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Liquefied Natural Gas (LNG): Jurisdiction Conflicts in Siting Approval

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Summary

Growing demand for natural gas and perceived limitations on domestic supply have increased U.S. interest in the importation of liquefied natural gas (LNG) as a supplement to more traditional natural gas sources. Importation of LNG requires import terminals to transfer LNG from tanker ships to the nation's pipeline system for distribution to its ultimate users. Because LNG is potentially hazardous, siting of these import terminals has become a contentious issue.

For some time, the Federal Energy Regulatory Commission (FERC) has exercised primary jurisdiction over onshore LNG terminals, although other federal, state, and local agencies have played significant roles as well. The California Public Utilities Commission (CPUC), among others, has advanced several arguments contending that FERC's jurisdiction over LNG import facilities under section 3 of the Natural Gas Act (NGA) has been removed by the Energy Policy Act of 1992 (EPAct) and has recently filed suit with the U.S. Court of Appeals for the District of Columbia Circuit. In relevant part, the EPAct amendments designate LNG imports as "first sales," deem LNG imports consistent with the public interest, and direct that applications to import LNG be approved without modification. These amendments potentially impact the statutory bases for FERC jurisdiction.

The designation of LNG imports as "first sales" does serve to remove those imports from at least some NGA regulation, but it would seem a permissible interpretation of the statute to conclude that *facilities* used to complete first sales are not also exempted from regulation. Similarly, the CPUC argument that the ban on modifying LNG import applications removes Commission jurisdiction finds some support in case law, although, arguably, the statute is ambiguous and subject to FERC's interpretation. Should the Commission retain jurisdiction, it appears that FERC would generally have the authority to preempt conflicting state and local regulation. FERC has voiced its intention to accommodate state and local standards and to include state and local authorities to the furthest extent practicable. In addition, FERC has expressly confirmed that state regulation enacted pursuant to federal law, such as the Coastal Zone Management Act, is beyond agency preemption.

Several pieces of legislation address LNG-related issues, including H.R. 6, H.R. 4503, S. 2095, H.R. 4520, and S. 1637. Recently introduced legislation, H.R. 4413, would essentially codify FERC's interpretation of its jurisdiction, although it would add several new authorities, including FERC authority to set an enforceable schedule for the completion of all necessary agency actions. This report will provide an overview of the current federal regulatory scheme, examine the legal arguments surrounding LNG facility siting jurisdiction, and describe the provisions of relevant pending legislation. It will be updated as necessary.

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Growing demand for natural gas and perceived limitations on domestic supply have increased U.S. interest in the importation of liquefied natural gas (LNG) to supplement traditional natural gas sources.[1] Importation of LNG requires import terminals to transfer LNG from tanker ships to the nation's pipeline system for distribution to its ultimate users. Because LNG is potentially hazardous, siting of these import terminals has become a contentious issue.[2]

The question of who has regulatory authority over importation facilities is inherent to the debate over LNG importation. Federal law has been interpreted by various agencies to authorize a broad role for the Federal Energy Regulatory Commission (FERC or the Commission), the Department of Energy (DOE), the U.S. Coast Guard, and the Department of Transportation, among others. FERC claims primary responsibility for overseeing siting and safety issues for onshore LNG terminals, while the Coast Guard regulates offshore facilities and LNG tankers.

Disputes have emerged regarding the extent of FERC's authority in LNG project authorization and siting approval. A recent California-based project proposed by Sound Energy Solutions has led to a series of FERC orders in which the Commission has claimed exclusive jurisdiction over onshore import terminals, subject to other federal law. The state of California, through the California Public Utilities Commission (CPUC), disputes FERC's position and has recently filed suit in the U.S. Court of Appeals for the District of Columbia Circuit.[3] Additionally, Californians for Renewable Energy has filed its own challenge to FERC's regulatory authority with the U.S. Court of Appeals for the 9th Circuit.[4] At issue is whether

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[1] For additional information on LNG and the natural gas market, see Paul W. Parfomak, *Liquefied Natural Gas (LNG) in U.S. Energy Policy: Issues and Implications*, CRS Report RL32836 (May 24, 2004) and Robert Pirog, *Liquefied Natural Gas (LNG) Markets in Transition: Implications for U.S. Supply and Price*, CRS Report RL32445 (June 24, 2004).

[2] For additional information on LNG terminal safety and siting, see Paul W. Parfomak and Aaron M. Flynn, *Liquefied Natural Gas (LNG) Import Terminals: Siting, Safety and Regulation*, CRS Report RL32205 (May 27, 2004).

[3] *See* Jacob Dweck, Katherine Yarbrough, and Steven Sparling, Needed: More Natural Gas, LEGAL TIMES Aug. 16, 2004 at 32.

[4] *See* FOSTER NATURAL GAS REPORT, *FERC Clarifies Declaratory Order Asserting "Exclusive Jurisdiction" Over Sound Energy Solutions*, Report No. 2502 at 8 (August 12, 2004).

certain amendments to the Natural Gas Act of 1938 (NGA),[5] the primary source of FERC authority over LNG terminals, are intended to strip the agency of its authority over the siting, construction, and operation of LNG import facilities.

Multiple proposals on LNG-related policy have been introduced and debated in the 108th Congress, including provisions in versions of comprehensive energy policy legislation, H.R. 6, H.R. 4503, S. 2095; and the Jumpstart Our Business Strength (JOBS) Act, H.R. 4520, S. 1637. One bill in particular, however, would address the current controversy over LNG import facility jurisdiction. The Liquefied Natural Gas Import Terminal Development Act of 2004, H.R. 4413, would clarify that primary regulatory authority rests with FERC and provide the Commission with several new authorities. This report will briefly describe the current federal regulatory authorities applicable to onshore LNG import terminals and the current jurisdictional dispute between state and federal authorities. It will also address the solutions proposed in currently pending legislation.

Federal Regulatory Authorities

The Department of Transportation (DOT) and FERC are the federal agencies primarily responsible for the regulation of onshore LNG facilities. Although federal statutes do not explicitly designate the relative jurisdiction of DOT and FERC, the agencies have clarified their roles through interagency agreement.

The DOT sets safety and siting standards for onshore LNG facilities under the Pipeline Safety Act, as amended.[6] The statute requires the Secretary of Transportation to consider geophysical risks, proximity to populations, adequacy of emergency services, operator qualifications, and security measures when promulgating LNG facility rules.[7] DOT's safety standards, including those on siting, for LNG facilities are in 49 C.F.R. § 193 and are overseen by the Department's Office of Pipeline Safety within the Research and Special Programs Administration.

While it establishes baseline siting standards, DOT does not itself approve or deny specific siting proposals. Under the Natural Gas Act of 1938 (NGA),[8] FERC grants federal approval for the siting of new onshore LNG facilities and may regulate more strictly than required by the DOT standards.[9] Specifically, FERC asserts approval authority over the place of entry and exit, siting, construction, and operation

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[5] Act of June 21, 1938, ch. 556, 52 Stat. 812, (codified as amended at 15 U.S.C. §§ 717 *et seq.*).

[6] 49 U.S.C. §§ 60101-60503.

[7] 49 U.S.C. § 60103.

[8] Act of June 21, 1938, ch. 556, 52 Stat. 812, (codified as amended at 15 U.S.C. §§ 717 *et seq.*).

[9] 15 U.S.C. § 717b. The Department of Energy Organization Act of 1977 (P.L. 95-91) transferred to the Energy Secretary the original NGA authority to approve siting, construction and operation of onshore LNG facilities (§ 301b). The Secretary, in turn, delegated this authority to FERC.

of new LNG terminals as well as modifications or extensions of existing LNG terminals.[10]

FERC implements its authority over onshore LNG terminals through the agency's regulations at 18 C.F.R. § 153. These regulations detail the application process and requirements under Section 3 of the NGA. FERC's requirements include detailed site engineering and design information, evidence that a facility will safely receive or deliver LNG, and delineation of a facility's proposed location.[11] Additional data are required if an LNG facility will be in an area with geological risk.[12]

Under the National Environmental Policy Act of 1969,[13] FERC must prepare an environmental impact statement in its review of an LNG terminal siting application.[14] FERC's review requires thirteen Environmental Resource Reports, five of which are applicable specifically to LNG facilities. These reports require analysis of, among other things, the socioeconomic impact of the LNG facility; geophysical characteristics of the site; safeguards against seismic risk; facility effects on air and noise quality; public safety issues in the event of accidents or malfunctions; and facility compliance with reliability standards and relevant safety standards.[15] While the environmental reports do not direct the outcome of final Commission action, they could have substantial impact on LNG siting decisions.

In practice, FERC requires compliance with DOT's siting and safety regulations as a starting point, but it can regulate more strictly if it chooses. This working arrangement is not explicitly established under the relevant federal law. In 1985, FERC and DOT executed a Memorandum of Understanding expressly acknowledging "DOT's exclusive authority to promulgate Federal safety standards for LNG facilities" but recognizing FERC's ability to issue more stringent safety requirements for LNG facilities when warranted. This agreement appears to have resolved any jurisdictional conflict between the agencies at that time.[16]

State and Federal Jurisdictional Conflicts

A recent LNG project proposal in California has resulted in some dispute as to whether the above-mentioned federal regulation now applies to LNG facilities not

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[10] *See* 18 C.F.R. § 153 (2004); *see also* Foley, R. Federal Energy Regulatory Commission (FERC), Office of Energy Projects, "Liquefied Natural Gas Imports," Slide Presentation at 10 (Jan. 2003), available at [http://www.ferc.gov/press-room/sp-archives/2003/12-18-03-wood.pps]).

[11] 18 C.F.R. § 153.8 (2004).

[12] *Id.*

[13] Act of January 1, 1970, Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C. §§ 4321 *et. seq.*

[14] *See* 18 C.F.R. § 380 (2004).

[15] *Id.* § 380.12.

[16] *See* "Notice of Agreement Regarding Liquified Natural Gas," 31 FERC 61,232 (1985).

engaged in interstate commerce.[17] The California Public Utility Commission has claimed that jurisdiction over the siting of a proposed Long Beach facility belongs entirely to the state.[18] In response, FERC has issued a series of orders declaring exclusive jurisdiction over the project.[19]

The CPUC claims that FERC authority to regulate LNG terminals is available only under section 7 of the Natural Gas Act and that section 7 authority is premised upon facility involvement in interstate commerce.[20] The CPUC argues that authority to regulate LNG terminals under section 3 of the NGA, which deals with importation and does not require interstate commerce, was removed by the Energy Policy Act of 1992 (EPAct).[21] The CPUC thus concludes that the proposed project falls outside the scope of FERC jurisdiction and should be regulated by the state alone.

In responding to the CPUC's claims, FERC conditionally agrees that, in accordance with *Border Pipe Line Co. v. FPC*,[22] FERC would not be able to claim NGA section 7 authority over the proposed LNG facilities.[23] FERC, however, maintains that it does have jurisdiction over siting and safety under section 3 of the NGA and, thus, does not agree that it has no regulatory authority over the proposed import terminal in California.[24]

Section 3 of the NGA states:

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[17] Arguably any importation of natural gas would affect interstate commerce, thus bringing it within the realm of potential federal regulation. For purposes of NGA regulation, the statute and FERC have defined interstate commerce more narrowly to include natural gas that moves across state lines or that has been introduced to an interstate pipeline system. See 15 U.S.C. 717a ("'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.") For purposes of the California dispute, FERC has stipulated that the LNG facilities in question will not be involved in interstate commerce. FERC, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, Docket No. CP04-58-001, 107 FERC 61,263 at 13 (June 9, 2004).

[18] California Public Utilities Comm'n, News Release, PUC Orders Sound Energy Solutions to Obtain State Approval For LNG Project: Seeks Rehearing of FERC's Sole Jurisdiction Ruling (June 10, 2004).

[19] FERC, Sound Energy Solutions, Declaratory Order Asserting Exclusive Jurisdiction, Docket No. CP04-58-000, 106 FERC ¶ 61,279 (March 24, 2004).

[20] *See* FERC, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, Docket No. CP04-58-001, 107 FERC ¶ 61,263 at 6 (June 9, 2004).

[21] *See id*. at 13.

[22] 171 F.2d 149 (D.C. Cir. 1948).

[23] FERC, Sound Energy Solutions, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, Docket No. CP04-58-001, 107 FERC ¶ 61,263 at 13 (June 9, 2004).

[24] *Id*. at 14.

> [N]o person shall . . . 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 . . . 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.[25]

While this statutory language quoted above does not explicitly mention siting or safety jurisdiction, read alone, it would appear to support FERC's claim to jurisdiction over issues incidental to the authorization of activities that are consistent with the public interest. The Department of Energy would appear to accept this interpretation, in that it has transferred its authority under section 3 to FERC specifically as to siting, construction, operations, and modifications.[26] Further, in 1974, the Court of Appeals for the District of Columbia Circuit held that FERC's section 3 authority over facilities was commensurate with FERC's authority under section 7, and that the Commission's power to attach conditions to the issuance of import permits allows regulation even where direct interstate commerce is lacking.[27] Thus, at the time of the decision, it was relatively clear that FERC had authority over siting and safety under section 3. However, this interpretation of FERC's section 3 authority predated the EPAct.

CPUC argues that the 1992 Energy Policy Act, which amended section 3 by adding additional subsections, stripped away FERC authority over facility siting and safety regulation.[28] The amendments relied upon state:

> (b) With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and *with respect to liquefied natural gas*——
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> > (1) the importation of such natural gas *shall be treated as a "first sale"* within the meaning of section 3301(21) of this title; and
> >
> > (2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.
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> (c) For Purposes of subsection (a) . . . the importation of the natural gas referred to in subsection (b) . . . *shall be deemed to be consistent with the public interest*,

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[25] 15 U.S.C. § 717b(a) (emphasis added).

[26] 49 Fed. Reg. 6684, at 6690 (Feb. 22, 1984).

[27] Distrigas Corp. V. FPC, 495 F.2d 1057, 1063 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 834 (1974).

[28] *See* FERC, Sound Energy Solutions, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, Docket No. CP04-58-001, 107 FERC ¶ 61,263 at 13 (June 9, 2004).

> and applications for such importation . . . *shall be granted without modification* or delay.[29]

Should a court adopt the CPUC interpretation, significant aspects of pending and future LNG projects would likely fall outside the realm of federal regulation. This would leave state agencies as primary regulators in, at least, some instances, leading to a potential for more disparate regulatory standards and, conceivably, an environment where obtaining LNG import infrastructure is more difficult. On the other hand, should ultimate authority devolve to the states, regulators might be better able to accommodate the interests and address the concerns of local communities. An analysis of the impact of subsections (b) and (c) follows.

Subsection (b). Subsection (b) contains two applicable provisions that arguably remove or limit FERC jurisdiction with respect to LNG import facilities. Subsection (b)(1) designates LNG imports as first sales and subsection (b)(2) prohibits FERC from treating LNG imports "on an unjust, unreasonable, unduly discriminatory, or preferential basis." FERC has interpreted both of the provisions as leaving its broad jurisdiction over LNG import facilities intact.

FERC first addressed the effect of subsection (b)(1) in *Dynegy LNG Production Terminal L.P.*,[30] finding that the provision does not remove its regulatory authority over siting.[31] Dynegy had argued that, under the 1993 amendments, the importation of LNG was to be treated as a "first sale," and that first sales are exempt from regulation under the NGA.[32] Under such reasoning, the EPAct would have removed FERC jurisdiction under section 3 over the siting, construction, and operation of LNG import facilities.

As stated above, section 3 was amended by adding a provision stating the importation of LNG "shall be treated as a first sale within the meaning of section 3301(21) of [Title 15]. . . ."[33] First sales are generally exempt from regulation under the NGA, although the extent of this exemption may not be immediately clear. In *Dynegy*, both FERC and Dynegy agreed that first sales had been removed from federal price regulation under the NGA.[34] For a time, first sales were subjected to an elaborate system of price ceilings under Title I of the Natural Gas Policy Act (NGPA)

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[29] 15 U.S.C. § 717b(b), (c).

[30] FERC, Dynegy LNG Production Terminal, L.P., Order Addressing Petition for Declaratory Order, Docket No. CP01-423-000, 97 FERC ¶ 61,231 (Nov. 21 2001).

[31] *Id*. at 1.

[32] *See id.*

[33] 15 U.S.C. § 717b(b). Section 3301 defines a first sale as:

> [A]ny sale of any volume of natural gas —
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> (i)to any interstate pipeline or intrastate pipeline;
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> (ii) to any local distribution company;
>
> (iii) to any person for use by such person;
>
> (iv) which precedes any sale described in clauses (i), (ii), or (iii).... *Id*. at § 3301(21).

[34] *See* FERC, Dynegy LNG Production Terminal, L.P., Order Addressing Petition for Declaratory Order, Docket No. CP01-423-000, 97 FERC ¶ 61,231 at 12 (Nov. 21 2001).

in place of NGA regulation.[35] Under the Natural Gas Wellhead Decontrol Act of 1989, NGPA regulation of first sales was phased out by 1993, leaving this category of transactions unregulated.[36] Thus, the NGPA now continues to exempt first sales from regulation without supplying additional regulation of its own.

The NGPA provision exempting first sales from NGA regulation states: "for purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply *to any natural gas solely by reason of any first sale of such natural gas*."[37] Section 1(b) states:

> **Transactions to which provisions of chapter applicable**
> The provisions of this chapter shall apply to the *transportation of natural gas in interstate commerce*, to the *sale in interstate commerce of natural gas for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use, and to *natural-gas companies engaged in such transportation or sale*, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.[38]

This provision therefore provides general guidance as to which transactions are regulated under the NGA, although it does not appear to address the role FERC plays in regulating imports or facilities used for importation. While it does not immediately clarify the reach of the first sale exemption, it is arguable that, by tying this provision to the first sale exemption, Congress intended first sale status to exempt natural gas *transactions* from regulation under the NGA but not to exempt the *facilities* used to facilitate first sales.

Additional support for this transaction-limited reading of the statutory exemption can be found in the phrasing of the exemption itself. The provision states that the jurisdiction of the Commission shall not attach by *sole* virtue of any first *sale* of natural gas. The use of the words "solely" and "sale" arguably differentiates between sales and other activities/conditions that might give rise to FERC jurisdiction. Thus, the relevant statutory language would appear to support the interpretation that jurisdiction over sales can be distinguished from jurisdiction over facilities, and that the exemption from the NGA for first sales would leave FERC with regulatory authority over LNG import terminals. Still, it remains arguable that the language of the first sale exemption does not adequately distinguish between sales and facilities jurisdiction and that treatment of LNG imports as a first sales incorporates deregulated status for import facilities.

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[35] Natural Gas Policy Act of 1978, Act of Nov. 9, 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified as amended at 15 U.S.C. §§ 3301-3432).

[36] *See* Act of July 26, 1989, Pub. L. No. 101-60, 103 Stat. 157 § 2(b) (repealing Title I of the Natural Gas Policy Act of 1978 (15 U.S.C. 3311-3333)).

[37] 15 U.S.C. § 3431(a)(1)(A) (emphasis added).

[38] 15 U.S.C. 717(b) (emphasis added).

In addition to the statutory language, there is some indication as to the extent of the first sale exemption in the legislative history of the NGPA. The key House Conference Report states:

> First, several existing regulatory barriers to Canadian natural gas imports are ended by language that treats Canadian imports just like deregulated U.S. "Wellhead" gas, bars the need for any further special import approvals, and bars FERC and state regulators from treating Canadian and American gas differently.[39]

The section by section analysis is more explicit:

> This section treats Canadian gas imports and liquid natural gas (LNG) imports more like domestic American natural gas production, in four different ways:
> 1. It gives "first sale" status to imports, so that like sales of domestic decontrolled gas, they need not be licensed.
> 2. It bars Federal or state regulators from treating these imports differently than domestic gas, for example, by imposing special new tests, rate adjustments, or standards for import projects.
> 3. It makes the current import approval process purely automatic, so that this procedure — which domestic gas does not undergo — cannot cause any delays. These three provisions are written so that they would also ease regulation of Mexican gas imports if a free trade agreement with Mexico is reached.
> 4. Fourth, it bars [FERC] from basing pipeline rates (A) on the type of gas carried in the pipeline, i.e. Canadian gas, or (B) on the rates or charges imposed on that gas while being shipped earlier in "upstream" Canadian pipelines.[40]

FERC interprets this legislative history as supporting its position that the amendments to section 3 ensure that imported gas is afforded "the same deregulated status *as a commodity* that the Wellhead Decontrol Act had earlier applied to first sales of domestic gas," deregulating the transaction but leaving facilities themselves under federal jurisdiction.[41] Many facilities used to facilitate first sales of domestic gas are not subject to FERC regulation. Intrastate transportation facilities, retail sales facilities, local distribution facilities, gathering facilities, and, notably, production facilities are all generally exempt from FERC regulation, and, as the legislative history indicates, Congress intended to make importation of LNG more like domestic production in several key respects.[42] However, the exempt status of these facilities is specifically provided for in individual sections of the NGA and would not appear related to the first sale exemption.[43] Thus, FERC asserts that, as facilities for

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[39] H.Rept. 102-474(I) 135 (Mar. 30, 1992).

[40] H.Rept. 102-474(I) 177-78.

[41] FERC, Dynegy LNG Production Terminal, L.P., Order Addressing Petition for Declaratory Order, Docket No. CP01-423-000, 97 FERC ¶ 61,231 at 12 (Nov. 21 2001) (emphasis in original).

[42] 15 U.S.C. § 717(b); *see, e.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988); National Fuel Gas Supply Corp. v. Public Serv. Comm'n, 894 F.2d 571 (2d Cir. 1990).

[43] 15 U.S.C. § 717(b) ("The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce ... but shall not apply ... to the production or gathering (continued...)

transporting domestic natural gas can remain subject to FERC regulation despite the first sale status of the gas itself, the Commission can assert similar jurisdiction as to import facilities. [44] As described above, the statute would seem to indicate that first sale deregulation is applicable only to the actual transactions themselves and not to associated facilities. Thus, while first sale status makes importation more like domestic production in terms of deregulated sales, it would not seem to also confer deregulation for associated facilities.

Certain information contained in the legislative history cited above, however, would appear to support the contention that FERC's authority over LNG import terminals has been limited by the enactment of the EPAct. The House Report states that the amendments bar "Federal or state regulators from treating these imports differently than domestic gas, for example, by imposing special new tests, rate adjustments, or standards for import projects." It is not immediately clear which provision of the amendments this statement is meant to characterize, although it would seem to be a reference to subsection (b)(2). That provision prohibits FERC from treating LNG imports "on an unjust, unreasonable, unduly discriminatory, or preferential basis" due to its national origin. Subsection (b)(2) does not appear to have been analyzed extensively in FERC's various orders or to have figured heavily in arguments against FERC's continued jurisdiction.[45] While the language of the legislative history speaks in terms of special standards for import projects, arguably supporting the contention that import facilities should not be subject to FERC regulation, the statutory language itself appears to be more circumscribed. The ban on "unjust, unreasonable, unduly discriminatory, or preferential" conditions on imported natural gas would not necessarily preclude the Commission from imposing regulations on import facilities.

Subsection (c). Under subsection (c), the importation of LNG is deemed to be consistent with the public interest and applications for importation must be granted without modification or delay.[46] This language arguably supports CPUC's position that FERC lacks regulatory authority under section 3 of the NGA. FERC, however, has concluded otherwise.

Currently, section 3 import authorities are divided between DOE and FERC. Section 3 authorities were originally vested in the Federal Power Commission, but in 1977, they were transferred to the newly formed DOE.[47] Through a series of delegation orders, DOE has transferred section 3 authorities to its Office of Fossil Energy (DOE/FE) and to FERC, giving import authorization responsibilities to the

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[43] (...continued)
of natural gas.").

[44] *Id*. at 13.

[45] *See* FERC, Sound Energy Solutions, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, Docket No. CP04-58-001, 107 FERC ¶ 61,263 at 27 (June 9, 2004).

[46] 15 U.S.C. § 717b(c).

[47] DOE Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified, as amended, at 42 U.S.C. §§ 7101-7375).

DOE/FE and siting and facilities responsibilities to FERC.[48] Specifically FERC is authorized to:

> (a) Approv[e] or disapprov[e] ... the construction and operation of particular facilities, the site at which such facilities shall be located, and, with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports ....
> (b) [Perform] All functions under sections 4, 5, and 7 of the NGA.[49]

The CPUC has challenged the validity of this delegation, arguing that subsection (c) now removes federal jurisdiction over LNG import facilities.[50] In *Distrigas Corp. v. FPC*, decided prior to the 1992 EPAct amendments to the NGA, the Circuit Court of Appeals for the District of Columbia Circuit held that FERC safety and siting jurisdiction over LNG import terminals was based on the NGA authority to determine if importation is in the public interest.[51] According to the court, the Commission was free to determine that importation would only be in the public interest if facilities were subject to certain regulations.[52] Further, the court stated that the Commission could, under section 3's grant of authority, authorize a particular import facility while imposing those "terms and conditions that it finds necessary and appropriate to the public interest."[53] No court case appears to have yet addressed the impact of the 1992 amendments to this statutory authorization.

As described above, subsection (c) states that LNG imports "shall be deemed to be *consistent with the public interest*, and applications for such importation or exportation shall be granted *without modification or delay*."[54] The CPUC argues that this amendment to the NGA removes the Commission's authority to impose siting and safety conditions on LNG import terminals. In accordance with *Distrigas*, the FERC jurisdiction over LNG import terminals is based on its NGA authority to condition its finding of consistency with the public interest on a project's compliance with safety and siting regulations.[55] Thus, arguably subsection (c), deeming importation consistent with the public interest and prohibiting application

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[48] DOE Delegation Order Nos. 0204-25 and 0204-26, 43 Fed. Reg. 47,769 (Oct. 17 1978); superseded by DOE Delegation Order Nos. 0203-54 and 0204-55, 44 Fed. Reg. 56,735 (Oct. 2, 1979); superseded by DOE Delegation Order Nos. 0204-111 and 0204-112, 49 Fed. Reg. 6,684 (Feb. 22, 1984); see also DOE Delegation Order No. 0204-127, 54 Fed. Reg. 11,436 (Mar. 20 1989) (transferring import authorization authority from the Economic Regulatory Administration to the DOE Office of Fossil Energy).

[49] Delegation Order No. 0204-112, 49 Fed. Reg. 6684, 6690 (Feb. 22, 1984).

[50] FERC, Sound Energy Solutions, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, Docket No. CP04-58-001, 107 FERC ¶ 61,263 at 15 (June 9, 2004).

[51] Distrigas Corp. v. FPC, 495 F.2d 1057, 1064 (D.C. Cir. 1974).

[52] *Id.*

[53] *Id.*

[54] 15 U.S.C. § 717b(c) (emphasis added).

[55] Distrigas, 495 F.2d at 1064.

modification, would remove FERC regulatory jurisdiction over LNG terminals. FERC's section 3 authority to impose conditions on import facilities, under such reasoning, would only apply to facilities that do not fall within the exceptions added by the 1993 EPAct.

FERC, on the other hand, contends that the subsection (c) only pertains to the DOE/FE import approval authority and leaves the Commission's authority to impose conditions on the facilities and operations of importers intact.[56] FERC has stated that if "Congress intended the Energy Policy Act of 1992 to eliminate siting authority that the Commission had exercised without question for the previous 18 years, we believe it would have done so expressly."[57]

In its order clarifying its exclusive jurisdiction, FERC cites *Commodity Futures Trading Commission v. Schor* for the proposition that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'"[58] Citing the extensive history of bifurcating LNG regulation into import authorization and regulation of facilities themselves, FERC argues that if Congress had intended subsection (c) to remove FERC's authority in addition to streamlining DOE/FE's import approval authority, Congress would have also amended "the first sentence of section 3 to remove the requirement that a person cannot import gas 'without first having secured an order of the Commission authorizing it to do so.'"[59] Thus, FERC concludes that because Congress was aware of the division of authorities between the agencies, if it had intended to alter FERC's section 3 authority as well as DOE's, it would have addressed both agency's functions individually.[60] It is also arguable that, like the designation of LNG imports as first sales, the purpose of this section is also to put Canadian and Mexican imports on an equal footing with domestically produced natural gas. Such an argument would also seem to support the contention that subsection (c) was intended to make the DOE/FE import authorization perfunctory without altering FERC's jurisdiction with respect to facilities.

On the other hand, it could be argued that, while Congress was aware of the agency delegation orders and resulting division of section 3 authorities, it was also aware that, as the CPUC contends, all import regulatory authority stems from section 3 itself, and that, by amending this section, Congress intended to amend section 3

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[56] FERC, Sound Energy Solutions, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, Docket No. CP04-58-001, 107 FERC ¶ 61,263 at 13 (June 9, 2004).

[57] 106 FERC ¶ 61,279, at 62,017 (2004), citing, Lorrillard v. Pons, 434 U.S. 575, 580-81 (1978).

[58] Commodity Futures Trading Commission v. Schor, 478 U.S. 8333, 846 (1986) (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974)).

[59] FERC, Sound Energy Solutions, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, Docket No. CP04-58-001, 107 FERC ¶ 61,263 at 24 (June 9, 2004).

[60] *Id*. at 16.

authority for all who exercise any part of it. However, as subsection (c) does not mention facility regulation explicitly, it might, therefore, legitimately be interpreted as amending only those section 3 authorities related specifically to importation approval alone. In such a situation, it would seem likely that a reviewing court would defer to agency interpretation.[61]

State Role Under the FERC Interpretation of Section 3. Should it be determined that the 1992 amendments to the NGA do not remove FERC jurisdiction over LNG import terminals, the issue of federal preemption of state regulation remains relevant. FERC has stated that "[t]o the extent we can, it is our practice to conform our regulatory requirements to accommodate those of state and local authorities."[62] The FERC review process requires applicants to submit summaries of state permits or licenses required for a facility and the status of any pending state "regulatory proceedings" related to the proposal.[63] Additional FERC regulations would appear to acknowledge that state permits may be required or contemplate consultation with state authorities.[64]

When a conflict between state or local regulation and FERC regulation emerges, however, FERC contends that federal regulation will prevail.[65] The preemption doctrine is based upon the Supremacy Clause of the Constitution,[66] and can occur in several different manners. Federal law will trump state law when: (1) Congress explicitly intends preemption; (2) there is actual conflict between state and federal law; (3) compliance with both state and federal law is impossible; (4) a barrier to state regulation is implicit in federal law; (5) federal regulation is so pervasive as to "occupy the field" entirely; or (6) state law frustrates the purposes of federal

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[61] *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *Chevron* establishes a standard by which courts inquire into the propriety of agency regulations. In general, if Congress has specifically legislated on an issue, then the courts adhere to the intent of the legislature. If Congress has not clearly spoken, then the courts defer to reasonable agency interpretation. *Id*. at 842-44.

[62] FERC, Sound Energy Solutions, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, Docket No. CP04-58-001, 107 FERC ¶ 61,263 at 29 (June 9, 2004).

[63] 18 C.F.R. § 153.7(b) (2004).

[64] *Id*. at § 153.8(a)(7); 380.3(b)(3), (4); 380.12(o)(13).

[65] FERC, Sound Energy Solutions, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, Docket No. CP04-58-001, 107 FERC ¶ 61,263 at 29 (June 9, 2004) ("if confronted with an irreconcilable conflict, federal law will preempt state and local law."); *see also* National Fuel Gas Supply v. Public Service Comm'n, 894 F.2d 571, 576-79 (2d Cir. 1990); Algonquin LNG v. Loqa, 79 F. Supp. 2d 49 (2000).

[66] United States Constitution, Art. VI, Clause 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

regulation.[67] In cases addressing state and local regulation of natural gas facilities, the court's have found federal preemption based on multiple grounds.[68] Thus, under FERC's broad interpretation of its authorities under section 3 of the NGA, the Commission generally would appear free to preempt state regulations when inconsistent with regulations promulgated by it pursuant to the NGA.

Prior to FERC's promulgation of extensive regulations governing LNG facilities, the U.S. District Court for the Eastern District of New York, in *Energy Terminal Services Corp. v. New York State Department of Environmental Conservation*, held that there was no preemption of New York land use laws regulating LNG terminals and thus provided a basis for state application of environmental and zoning restrictions.[69] FERC addresses this decision by arguing that the Commission now comprehensively regulates LNG imports and that the Supreme Court decision in *National Fuel Gas Supply*, which found that a comparable regulatory scheme under NGA section 7 preempted state law, effectively overrules the *Energy Terminal* decision.[70]

Despite the positions discussed above, states assert and FERC appears to recognize that the agency's claim to exclusive jurisdiction does not affect state agencies that have been delegated authority to act pursuant to federal law. FERC specifically indicates that LNG projects must be consistent with state Coastal Zone Management Act (CZMA), Clean Water Act (CWA), and Clean Air Act (CAA) implementing regulations.[71] Significantly, under the section 307 of the CZMA, FERC cannot authorize a project that is within or will affect a state's designated coastal zone until the appropriate state CZMA agency determines that the project will be consistent with the state's Coastal Zone Management Program.[72] Thus, while FERC appears to be empowered to preempt certain state regulations, those issued pursuant to the CZMA and similar federal statutes are "of equal dignity [with the NGA] and should be read to complement rather than preempt one another."[73]

Legislation

H.R. 4413 would amend section 3 of the NGA by adding several provisions specifically applicable to LNG facilities, and would, among other things, clearly

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[67] *See* National Fuel Gas Supply, 894 F.2d at 575.

[68] *See, e.g., id.*; *see also* Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988).

[69] Energy Terminal Services Corp. v. New York State Department of Environmental Conservation, 11 Envt'l L. R. 20,871 (1981).

[70] FERC, Sound Energy Solutions, Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, Docket No. CP04-58-001, 107 FERC ¶ 61,263 at 32 (June 9, 2004).

[71] FERC, Sound Energy Solutions, Order Clarifying Prior Order, Docket No. CP04-58-002, 108 FERC ¶ 61,155 at 3 (Aug. 5, 2004).

[72] 16 U.S.C. § 1456(c)(3)(a).

[73] *See* FERC, Sound Energy Solutions, Order Clarifying Prior Order, Docket No. CP04-58-002, 108 FERC ¶ 61,155 at 4 (Aug. 5, 2004).

provide regulatory authority over LNG import terminals to FERC.[74] The bill would first make clear that FERC has authority to regulate the siting, construction, expansion, and operation of LNG facilities to ensure that they comport with the public interest.[75] The bill would go further, however, in establishing the relationship of FERC regulation to state and local authority. The bill states:

> Except as otherwise provided by Federal law, no State or local government may require a permit, license, concurrence, approval, certificate, or other form of authorization with respect to the siting, construction, expansion, or operation of a liquefied natural gas import terminal.[76]

Thus, levels of regulation not specifically authorized by federal law would appear to be removed from the permitting process, potentially displacing land use and environmental regulation based only upon state law and relevant local zoning ordinances. Additionally, H.R. 4413 would attempt to streamline the application process by consolidating primary authority over LNG import facilities in FERC, providing that:

> [a]ny decision made or action taken by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to the siting, construction, expansion, or operation of a liquefied natural gas import terminal must be consistent with any authorization provided by the Federal Energy Regulatory Commission pursuant to this subsection with respect to the liquefied natural gas import terminal, and shall not prohibit or unreasonably delay the siting, construction, expansion, or operation.[77]

FERC would also be directed to complete action on applications which fall under its jurisdiction within one year and would be empowered to establish a schedule for "all Federal and State administrative proceedings commenced under authority of Federal law, the completion of which is required before a person may site, construct, expand, or operate the liquefied natural gas import terminal."[78] An enforcement mechanism for FERC's imposed schedule is also provided for in the bill. Any federal or state administrative action generally required as a condition to LNG import facility siting, construction, expansion, or operation would have to be completed in accordance with the FERC schedule or such administrative action

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[74] H.R. 4413, 108th Cong. (2004).

[75] *Id*. (adding new 15 U.S.C. §717b(d)(1)). "No person shall site, construct, expand, or operate a liquefied natural gas import terminal without first having secured an order of the Federal Energy Regulatory Commission authorizing such person to do so. The Federal Energy Regulatory Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed siting, construction, expansion, or operation will not be consistent with the public interest. The Federal Energy Regulatory Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Federal Energy Regulatory Commission may find necessary or appropriate."

[76] *Id*. (adding new 15 U.S.C. § 717b(d)(3)).

[77] *Id*. (adding new 15 U.S.C. § 717b(d)(4)).

[78] *Id*. (adding new 15 U.S.C. § 717b(e)(1), (2)).

"shall be conclusively presumed and the siting, construction, expansion, or operation shall proceed without condition."[79]

Conclusion

For some time, the Federal Energy Regulatory Commission and the Department of Energy have shared primary jurisdiction over onshore LNG terminals, although other federal, state, and local agencies have played significant roles as well. The California Public Utilities Commission has advanced several arguments contending that FERC's jurisdiction over LNG import facilities under section 3 has been removed by the Energy Policy Act of 1992's amendments to the Natural Gas Act. The CPUC has recently filed suit challenging the FERC interpretation with the Court of Appeals for the District of Columbia Circuit, and Californians for Renewable Energy has also filed suit with the Court of Appeals for the Ninth Circuit. The designation of LNG imports as "first sales" does serve to remove those imports from at least some NGA regulation, but it would seem a permissible interpretation of the statute to conclude that *facilities* used to complete first sales are not also exempted from regulation. Similarly, the CPUC argument that the ban on LNG import application modifications removes Commission jurisdiction finds some support in case law, although, arguably, the statute is ambiguous and subject to the Commission's interpretation.

Should the Commission retain jurisdiction, it appears that FERC would have the authority to preempt conflicting state and local regulation. FERC has voiced its intention to accommodate state and local standards and to include state and local authorities to the furthest extent practicable, and has expressly confirmed that state regulation enacted pursuant to federal law, such as the Coastal Zone Management Act, is beyond agency preemption. Recently introduced legislation, H.R. 4413, would essentially codify FERC's interpretation, although it would add several new authorities, including FERC authority to set an enforceable schedule for the completion of all necessary agency actions.

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[79] *Id.* (adding new 15 U.S.C. § 717b(e)(2)).