and “reasonably supported by substantial record evidence.”¹⁷⁶

167. Order Requiring Application Filings, 49 F.P.C. 1145 (May 25, 1973).

168. *Id.*

169. *Id.*

170. *Hearing on Siting of LNG Imp. Facilities*, *supra* note 139.

171. *Id.*

172. *Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057 (D.C. Cir. 1974).

173. *Id.* at 1062.

174. *Id.* at 1064.

175. *Id.*

176. *Id.*

The court concluded that the FPC could use the authority granted to it under Section 3 to require Dstrigas to file an application under Section 7, stating:

. . . [W]e find it fully within the Commission's power, so long as that power is reasonably exercised, to impose on imports of natural gas the equivalent of Section 7 certificate requirements both as to facilities and . . . as to sales within and without the state of importation. Indeed, we think that Section 3 supplies the Commission not only with the power necessary to prevent gaps in regulation, but also with the flexibility in exercising that power...¹⁷⁷

This decision reaffirmed the Commission's power to exercise jurisdiction over LNG imports under Section 3 of the NGA.

3. Public Utilities Commission v. FERC

The battle over jurisdiction continued in 1990, when California alleged that it had jurisdiction over "taps, meters, and other tie-in facilities" that connect pipelines to their end users.¹⁷⁸ FERC responded to this claim by asserting exclusive jurisdiction over the entire pipeline under Section 1(b) of the NGA.¹⁷⁹ In resolving this dispute, the D.C. Circuit Court of Appeals interpreted Congress's intent in enacting the NGA. The court pointed out that before Congress enacted the NGA in 1938, the Supreme Court had repeatedly held that "state regulation of the interstate transportation of natural gas, or of wholesale interstate sales, was invalid under the negative implications of the Commerce Clause."¹⁸⁰ The NGA was enacted to "fill the regulatory 'gap' and Congress intended to 'occupy this field.'"¹⁸¹ The court also noted that where "state

177. *Id.* For a detailed discussion of the Court's decision in *Dstrigas*, see KNOWLES, *supra* note 134, at 1064.

178. *Public Util. Comm'n v. Fed. Energy Reg. Comm'n*, 900 F.2d 269, 274 (D.C. Cir. 1990).

179. *Id.* at 274.

180. *Id.*

181. *Id.* (citing H.R. REP. NO. 709-75, at 2 (1937) (quoted in *Illinois Natural Gas Co. v. Public Serv. Co.*, 314 U.S. 498, 506-07 (1942))).

regulation would operate ‘within this exclusively federal domain,’ of interstate commerce, such state regulation is preempted.”¹⁸²

The court did not, however, say that states have no authority in these matters, pointing out that “federal and state jurisdictions are interlocking.”¹⁸³ In this vein, the court held that the NGA was not meant to usurp the authority of the States.¹⁸⁴ The court reiterated its earlier decision in *FPC v. East Ohio Gas Co.*,¹⁸⁵ where the court clearly delineated the jurisdiction of FPC and the jurisdiction of the States. FERC has been given jurisdiction over the transportation of natural gas traveling in interstate commerce, while the States retain jurisdiction over “local distribution facilities.”¹⁸⁶

4. Dynergy

2001 brought the next major decision involving jurisdiction over the siting, construction, and operation of LNG import facilities, when Dynergy LNG Production Terminal questioned whether the Section 3 jurisdiction remained in effect after the enactment of the Energy Policy Act.¹⁸⁷ Dynergy proposed to construct a new import facility in Hackberry, Louisiana, and alleged that the Commission no longer had Section 3 authority over the siting, construction, and operation of terminals such as the one it hoped to build.¹⁸⁸ In its argument, Dynergy asserted that the Energy Policy Act required that LNG be treated as a “first sale,” over which the Commission had no jurisdiction.¹⁸⁹ As such, Dynergy concluded, the Commission did not have jurisdiction over the siting, construction, and operation of LNG facilities under Section 3, as these facilities were associated

182. *Id.* (quoting *Schneidewind v. ANR Pipeline*, 485 U.S. 293, 305 (1988)).

183. *Id.*

184. *Id.* at 275.

185. *F.P.C. v. East Ohio Gas Co.*, 338 U.S. 464 (1950).

186. *Public Util. Comm’n v. Federal Energy Regulatory Comm’n*, 900 F.2d 269, 274 (D.C. Cir. 1990) (citing *F.P.C. v. East Ohio Gas Co.*, 338 U.S. 464).

187. *Dynergy LNG Production Terminal, L.P.*, 97 F.E.R.C. 61,231 (2001).

188. *Id.* at 62,048.

189. *Id.* at 62,050.

with “first sales.”¹⁹⁰ The Commission interpreted the Energy Policy Act differently, and held that it left Section 3 of the NGA, and the jurisdiction provided to FERC under that section, intact.¹⁹¹

5. Southern LNG, Inc.

In 2002, FERC took a step toward changing its policy regarding LNG import facilities by issuing an order that granted preliminary authorization under Section 3 of the NGA, as opposed to Section 7, for Southern LNG, Inc. to expand its existing LNG terminal.¹⁹² In direct opposition to its prior policy, FERC held that it need not consider Southern’s request for authorization under Section 7, and it granted expansion under Section 3.¹⁹³ In explaining this new position, FERC stated that their “assessment of the proposal under the public interest standard of section 3 replicates the criteria we would apply under the substantially equivalent public convenience and necessity standard of section 7.”¹⁹⁴

6. Hackberry

In 2002 FERC issued an order authorizing the Hackberry LNG terminal under Section 3 of the NGA, wherein it announced changes to the Commission’s policy regarding rates and open access.¹⁹⁵ In this opinion, FERC reiterated that it was not relinquishing any of its jurisdiction over LNG terminals in making this policy shift.¹⁹⁶ To this end, the Commission unambiguously stated that the “decision to

190. *Id.*

191. *Id.* at 62,055. For a detailed discussion of the *Dynergy* order, see KNOWLES, *supra* note 134, at 308.

192. Preliminary Determination on Non-Environmental Issues, Southern LNG, Inc., 101 F.E.R.C. ¶ 61,187 (Nov. 20, 2002).

193. *Id.* at 61,738.

194. *Id.* For a detailed discussion of the *Southern LNG* order, see KNOWLES, *supra* note 134, at 309.

195. Preliminary Determination on Non-Environmental Issues, Hackberry LNG Terminal, L.L.C., 101 F.E.R.C. ¶ 61,294, at 62,179 (Dec. 18, 2002). For a detailed discussion of the *Hackberry* decision, see KNOWLES, *supra* note 134, at 311.

196. *Id.*

adopt a less intrusive degree of regulation . . . does not affect our jurisdiction...."¹⁹⁷

V. THE BASIS FOR STATE JURISDICTION

As the jurisdictional battle continues, some proponents of federal regulation have postulated that state and local regulators can impede the "natural gas infrastructure already authorized by FERC."¹⁹⁸ Many state agencies believe that laws exist that contain "jurisdictional hooks" that allow state and local groups to second guess decisions made by FERC under the authority granted to it by the NGA.¹⁹⁹ In addition, state agencies point to a variety of state statutes as their source of jurisdiction over LNG import terminal siting. For example, in 1981 the New York State Department of Environmental Conservation claimed jurisdiction over the siting of LNG import terminals under the New York Liquefied Natural and Petroleum Gas Act.²⁰⁰ In Rhode Island, when KeySpan, the owner of an LNG terminal located in Providence, sought permission to expand its facility, the state fought the proposal on the ground of territorial sovereignty.²⁰¹ States continue to seek authority that would allow them to make the siting decisions that traditionally have been left to FERC.

197. *Id.*

198. *Hearing on Siting of Liquefied Natural Gas Imp. Facilities*, *supra* note 139.

199. *Id.*

200. *Energy Terminal Serv. Corp. v. New York State Dep't of Env'tl Conservation*, 11 ENVTL. L. REP. 20871 (E.D.N.Y. 1981); N.Y. ENVTL. CONSERV. § 23-701 *et seq.* In *Energy Terminal Services Corp.*, the District Court held that the state statute was not preempted by the Natural Gas Act because "FERC has never issued guidelines pursuant to the Natural Gas Act for the regulation of liquefied natural gas facilities."

201. *Rhode Island Delegation Prepares Challenge to FERC Authority*, *supra* note 105.

VI. THE ARGUMENTS FOR EACH SIDE

A. *Federal*

Those in favor of federal authority over siting of LNG facilities name numerous benefits of such authority, including a single federal record, direct court appeal of LNG-related decisions, a single lead agency handling NEPA requirements, and elimination of the delays caused by sequential permitting.²⁰² Other benefits include preventing inconsistent regulation to which LNG facilities would be subject if siting were left to the states²⁰³ and ensuring that federal needs will be met, as opposed to only the needs of smaller regions.²⁰⁴ Groups also claim that allowing FERC authority over siting would not give the Commission authority to overrule state or local governments on matters related to the environment.²⁰⁵

Those who support FERC's position in the jurisdiction battle contend that the *Distrigas* decision grants FERC the authority to site LNG import facilities and to attach conditions to siting decisions.²⁰⁶ These groups also argue that the federal government has authority over the regulation of foreign commerce, and because the import of LNG and siting import facilities are directly related to foreign commerce, the federal government's authority extends to these practices.²⁰⁷

An additional argument is made that the doctrine of preemption makes FERC's LNG terminal siting procedures supreme over those of any state agency. In *Schneidewind v. ANR Pipeline Co.*, the Supreme Court held that "[t]he NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale."²⁰⁸ The Court also held that "even

202. *Senate Energy Panel Takes up LNG as Hearings Continue*, *supra* note 76.

203. *Hearing on Siting of LNG Imp. Facilities*, *supra* note 139.

204. *Lawmakers Take California's Side in LNG Dispute*, GREENWIRE, Jan. 11, 2005.

205. *Senate Energy Panel Takes up LNG as Hearings Continue*, *supra* note 76.

206. *Hearing on Siting of LNG Imp. Facilities*, *supra* note 139.

207. *Id.*

208. *Schneidewind v. ANR Pipeline Company and ANR Storage Company*, 485 U.S. 293, 300-01 (1988).

where Congress has not entirely displaced state regulation in a particular field, state law is preempted when it actually conflicts with federal law.”²⁰⁹ In addition, the Court noted that in cases where an agency has created a regulation in accordance with its authority, it may preempt an existing state regulation.²¹⁰ Under this proposition, FERC may preempt any state law regarding regulation of LNG import facilities.

According to FERC, the Commission considers regional issues and needs when analyzing proposals for siting LNG import terminals.²¹¹ As an example of its efforts to understand regional issues, FERC has conducted regional conferences on energy infrastructure throughout the United States.²¹² The FERC staff has also assembled reports regarding various regions, including the “New England Natural Gas Infrastructure Report,” which it assembled with data from numerous

209. *Id.* at 300. The preemption clause stems from the Supremacy Clause of the U.S. Constitution. U.S. CONST, art. VI, cl. 2. A court will find preemption in six instances. These are where “(i) Congress expressly intended to preempt state law, (ii) there is actual conflict between federal and state law, (iii) compliance with both federal and state law is impossible, (iv) there is implicit in federal law a barrier to state regulation, (v) Congress has ‘occupied the field’ of the regulation, leaving no room for a state supplement the federal law, or (iv) the state statute forms an obstacle to the realization of Congressional objectives.” *National Fuel Gas Supply Corp. v. Public Serv. Comm’n*, 894 F.2d 571, 575 (2d Cir. 1990) (citations omitted). The Supreme Court recently reiterated the doctrine of preemption, stating that “[b]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest.” *Bates v. Dow Agrosiences, LLC*, 125 S. Ct. 1788, 1801 (2005)

210. *National Fuel Gas Supply Corp.*, 894 F.2d at 576.

211. Letter from Pat Wood, III, Chairman, Federal Energy Regulatory Commission, to the Honorable John F. Tierney, United States Representative from the Sixth District of Massachusetts 1 (Nov. 5, 2004), *available at* <http://www.eenews.net/Greenwire/Backissues/images/112404gwr1.pdf>.

212. *Id.*

sources, including state agencies and energy groups. FERC has also noted that to comply with NEPA, it must review “all aspects of the project including the safety and security of LNG vessels and marine facilities, construction and operation, and environmental and cultural impacts.”²¹³

FERC also notes that “significant opportunities . . . for coordination with federal and state agencies and elected officials in the region affected by the proposed project” exist.²¹⁴ The role played by FERC “is to determine whether the proposed sites are environmentally acceptable, which incorporates public safety and security considerations, and to approve only those projects that are found to be in the public interest, after considering all issues, including those of regional significance.”²¹⁵ FERC also includes the public in its siting evaluation process via public comment periods.²¹⁶ According to FERC, then, it does not disregard state concerns simply because FERC exercises exclusive jurisdiction over the siting of new LNG import terminals.

Those supporting a grant of exclusive jurisdiction to FERC argue that most LNG facilities engage in both interstate and foreign commerce.²¹⁷ They also contend that the importation of LNG is a matter of national and regional importance.²¹⁸ Thus, their argument is that the authorization of LNG import terminals is “properly done in the national interest consistent with the Commerce Clause of the Constitution.”²¹⁹

213. *Id.* at 2.

214. *Id.* at 3.

215. *Id.*

216. *Id.*

217. 151 CONG. REC. H2432 (daily ed. Apr. 21, 2005) (statement of Rep. Green).

218. *Id.*

219. *Id.* For additional discussion of the role the Commerce Clause plays in the debate over jurisdiction in LNG terminal siting cases, see Monica Berry, *Liquefied Natural Gas Import Terminals: Jurisdiction Over Siting, Construction, and Operation in the Context of Commerce Clause Jurisprudence*, 26 ENERGY L.J. 135 (2002).

B. State

Many States disagree with FERC's contention that federal jurisdiction over the siting of new LNG import facilities is the only way to ensure that the network of facilities receiving natural gas will work in a way that will benefit the country as a whole. On October 18, 2004, representatives from a number of states in New England sent a letter to FERC, the U.S. Coast Guard, the Energy Department, and the Transportation Department,²²⁰ suggesting that siting and permitting for new LNG facilities should be done on a comprehensive, regional, basis.²²¹ Under their proposed approach, both the national and regional demands for imported LNG would be reviewed to determine whether an LNG import facility is needed in the proposed area.²²² The letter also states that increased coordination is necessary between state and federal agencies that play a role in LNG regulation.²²³ The proposed regional approach would require consideration of safety issues, as well as analysis of possible alternative sites for all proposed LNG terminals.²²⁴

Opponents also argue that those who will make the siting decision "should be politically accountable to the people who live in the place where the plant is going to be sited, they should have visited the place where the plant is going to be sited, and they should have some clue as to what the locality is of where the plant will be

220. Letter from John F. Tierney, et al., Members of the United States Congress, to the Honorable Patrick Wood, Chairman, Federal Energy Regulatory Commission (Oct. 18, 2004), *available at* <http://www.house.gov/tierney/press/LNG10182004.shtml>. Each of these departments plays a roll in the approval of LNG facilities. As discussed above, FERC has authority over the siting and construction of onshore LNG terminals and also over the construction and operation of pipelines associated with these LNG facilities. The Coast Guard is responsible for the safety and security of waterways and port areas, and the Department of Transportation has authority over transportation and storage of LNG, and the safety of these procedures. *Northeast Lawmakers Press for a 'Regional' Permitting Strategy*, GREENWIRE, Oct. 20, 2004.

221. Letter from John F. Tierney, *supra* note 220.

222. *Id.*

223. *Id.*

224. *Id.*

sited.”²²⁵ These opponents also argue that States need to play a significant role in the approval process because, in the event of a disaster, it is local fire, police, and medical departments that would be charged with responding.²²⁶ They do not argue that there is no need for LNG in America; rather they ask that terminals be placed either in remote areas or offshore.²²⁷

FERC has acknowledged that regional planning is “important,”²²⁸ but also indicated that FERC must continue to review submitted proposals to continue to develop the United States LNG infrastructure in a timely manner.²²⁹

VII. RECENT LEGISLATION

Increased concern over meeting the demand for natural gas in the United States, and the continued debate between federal and state authority over the siting of additional import terminals, led to the inclusion of Section 311 in the recently passed EPAct. A number of members of the Senate Energy and Natural Resources Committee wanted this bill to grant FERC explicit ultimate authority over siting LNG terminals under its authority over natural gas imports.²³⁰ Some felt that the language originally included in the bill addressing FERC’s jurisdiction was either too harsh or did not accomplish the goals set forth by the Bush administration or by FERC. Congress ultimately considered the original version of the EPAct, the Castle-Markey Amendment to the EPAct, and the NGPRA. Each set forth different plans for dealing with the authorization of LNG import and

225. 151 CONG. REC. H2433 (daily ed. Apr. 21, 2005) (statement of Rep. Andrews).

226. 151 CONG. REC. H2432 (daily ed. Apr. 21, 2005) (statement of Rep. Markey).

227. *Id.*

228. *Northeast Lawmakers Press for a ‘Regional’ Permitting Strategy*, GREENWIRE, Oct. 20, 2004; Letter from Pat Wood, III, *supra* note 211.

229. Letter from Pat Wood, III, *supra* note 211; *see also*, *Northeast Lawmakers Press for a ‘Regional’ Permitting Strategy*, *supra* note 228.

230. *Senate Energy Panel Takes up LNG as Hearings Continue*, *supra* note 76.

export facilities, and each differs significantly from the version of the EAct signed into law.

A. *The Energy Policy Act of 2005 as Passed by the House of Representatives*

The EAct was introduced in the House of Representatives on April 18, 2005.²³¹ As introduced, the bill contained a provision, Section 320, which addressed jurisdiction over the siting of LNG import and export facilities.²³² From the time that the EAct was introduced in the House, it has been the subject of much debate, particularly with regard to the proposed changes to FERC's jurisdiction over LNG import and export facilities.

At the outset, the Bush Administration requested that lawmakers include "clean and clear" language giving exclusive jurisdiction over LNG facilities to FERC.²³³ Even so, the word "exclusive" was substituted with the phrase "lead agency" in the form of the bill passed by the House of Representatives.²³⁴ Under this version of the bill FERC would be responsible as the lead agency for coordinating the roles of federal and state agencies during the authorization of proposed terminals and also for creating the schedule that the siting process must follow.²³⁵ Some argued that absent the term "exclusive," the bill did not satisfy the request made by the Bush Administration.²³⁶

231. 2005 Bill Tracking H.R. 6, Congressional Information Service.

232. Energy Policy Act of 2005, H.R. 6, 109th Cong. § 320 (2005).

233. *House Panels Pass Measures to Boost FERC LNG Siting Authority, Repeal PUCHA*, INSIDE FERC, Apr. 18, 2005, at 14.

234. H.R. 6, 109th Cong. § 320. The statute as passed by the House read: "The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4312 et seq.) for a liquefaction or gasification natural gas terminal." 320(d)(2)(B)(i). This did not use the term "exclusive" as the Bush Administration requested.

235. *House Panels Pass Measures to Boost FERC LNG Siting Authority, Repeal PUCHA*, *supra* note 233, at 14.

236. *Id.*

In addition to making FERC the lead agency in siting these terminals, the House version of the EAct required FERC to “consult with the State commission of the State in which the liquefaction or gasification natural gas terminal is located regarding state and local safety considerations” before giving authority to construct a terminal in the proposed location.²³⁷ Additionally, the legislation gave States the right to conduct safety inspections of terminals once they become operational, so long they notify FERC of the inspection.²³⁸

FERC expressed misgivings about this version of the EAct. FERC Chairman Pat Wood went so far as to say that allowing States to play a role in safety inspections for operating facilities could cause problems in the inspection process.²³⁹ “When an entity has two masters, it becomes a pretty hard place to live,” he said.²⁴⁰

B. The Castle-Mackey Amendment to the EAct

Representatives Edward Mackey (D-Mass.) and Michael Castle (R-Del.) proposed on April 21, 2005, an amendment to strike Section 320 from the original version of the EAct.²⁴¹ Representative Mackey argued that this amendment was necessary to prevent States and localities from losing any ability to prevent the siting of LNG terminals in coastal areas with high populations.²⁴² There was also speculation that this amendment was an attempt to prevent the EAct from undermining the lawsuit brought by CPUC against FERC, which is currently pending in the Ninth Circuit Court of Appeals.²⁴³

Those supporting the Castle-Mackey Amendment claimed that it would provide an outlet for community involvement otherwise

237. H.R. 6, 109th Cong. § 320.

238. *Id.*

239. *House Panels Pass Measures to Boost FERC LNG Siting Authority, Repeal PUCHA*, *supra* note 233, at 14.

240. *Id.* at 14-15.

241. 2005 Bill Tracking H.R. 6, Congressional Information Service.

242. *House Panels Pass Measures to Boost FERC LNG Siting Authority, Repeal PUCHA*, *supra* note 233, at 14.

243. *Id.*

not provided under the EPAct.²⁴⁴ They argued that under the language included in the EPAct, States and localities that “must live with the decision either way” have no means of playing a part in the final decision regarding the siting of proposed LNG terminals.²⁴⁵ Representatives from coastal states supported this Amendment, stating that the issue of LNG terminal siting is not only a federal concern, but a local one.²⁴⁶

Had this amendment passed in the House, the result would have left the existing siting process in place. However, even with the support of numerous Representatives from coastal states, the House rejected the Amendment by a vote of 237 to 194 on April 21, 2005.²⁴⁷

C. *The Natural Gas Price Reduction Act of 2005*

The NGPRA was introduced by United States Senator Lamar Alexander (R-Tenn.) on April 6, 2005.²⁴⁸ Section 301 of the proposed legislation addresses the importation and exportation of natural gas.²⁴⁹ Those supporting this bill say that it strikes a balance not found in either the EPAct or in the current regulatory system that the Castle-Mackey Amendment sought to preserve. Chairman Wood indicated that the language put forth in the NGPRA is “much more in line with what the commission had originally endorsed.”²⁵⁰

Importantly, the NGPRA proposed to grant FERC exclusive authority over the siting and regulation of LNG import terminals, while allowing States to retain the authority granted to them under the Coastal Zone Management Act, the Clean Water Act, and the Clean Air Act. The result of these provisions would be a streamlined permitting process that would allow States to maintain a

244. 151 CONG. REC. E789 (daily ed. Apr. 27, 2005) (statement of Rep. Wu).

245. *Id.*

246. 151 CONG. REC. S5295 (daily ed. May 17, 2005) (statement of Sen. Landrieu).

247. 2005 Bill Tracking H.R. 6, Congressional Information Service.

248. Alexander Introduces Natural Gas Legislation, *supra* note 1.

249. S. 726, 109th Cong. § 301.

250. *House Panels Pass Measures to Boost FERC LNG Siting Authority, Repeal PUCHA*, *supra* note 233, at 15.

number of rights that could come into play during the siting process.²⁵¹ It seems, then, that the NGPRA seeks to serve the dual purpose of granting FERC clear and exclusive authority over the regulation of LNG facilities, while protecting rights already possessed by the States – something lacking in the EPAct as introduced in the House.²⁵²

Under the NGPRA, FERC would be the lead agency in siting LNG import terminals, a designation which charges the Commission with compiling a single administrative record and establishing the schedules for all federal and state administrative proceedings required before the issuance of an LNG permit.²⁵³ Significantly, the NGPRA requires FERC to allow any state or local agency requesting “cooperating agency status” in accordance with NEPA to participate in the siting process.²⁵⁴

In addition, under the NGPRA, if a federal or state action fails to comply with the established schedule, it would be considered “conclusively permitted” and the permitting process would proceed as scheduled.²⁵⁵ Finally, and perhaps most importantly, the NGPRA states that FERC “shall have exclusive authority to approve or disapprove the siting, construction, expansion, or operation of particular facilities (onshore or in State waters) for the import or export of natural gas from a foreign country.”²⁵⁶ If passed by Congress, this clear, unambiguous language will help clear the murky waters that have surrounded FERC’s jurisdiction over the siting of LNG import and export facilities for years.

251. 151 CONG. REC. S5369 (daily ed. May 17, 2005) (statement of Sen. Alexander).

252. Alexander Introduces Natural Gas Legislation, *supra* note 1.

253. S. 726, 109th Cong. § 301; *see also*, Narrative Summary of Natural Gas Price Reduction Act of 2005 – Key Provisions, available at www.dow.com/friends/pdfs/GasPRAct2005.pdf (last visited June 12, 2005).

254. S. 726, 109th Cong. § 301.

255. *Id.*; *see also*, Narrative Summary of Natural Gas Price Reduction Act of 2005 – Key Provisions, *supra* note 253.

256. S. 726, 109th Cong. § 301 (2005).

D. The Energy Policy Act of 2005 as Signed into Law

The version of the EPAct that became law in August 2005 differs significantly from the version of that bill passed by the House of Representatives. In fact, Subtitle B of the bill, which addresses the jurisdiction over LNG import and export terminals, more closely mirrors the proposed NPGRA than the version of the EPAct passed by the House. Unlike the original text of the bill, as passed the Act clearly grants FERC the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of facilities located onshore or in State waters for the import of natural gas from a foreign county or the export of natural gas to a foreign country.²⁵⁷ In addition, the legislation includes the same provisions seen in the proposed NPGRA that allow States to maintain the authority granted to them under the Costal Zone Management Act, the Clean Water Act, and the Clean Air Act.²⁵⁸ Additionally, the EPAct does not contain any provision giving the power of eminent domain to the federal government, leaving States some power over siting where eminent domain plays a role.

In addition, the EPAct provides that FERC “shall consult with [the State agency designated by the Governor of the State] regarding State and local safety considerations prior to issuing an order pursuant to section 3.”²⁵⁹ It also provides the States with the authority to conduct safety inspections of LNG import and export facilities once they are operational.²⁶⁰ Significantly, the legislation contains the same language as in the original version of the Act – designating FERC as the “lead agency” for purposes of compliance with NEPA, and authorizing FERC to establish the schedule for siting proposed terminals.²⁶¹ As passed, the EPAct both gives FERC exclusive jurisdiction over the siting of LNG import terminals, and preserves some rights of the states to participate in the process. However, a closer examination reveals that what Congress changed is not enough.

257. Energy Policy Act of 2005, P.L. No. 109-058, § 311.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

VIII. THE FEDERAL JURISDICTION SOLUTION

Each proposal discussed *supra* has both staunch supporters and harsh critics. Each has very beneficial points and significant failures. It is obvious that the siting of new LNG import terminals is an issue of great importance to both state and federal agencies. It is also obvious that the issue is also one of great importance to the nation as a whole. To ensure that America continues to find the energy needed to keep the country running, it needs to construct additional LNG terminals. To ensure that this happens in a timely fashion, Congress must clarify which agencies control where new terminals will be located.

Those arguing in favor of States' rights and the development of a regional regulation system have overlooked the numerous benefits that the federal system brings, which would be absent if a regional system for siting was implemented. This is true regardless of whether the proposed terminal is intended to import or export LNG to be transported or sold in interstate commerce, or LNG destined to remain within the State housing the terminal. For the benefit of the country as a whole, FERC's exclusive jurisdiction over the siting of LNG import facilities should be upheld, and extended to apply to intrastate facilities. In addition, to be effective, any legislation granting exclusive jurisdiction to FERC must also formalize the ways in which it must consider regional concerns during the review of proposed site applications, but must not give States the power to veto FERC's decisions.

A. *Why Federal Jurisdiction is the Natural Choice*

There are a number of compelling reasons that support allowing FERC to retain exclusive jurisdiction over the siting of LNG import terminals. These reasons also justify the extension of that jurisdiction to terminals that will be used for LNG imported for intrastate purposes. First, and perhaps most important, is that the increasing demand for natural gas is a national need, not a regional one. In addition, matters of foreign commerce, such as the import and export of LNG, are of national concern as well.²⁶²

By allowing FERC to maintain exclusive jurisdiction over the siting of LNG import terminals, a single federal agency will be responsible for ensuring that LNG imports have the capacity to meet

262. See Sound Energy Solutions, *supra* note 13, at 62,018.

America's growing demand for this resource. Although it would be possible for state agencies to communicate with each other regarding their plans to approve siting for new import terminals, the ongoing changes in the status of terminals in the LNG network – some terminals may be under construction, others in the process of being approved, some shutdown for long-term maintenance – would mean that there would not be a way for each state agency to know exactly what was happening in the rest of the LNG import terminal network. This could result in the approval and construction of too many or too few import facilities. Either would hamper the ability of the United States to meet its demands for natural gas in an efficient and cost-effective manner.²⁶³

An important factor to consider when choosing sites for LNG terminals is the proximity of those sites to the market.²⁶⁴ Sites under consideration should be in areas where the demand for natural gas is high.²⁶⁵ Another major consideration in the siting of LNG import terminals is the fact that the nearer the LNG terminal is to a pipeline, the more efficient the system will be.²⁶⁶ However, these factors do not justify turning over jurisdiction to the States.

Not every State has coastline sufficient for building an LNG import facility. By allowing states or regions to base siting decisions even in part on regional need, areas with great need for natural gas but without sufficient coastline for a terminal in its State will have fewer alternatives for getting the fuel to meet growing demand. Federal control over the siting of LNG import facilities will ensure that enough terminals are constructed and operational to meet the demands not only of States where the terminals are located, but also States that cannot house an LNG import facility.

As discussed *supra*, FERC has noted that one benefit of exclusive federal jurisdiction is that its activities would establish a set of standard guidelines applicable to all proposed facilities. Allowing states to have authority over the siting of LNG facilities would result in a patchwork of non-uniform laws that when applied to similar proposed projects would create different outcomes in distinctly similar cases. Not only would this lend an air of injustice to the

263. *Id.*

264. HIGHTOWER, *supra* note 27, at 26.

265. *Id.*

266. 151 CONG. REC. H2431 (daily ed. Apr. 21, 2005) (statement of Rep. Castle).

system, but it would also result in gas companies participating in “forum shopping” as they seek the most lenient or flexible States in which to construct their import terminals.²⁶⁷ This would enable regions with a greater demand for imported LNG to implement lax and insufficient guidelines for proposed terminals within their borders, and leave regions unable to satisfy that need if their applicable laws are harsher than those in other States competing for terminals.²⁶⁸

Similarly, regional authority over the siting of LNG terminals likely will result in duplicative work as companies submit application proposals to more than one state agency in hopes that one will approve the requested site. This will not only create increased costs for gas companies, but also for state governments as they are forced to review applications that are also being reviewed, and possibly approved, in other States. In addition, with a variety of state agencies approving siting for new LNG import facilities, there is the chance that terminals will be approved within very short distances of each other, for example, on either side of the border between two coastal States. With exclusive jurisdiction, FERC can not only examine the current locations of approved terminals and sites, but can also consider other applications that have not yet been approved when making siting determinations.

Another benefit of a federal agency having authority to approve sites for new LNG import facilities is that the consideration of regional needs can be integrated easily into a federal approval process. It would not be nearly as easy to integrate federal concerns into fifty different state approval plans or multiple regional approval plans. With a slight alteration of the method by which FERC currently reviews applications for new LNG import terminals, States can play a role in the process and will be assured that state and regional concerns are addressed on a consistent basis and in a thorough manner.

It is important to realize that federal regulation is also the natural choice for LNG terminals that receive LNG for use solely within the terminal State. Applying federal regulation to such terminals accords with the federal government’s jurisdiction over foreign commerce. Regardless of whether imported LNG may be

267. *Distrigas Corp. v. Federal Power Comm’n.* 95 F.2d 1057, 1063 (D.C. Cir. 1974).

268. *See Sound Energy Solutions*, *supra* note 13, at 62,018. †

used within one State, the gas is imported to the United States from a foreign country. This involves contracts with suppliers in other countries, and possibly interactions between import terminals and foreign shipping vessels. States do not have the jurisdiction to regulate foreign commerce, and by allowing them the authority to site terminals that will play a central role in the United States' participation in the growing international LNG import industry, States would be allowed to infringe on a right which is reserved to the federal government.²⁶⁹

Additionally, although LNG imports might be used within one State, the terminal might be used differently in the long run. If demand continues to increase, the owner of the terminal may realize that his profits will increase substantially by sending LNG to other States that do not have space for their own terminals. It is also possible that the State will see its own need for LNG decline, forcing the owner to either mothball the terminal or to use it to receive shipments for other regions. By allowing States the authority to site terminals that likely could be used in interstate commerce in the future, it will be necessary to have FERC reauthorize the terminal's use at a later date to ensure compliance with federal regulations. Owners might seek reauthorization after FERC has already approved a separate terminal in close range to serve interstate needs. This would result not only in excess work for FERC, as it reauthorizes a terminal that has already been approved by the States using different guidelines, but could also result in a multitude of LNG import facilities within close range of one another, which may be used at less than full capacity, or not at all.

Finally, although LNG may be imported into one State and used solely within its borders, that amount of LNG still plays a role in the federal natural gas market. To determine how best to satisfy the natural gas demands of the entire country, FERC needs to be aware of the amount of LNG imported and where it is used. Terminals that provide LNG only to one State will affect the total amount of LNG that must come from other terminals, especially when a terminal will service only a State as large as California. This will dramatically impact remaining demand. If it does not make sense to approve a terminal used only intrastate, FERC must be

269. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) (stating that foreign commerce is "pre-eminently a matter of national concern."):

allowed to reject that terminal in favor of one that can supply multiple States.²⁷⁰ To ensure that FERC has all of the information it needs to plan for the future of the natural gas industry, it must have exclusive jurisdiction over the siting of all LNG import facilities, whether used in interstate or intrastate commerce.

B. Regional Concerns that Must be Considered

Although federal jurisdiction is an essential element in creating a seamless LNG import network for the nation, there are a number of important state and regional concerns that FERC must consider during its review and approval of applications for siting of new LNG terminals. While it is true that the increased need for natural gas, and the resulting need to import a larger quantity of LNG from other countries, is a national need, FERC should consider regional needs for such fuel in siting decisions. If a State or region has a great need for additional natural gas and a company applies for approval of a site in that region, this should weigh in favor of approval of that terminal. If the State or region has no particular need for natural gas, this should likewise weigh against approval.

Where it is determined that a region with a proposed terminal has no need for additional natural gas, FERC should consider whether there are alternative sites available in regions with a greater need. It is important to note that this evaluation should differ from the evaluation of alternative sites required under NEPA. The evaluation proposed here should consider the cost of transporting LNG from the terminal to the locations that need the natural gas and whether it would be more cost-effective to locate a closer terminal. A lack of need in the region should not be sufficient to prevent the site from being approved, however, but should be one among many additional factors considered.

When considering alternative locations for proposed terminals, the type of facilities located in the area of the proposed site and those of alternate sites should be considered carefully. Locations near residential developments, schools, or frequently visited recreation areas would not be ideal for a terminal. Although LNG has an excellent safety record, a large percentage of the population would

270. This is similar to the notion put forth in *Border Pipe Line Co.*, 171 F.2d at 151, wherein the court stated that “if a company be in both interstate and foreign commerce, one might burden the other.”

feel uncomfortable living or playing in areas near a large tank storing LNG. This is a significant issue for States because areas near terminals could see a significant decrease in land values as a result of the terminal's presence.

FERC is required to comply with NEPA when reviewing and approving siting requests,²⁷¹ but it is important to note that each State has different and unique environmental concerns. These concerns should be evaluated and addressed not only through the procedures required under NEPA, but also through input and discussion with state agencies and environmental groups with the knowledge to explain to FERC why certain environmental issues are significant in the area of the proposed site. This is an excellent area for state-federal collaboration because of the state-specific knowledge not possessed by federal agencies.

Hand-in-hand with environmental concerns are concerns for state tourism industries. Most States receive a significant amount of revenue each year from their tourist industries, especially States known for their coastlines. The construction of LNG import facilities along coastlines concerns States that the facilities will become an eyesore on the picturesque landscapes that attract so many individuals. FERC must consider the potential impact on the tourism industry that LNG import terminals may cause.²⁷²

Another state and regional concern that arises with the proposal of a new LNG import facility is the impact that such a facility will have on employment. The construction of new terminals will bring the potential for new employment opportunities for area citizens. FERC should consider this positive impact on the community when evaluating an application for siting of a new LNG import terminal, especially if it would be located in an area suffering from high unemployment.

Finally, because regulation of intrastate commerce is left to the States, it is important that FERC listen carefully to the input of state agencies on the location of new terminals when that location may have an impact on such commerce. The proposed terminal at the Port of Long Beach in California is a perfect example of this type

271. *See supra* note 146 and accompanying text.

272. However, this concern may be lessened given the fact that some of the proposed facilities presented to FERC recently involve the storage of LNG in underground salt caverns, as opposed to the above ground tanks used currently. *See supra* note 74.

of concern. California's interests do not stem from the construction of the facility alone. According to SES, the LNG taken into the Port of Long Beach will be "for sale in California's non-core natural gas markets . . ." and will "provide liquid vehicle fuel to customers in the Los Angeles basin."²⁷³ This LNG will travel via a pipeline that is to be constructed, owned, and operated by a company other than SES, and which will connect the terminal to the existing pipeline system owned by the Southern California Gas Company.²⁷⁴ A portion of the imported LNG will remain liquefied and will be used as "liquid vehicle fuel for LNG vehicles in the Port of Long Beach and other vehicle fleets in the Los Angeles Basin."²⁷⁵ This liquid fuel will be transported using trucks.²⁷⁶ Clearly, the LNG brought into the State will affect intrastate commerce in significant ways. Where the imported fuel will be used primarily within the State of the terminal, States should have input into which proposed locations would be best suited for the sale, transportation, and distribution of the fuel, but they should not be able to have the final say in siting decisions.

C. Why the EPAct, NGPRA, and the Castle-Mackey Amendment Are Not Enough

Although the EPAct, NGPRA, and the Castle-Mackey Amendment each attempted to make strides toward an LNG policy that would keep America running in an efficient manner, all three possess weaknesses that cause them to fall short of this goal. The piece of legislation with the most fatal flaw was the proposed, and ultimately rejected, Castle-Mackey Amendment.²⁷⁷ As discussed, this Amendment sought to delete Section 320 from the original version of the EPAct.²⁷⁸ The result would have been to leave the LNG import terminal authorization system as it is stood before the EPAct was passed.

As the situation in California demonstrates, the approval system in place when the EPAct was introduced in the House of

273. Notice of Application, *supra* note 80.

274. *Id.*

275. *Id.*

276. *Id.*

277. Castle-Mackey Amendment to H.R. 6, § 320 (rejected Apr. 21, 2005).

278. *Id.*

Representatives was inefficient. It left loopholes that allowed States to question FERC's jurisdiction over the siting of proposed terminals, especially where the LNG was intended to remain within State borders. This resulted in long delays in the approval of needed terminals, even longer delays in beginning their construction, and, ultimately, the possibility that America would not have enough terminals to receive the quantity of LNG needed for the country to continue to operate normally. No good can come of this system.

Both the EPAct as passed by the House of Representatives and the NGPRA took much larger steps toward the creation of a more efficient system for the authorization of new LNG facilities. Even so, each is flawed in ways that do not make them the solution to the problem at hand. The flaw in the EPAct is the most obvious – it fails to include the term “exclusive” when attempting to clarify FERC's jurisdiction over LNG import and export facilities. Rather, the EPAct makes FERC the “lead agency” in this process.²⁷⁹ The term “lead agency” does not provide the same clear, unquestionable grant of power that the term “exclusive” implies. To ensure that America sees an end to the continued battles between the States and FERC over what is meant in the grant of jurisdiction to FERC, clear and unambiguous language is necessary. The term “lead agency” is neither clear nor unambiguous and leaves the door open for States to question what that term empowers FERC to do.

While NGPRA explicitly grants FERC exclusive jurisdiction over LNG import and export facilities, it also allows States to retain some semblance of a veto power by retaining their powers under the Clean Air Act, Clean Water Act, and Coastal Zone Management Act.²⁸⁰ Some argue that in keeping these provisions intact, States are given a greater opportunity to play a role in the authorization process.²⁸¹ However, there are other ways to incorporate the States into the process without allowing them to prevent FERC from issuing a permit it feels should be granted. The House version of the EPAct stated that FERC *shall* consult with State agencies during the authorization process.²⁸² This language ensured that States would be given input into the process without allowing them to usurp the

279. Energy Policy Act of 2005, H.R. 6 § 320.

280. S. 726, 109th Cong. § 301 (2005).

281. *See, e.g.* 151 CONG. REC. S3300 (daily ed. Apr. 6, 2005) (statement of Sen. Alexander).

282. Energy Policy Act of 2005, H.R. 6 § 320.

authority of the federal government – authority that should be entrusted to one entity only for natural gas to flow seamlessly throughout the country. The veto power contained in the NGPRA creates a system that is not much more stable than the one already in place. The only benefit it affords is that States and FERC can no longer argue over which has exclusive jurisdiction. Rather, they can argue over the actions on which the States may rely to utilize their veto power under the Clean Air, Clean Water, and Coastal Zone Management Acts.

Even if the version of the EAct passed by the House or the NGPRA did not contain these faults, both pieces of legislation contain a common fatal flaw – neither explicitly mentions LNG terminals for natural gas that will remain intrastate. One of CPUC's major arguments is that the LNG intended for the Point of Long Beach terminal will remain within the borders of California.²⁸³ As discussed, there are a number of reasons why even terminals that receive LNG for intrastate use only must fall within the exclusive jurisdiction of FERC.²⁸⁴ To ensure that this is the case, Congress must not only grant FERC exclusive jurisdiction over LNG terminals, but must also grant explicit jurisdiction over terminals intended for both interstate and intrastate use.

It cannot be denied that the version of the EAct signed into law provides substantially stronger changes to the terminal siting process. However, even with the changes to the original language of the legislation, Congress has still failed to provide FERC with the exclusive jurisdiction required to create the seamless network of import and export facilities necessary to make LNG a substantial part of the United States economy. This is largely due to two weaknesses – one within the language of the legislation, and one in what has been left out.

As discussed, although FERC must be required to consult with state agencies regarding the unique safety concerns and topographical issues of the area, States must not have the ability to veto FERC decisions after it has undertaken such consultation and careful review. The EAct provides that the authority granted to the States under the Clean Air Act, the Coastal Zone Management Act

283. Order Instituting Investigation into the Proposal of Sound Energy Solutions, Inc. to Construct and Operate a Liquefied Natural Gas Terminal at the Port of Long Beach, *supra* note 97.

284. See discussion *supra* Part VIII.A.

and the Federal Water Pollution Control Act remains intact, just as in the proposed NPGRA. As such, States possess a veto power that poses just as much of a threat to the newly created exclusive jurisdiction of FERC as that which existed prior to the Act. As the EPAct also specifically requires FERC to consult with state agencies prior to deciding siting matters, it is unnecessary to provide States with this veto power. After all, the purpose of exclusive jurisdiction is to designate one group as the decision maker.

In addition, the EPAct as passed fails to resolve the problem presented by scenarios such as in California – where the LNG to be imported is slated to remain in intrastate commerce. The legislation provides the following definition of “LNG terminal”:

[A]ll natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel...²⁸⁵

This definition arguably includes *all* LNG facilities, regardless of whether the LNG is to be used in intrastate or interstate commerce. However, for a network of LNG terminals to be constructed in a timely matter, it must not be left for debate whether FERC has jurisdiction to site terminals for use solely in intrastate commerce. The EPAct as passed does not clearly provide FERC with the explicit exclusive jurisdiction needed to get the job done.

To create a seamless LNG network throughout the country—which must be within the jurisdiction of FERC—Congress needed to specify, in explicit terms, that FERC has jurisdiction over the siting of all LNG import facilities, regardless of whether the imported LNG was ultimately destined for use in intrastate or interstate commerce. In addition, the veto power preserved for the States through the references to their rights under the Clean Air Act, the Coastal Zone Management Act and the Clean Water Act needed to be stripped away. As the current framework stands, States may not only continue the jurisdictional battle that has waged for years by disputing the extent of FERC’s jurisdiction over terminals used in

285. Energy Policy Act of 2005, P.L. No. 109-58 § 311.

intrastate commerce, but they may also indirectly veto FERC's decisions regarding terminals used in interstate commerce. The EPAct missed the mark regarding LNG imports.

IX. CONCLUSION

The simple fact cannot be denied – America's reliance on natural gas is growing.²⁸⁶ This demand will get larger long before it gets smaller, and it will grow even as domestic production of natural gas continues to decline.²⁸⁷ To meet the growing demand, the United States will need to import LNG from countries across the oceans. Despite this certainty, the question remains as to where will the LNG go. Both the federal government and the States want to decide.

This is not an easy issue to resolve. The federal government insists that exclusive jurisdiction over the siting of these LNG import facilities must remain with FERC. Meanwhile, States continue to claim that their rights are being squashed under the thumb of FERC, and that they should have exclusive jurisdiction over the terminals proposed within their borders, especially where the imported gas will remain within the State. To effectively develop the LNG import network in the United States and ensure that the demand for natural gas is met, exclusive jurisdiction over the siting of LNG import facilities must remain with FERC. Congress must not only explicitly grant FERC *exclusive* jurisdiction, it must grant FERC exclusive jurisdiction over terminals receiving natural gas to be used in both interstate and *intrastate* commerce.

The increased number of LNG terminals raises a number of issues of great concern to many States and regional areas. Congress must consider these, and must address them in any legislation discussing LNG import terminals. However, States should not be granted any power that would allow them to veto the decisions of FERC with regard to new import facilities. There must be only one party entrusted with the ultimate decision about the importation of LNG into the country. It must be the federal government, through FERC, which is allowed to make the decisions that are best for the country, and the States must learn to trust that those decisions will be best for them as well.

286. 151 CONG. REC. H2384 (daily ed. Apr. 20, 2005) (statement by Rep. Terry).

287. *Id.*

