

LIQUEFIED NATURAL GAS (LNG) LITIGATION AFTER THE ENERGY POLICY ACT OF 2005: STATE POWERS IN LNG TERMINAL SITING

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I. INTRODUCTION

Historically, the United States has relied on domestic and Canadian sources to satisfy its domestic demand for natural gas. As domestic and Canadian gas reserves have declined in recent years, however, the demand for and the price of natural gas has increased, leading to increasing interest in imports of liquefied natural gas (LNG). Transporting natural gas very long distances from gas fields located in regions of the world with little or nonexistent consuming markets across the oceans to large consuming markets is made feasible by chilling the gas to minus 260 degrees Fahrenheit, at which point the natural gas changes to a liquid state, reducing its volume to 1/600th that of vaporous natural gas. LNG can then be transported via ocean-going vessels across the ocean to be regasified and distributed in consuming markets.

In the 1970s, four U.S. import terminals opened and began importing new quantities of LNG. This first start for LNG importation into the United States fell into recession in the early 1980s when market conditions made LNG importation commercially impracticable. Recent increases in natural gas prices and heightened demand based on natural gas's environmentally friendly conditions has created a second and more powerful push for LNG importation with over forty applications filed with the Federal Energy Regulatory Commission (FERC) and the Maritime Administration to construct or expand LNG regasification terminals in the United States.

As the United States moves toward increasing LNG importation and developers race to construct import terminals, the relatively young U.S. LNG industry is experiencing expected growing pains that have created obstacles and opposition to the LNG movement, including infrastructure concerns related to gas quality and interchangeability, safety and security concerns, environmental concerns, competition over supply, and coordination of upstream supply and

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downstream regasification capacity. Such challenges present an opportunity to slow the development of LNG terminals.

However, regardless of potential challenges and varying predictions about how much of the projected U.S. consumption will be fulfilled by imports of LNG, it is clear that LNG will have an important role to play in the energy future of the United States. There must be enough infrastructure to accommodate the LNG imports as well, and that infrastructure must be proximate to the market centers where the peak demand occurs.

Energy infrastructure raises unique concerns, specifically in the post-September 11 environment. As a result, LNG has engendered huge opposition in many of the communities in which it has been proposed and those communities have methods by which they can negatively impact the review and regulatory processing of LNG terminals. The primary tools available to LNG opposition are the powers, embedded in various federal and state laws, which the states have to affect LNG terminal siting. Aware of the potential delay caused by some of these tools and recognizing that states may react to satiate local opposition, Congress passed, and the President signed, the Energy Policy Act of 2005 (EPAAct 2005),¹ which included LNG-specific sections intended to restrict certain state powers, while at the same time including provisions to facilitate states' input into the LNG terminal siting process.

The EPAAct 2005 amended the Natural Gas Act of 1938 (NGA)² to streamline the process for approving natural gas projects, including LNG import terminals. The EPAAct 2005 expressly provided the FERC with exclusive authority over applications to site, construct, and operate LNG terminals. It also provided a direct, expedited appeal to the U.S. courts of appeals from most agency decisions authorized under federal law, and authorized the FERC to create a binding schedule for agencies reviewing projects under the FERC's jurisdiction. To facilitate the process, the FERC is required to institute a pre-filing process, consult states in the application process, and create a single consolidated record for appeals from all agency decisions.

Although the EPAAct 2005 preempted state's powers in some areas, in other areas states have retained powers that directly could affect LNG terminal siting. These powers are not insignificant, but yet also are not well defined. As a result, this lack of definition will continue to spawn litigation in states and localities that are opposed to LNG. Moreover, the uncertainty created by the threat of litigation can jeopardize a terminal's access to supply and commitments to consumer markets and cause delays that might result in abandonment of a project as market conditions change.

Experience suggests that where there is strong opposition and states have power to block, delay, or derail an LNG regasification terminal proposal and choose to use that power, LNG terminal developers have a significant battle to fight and litigation should be expected. Ultimately, it is very difficult to pursue LNG terminal projects in the presence of significant state and local opposition.

Having carefully surveyed the law and based on actual experience, it is the writer's view that developers should seek to address LNG opposition through

1. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

2. Natural Gas Act, 15 U.S.C. §§ 717-17w (2000).

stakeholder engagement and other non-litigation methods. Conversely, developers who aggressively pursue LNG terminal projects and seek to “shove a project down the locals’ throats” likely will not succeed as states will use all available means, and sometimes come up with new creative means, to halt a project.

These debates are particularly poignant on the U.S. East and West Coasts, where state and local politicians motivated by strong constituency views have taken a proactive role in the LNG terminal siting process. The U.S. Gulf Coast generally has been more accepting of LNG infrastructure; although, even in the Gulf, opposition to LNG terminals has led to withdrawn terminal proposals (e.g., in Mobile Bay, Alabama) and significant litigation (e.g., BP’s Pelican Island terminal in Galveston).

Ultimately, while the EFACT 2005 might have streamlined the federal review process in some respects and changed the rules under which the review takes place, it has not dramatically changed the balance of power between the federal government and states.

This article discusses two areas where courts are likely to be asked to decide issues related to LNG terminal siting and considers the impact of the EFACT 2005 on LNG-related litigation.³ Part II considers litigated disputes to determine which government agency has jurisdiction to authorize or prohibit a project. This is divided into two general types of jurisdictional disputes: federal versus state disputes and state versus state disputes. Part III considers the use of lawsuits to challenge issues indirectly related to the siting of terminals, including challenges to land ownership and attempts to block downstream access.

II. JURISDICTION AND FEDERAL PREEMPTION: DECIDING WHO WILL DECIDE

The most significant stakeholder in every project arguably is the government agency that has the authority to permit or deny construction of the proposed regasification terminal. Therefore, knowing which government agencies will have jurisdiction over a project is a prerequisite to developing a comprehensive strategy for approaching terminal development. Because questions regarding jurisdiction arise early in the approval process, disputes over jurisdiction provide one of the earliest opportunities for litigation.

Jurisdictional disputes are most likely to occur between the federal government and state governments, but litigation may also arise between adjoining states.⁴ The EFACT 2005 addressed two jurisdictional conflicts between federal and state agencies already pending in courts at the time of its

3. This article considers the courts’ role in siting onshore LNG terminals in light of enactment of the Energy Policy Act of 2005. It is not intended to address other obstacles or issues facing LNG developers and opponents of LNG terminals, and does not address the Deepwater Port Act or related litigation involving offshore terminals. Also, the article does not address appeals from agency decisions under the Administrative Procedure Act.

4. Conflicts may also arise between the federal government and foreign governments such as Canada and Mexico, but such conflicts are less likely to result in litigation. Barb Rayner, *LNG Fight Still On*, SAINT CROIX COURIER, May 17, 2006. Intra-governmental disputes between federal agencies and between the agencies of a single state also could impact LNG projects, but because such agencies are ultimately controlled by the same authority, the likelihood of NIMBY-related conflicts is less likely. This article does not address international disputes or intra-governmental disputes.

passage, and left a significant role for federal courts to settle jurisdictional disputes in the future. After the EAct 2005, federal preemption remains the most likely intergovernmental-jurisdictional issue to be litigated, but opportunities for conflicts between states also remain.

A. *The FERC's Preemptive Authority Under the EAct 2005*

It is well established that a valid federal law will preempt any state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁵ Specifically, courts have recognized federal preemption of state laws impeding the siting and construction of natural gas facilities as necessary to further Congress’s goals under the NGA.⁶ According to the Second Circuit, if state laws were not preempted, “agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need.”⁷ However, during the recent rush to construct natural gas infrastructure, apparent gaps in Congress’s delegation of authority to the FERC and conflicts among competing Congressional objectives threatened the FERC’s preemptive authority under the NGA.⁸

In 2005, the EAct 2005 was enacted to clarify the powers of the FERC and create a framework for resolving federal-state tensions in the FERC’s natural gas facilities siting process, including LNG terminals.⁹ Passage of the EAct 2005 was criticized by some state and local politicians as a power-grab by the federal government to strip local communities of their ability to control land use and local safety and security issues.¹⁰ At the same time, supporters of the law tried to assuage local constituencies by arguing that the law did not cause a significant change in the distribution of power between states and the federal government.¹¹

5. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also* *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (NGA preempted state law requiring natural gas companies to receive state approval to issue long-term securities).

6. *National Fuel Gas Supply Corp. v. Pub. Serv. Comm’n*, 894 F.2d 571, 576 (2d Cir. 1990) (noting local opposition to natural gas facilities is to be expected and, if allowed to regulate, states “would certainly delay and might well, by the imposition of additional requirements or prohibitions, prevent the construction of federally approved interstate gas facilities”).

7. *Id.* at 579.

8. *See Sound Energy Solutions*, 106 F.E.R.C. ¶ 61,279 (2004), *order denying reh’g, denying stay, and clarifying prior order*, 107 F.E.R.C. ¶ 61,263 (2004), *order on clarification*, 108 F.E.R.C. ¶ 61,155 (2004), *appeal docketed sub nom.*, *Californians for Renewable Energy, Inc. v. FERC*, No. 04-73650 (9th Cir. filed July 23, 2004) (questioning scope of the FERC’s authority under section 3 of the NGA); *Weaver’s Cove Energy, LLC*, 112 F.E.R.C. ¶ 61,070 (2005), *order on reh’g*, 114 F.E.R.C. ¶ 61,058 (2006), *appeal docketed sub nom.*; *Petition for Expedited Review, Islander East Pipeline Co. v. Conn. Dept. of Env’tl. Prot.*, No. 05-4139-AG (2d Cir. Aug. 8, 2005) (considering conflict between order issued by the FERC under the NGA and state’s enforcement of the CWA) [hereinafter *Islander East Petition*].

9. *See Energy Policy Act of 2005*, Pub. L. No. 109-58, §§ 311, 313, 119 Stat. 594.

10. *See, e.g.*, Press Release, Congresswoman Rosa L. DeLauro, DeLauro Statement on the Energy Policy Act Conference Report (Nov. 18, 2003), *available at* http://www.house.gov/delauro/press/2003/statement_energy_bill_11_18_03.html (“[the law] subordinates all state and federal agencies to the authority of the [FERC]”).

11. *See, e.g.*, Press Release, FERC, Chairman Pat Wood, III Welcomes President’s Support of FERC’s Jurisdiction Over LNG Facilities (Apr. 27, 2005), *available at* <http://www.ferc.gov/press-room/press-releases/archives.asp> (“[the law] will not change the states’ current role in LNG project applications”).

The EPAct 2005 effectively ended a power struggle between the FERC and the California Public Utilities Commission (CPUC) in favor of the FERC by amending section 3 of the NGA to give the FERC expressed authority over applications to site, construct, expand, or operate LNG terminals.¹² The law also channeled to federal appellate court certain challenges to permitting decisions made pursuant to federally delegated authority, including decisions by state agencies that previously were open to review by state courts.¹³ Although these changes to the NGA can be summarized as expressions of national supremacy and the subordination of state and local policymakers—a reduction of states' rights as some have argued—they also can be described reasonably as simply clarifying existing law and closing a loophole being used by states to circumvent the objectives of the NGA.

1. The FERC's Authority Under Sections 3 and 7 of the NGA Prior to the EPAct 2005

The NGA predates commercial LNG shipping in the United States.¹⁴ Therefore, prior to the EPAct 2005, the NGA provided no express authority for the FERC to regulate LNG marine terminal facilities.¹⁵ During the first waive of LNG terminal construction in the United States in the 1970s, the FERC, with help from the U.S. Circuit Court of Appeals for the D.C. Circuit, interpreted sections 3 and 7 of the NGA in search of a hook for FERC regulation of LNG terminals, ultimately relying on section 3.

Section 3 of the NGA empowers and requires the FERC to authorize any proposal to import or export natural gas to or from the United States unless the FERC “finds that the proposed exportation or importation will not be consistent with the public interest.”¹⁶ The FERC may condition and supplement its authorization under section 3 as it “may find necessary or appropriate.”¹⁷ This ability to condition authorization has led the D.C. Circuit to describe the FERC's section 3 authority as “plenary and elastic.”¹⁸

Section 7 of the NGA authorizes the FERC to issue “certificate[s] of public convenience and necessity” for the construction and operation of natural gas facilities for the transportation of gas in “interstate commerce.”¹⁹ The standard for evaluating an application for a certificate of public convenience and necessity

12. See Energy Policy Act of 2005 §§ 311, 313.

13. Energy Policy Act of 2005 § 313(b); See *Islander East Petition*, *supra* note 8 (seeking expedited review in federal court).

14. CENTER FOR ENERGY ECONOMICS, INTRODUCTION TO LNG: AN OVERVIEW ON LIQUEFIED NATURAL GAS (LNG), ITS PROPERTIES, THE LNG INDUSTRY, SAFETY CONSIDERATIONS 10-11 (2003) (*The Methane Pioneer* carried an LNG cargo from Lake Charles, Louisiana, to the United Kingdom in 1959); NGA was enacted in 1938.

15. See Natural Gas Act, 15 U.S.C. §§ 717-17w (2000).

16. *Id.* § 717b(a).

17. Natural Gas Act § 717b(a).

18. *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1064 (D.C. Cir. 1974).

19. Natural Gas Act §§ 717e, 717f(c)(1) (“No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity”); *Id.* § 717a(6) (defining “natural-gas company” as “a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale”).

is more stringent than the standard required for section 3 authorization: the FERC must find that the proposed project is "necessary or desirable in the public interest."²⁰ To find that an action is necessary or desirable, the FERC must determine that the applicant is willing and able to satisfy a panoply of requirements enumerated in section 7, and that the action "is or will be required by the present or future public convenience and necessity."²¹ This higher standard is consistent with the extraordinary power of eminent domain that accompanies a certificate of public convenience and necessity.²² Therefore, section 3 allows the FERC greater flexibility and discretion while section 7 authorizes the FERC to grant applicants the power of eminent domain.

In 1972, the Federal Power Commission (FPC)²³ interpreted "natural gas," as defined by the NGA, to include LNG.²⁴ Considering an application by Distrigas Corporation to construct and operate LNG terminal facilities in New York and Massachusetts, the FPC compared the importation of LNG to the production or gathering of natural gas, and concluded that just as it has no jurisdiction over producing and gathering activities, the FPC would not exercise jurisdiction over the construction or operation of LNG terminal facilities.²⁵ In Order No. 613, the FPC defined its section 3 jurisdiction as beginning and ending as the LNG exited the docked tanker at the LNG import terminal.²⁶ Because the transfer from the LNG vessel to the onshore facility was not "interstate commerce," as defined by the NGA,²⁷ and as interpreted by the D.C. Circuit Court of Appeals,²⁸ the FPC found that its section 7 jurisdiction began at the tailgate of the regasification plant, and existed only to the extent that the gas was sold or transported in interstate commerce.²⁹ Although the FPC initially chose not to regulate the construction and operation of Distrigas's proposed LNG terminal, it cautioned the applicant that its decision not to regulate the terminal was "only the first step in the development of a comprehensive Commission policy on long-term imports of LNG," and that jurisdiction in all future applications would be considered on a case-by-case basis.³⁰

The case-by-case approach forewarned in Order No. 613 materialized when Distrigas later applied for section 7 authorization to sell its imported gas in interstate commerce and sought section 3 authorization to increase the volumes of LNG imported.³¹ Just more than two years after issuing Order No. 613, the

20. Natural Gas Act § 717f(a).

21. *Id.* § 717f(e).

22. Natural Gas Act § 717f(h).

23. The FPC is the predecessor to the FERC.

24. *Distrigas Corp.*, 47 F.P.C. 752 (1972) [hereinafter Order No. 613].

25. *Id.* (rejecting the applicability of section 7 to LNG terminals, but cautioning that its policy might change).

26. *See* Order No. 613, *supra* note 24.

27. Natural Gas Act §§ 717a(6) (defining "natural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale"); *id.* at 717a(7) (defining "interstate commerce" to include only commerce within the United States).

28. *Border Pipe Line Co. v. FPC*, 171 F.2d 149 (D.C. Cir. 1948) (holding that the importation of natural gas is not "interstate commerce," as defined by the Natural Gas Act).

29. *Id.*

30. *See* Order No. 613, *supra* note 24.

31. *Distrigas Corp.*, 49 F.P.C. 1145 (1973).

FPC concluded that section 7 certification was required for all of Distrigas' facilities, because they were being used to transport and sell gas in interstate commerce.³² The FPC based its jurisdiction on the theory that all natural gas imports are in interstate commerce, and argued that contrary precedent, *Border Pipe Line Co. v. FPC*, should be overruled to the extent that it was contrary to the FPC's decision.³³ Distrigas appealed the decision to the U.S. Court of Appeals for the D.C. Circuit.³⁴

The D.C. Circuit refused to overturn *Border*, but offered that it would be willing to overturn *Border* if necessary to avoid a "regulatory gap."³⁵ Noting that section 3 expressly allows the modification and conditioning of orders as the FERC finds necessary and appropriate, the Court found that the FPC could avoid such a gap by conditioning section 3 authorization on the equivalent of the section 7 certification requirements.³⁶ This approach, the Court explained, would allow the FPC "flexibility far greater than would be the case were we to hold that imports are interstate commerce, automatically and compulsorily subject to the entire panoply of Section 7's requirements."³⁷

During the recent race to construct and expand LNG import terminals, the FERC has adopted the D.C. Circuit's recommended approach, relying on its section 3 authority to regulate LNG terminals.³⁸ Under the *Distrigas* regime, section 3 authority begins as the natural gas crosses the flange of the docked ship, and includes jurisdiction over the siting, construction, and operation of the facility, and section 7 authority generally begins when the gas enters the interstate grid.³⁹

The flexibility available under section 3 has allowed the FERC to limit its application of section 7 requirements to those cases where necessary to meet the public interest. For example, in its order authorizing the Hackberry LNG terminal, the FERC changed its policy for LNG import facilities, abandoning the open-access requirement necessary under section 7 in favor of less regulatory oversight.⁴⁰ The FERC justified a less restrictive regulatory regime for LNG terminals in part based on the fact that section 3 authorizations do not include the power of eminent domain.⁴¹

2. National Supremacy: CPUC v. FERC and the EPAct 2005

Three decades after section 3 was first recommended as the jurisdictional hook by the D.C. Circuit Court in *Distrigas*, the FERC's practice of exercising section 3 jurisdiction over LNG import terminals was challenged by the

32. *Id.* The makeup of the FPC had changed since Order 613 because two members of the FPC had resigned and not been replaced. *Distrigas Corp. v. FPC*, 495 F.2d 1057 (D.C. Cir. 1974).

33. *Distrigas Corp.*, 495 F.2d at 1062-63.

34. *Id.*

35. *Distrigas Corp.*, 495 F.2d at 1062-63.

36. *Id.* at 1066.

37. *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1064 (D.C. Cir. 1974).

38. *Sound Energy Solutions*, 107 F.E.R.C. ¶ 61,263 (2004).

39. *Distrigas Corp.*, 495 F.2d at 1057.

40. *Hackberry LNG Terminal, L.L.C.*, 101 F.E.R.C. ¶ 61,294 at P 3 (2002).

41. *Cameron LNG, LLC*, 104 F.E.R.C. ¶ 61,269 at P 12 (2003).

California Public Utilities Commission (CPUC).⁴² In October 2003, as Sound Energy Solutions (SES) was preparing to file an application with the FERC for section 3 authorization to construct an onshore LNG import terminal in Long Beach, California, the CPUC informed SES of its intent to exercise jurisdiction over the project.⁴³ The CPUC argued that because the gas to be imported was intended solely for intrastate distribution within California, the FERC did not have authority to regulate the construction of the terminal.⁴⁴ In January 2004, SES ignored the CPUC's demand for an application to build and operate the proposed facility, instead applying only to the FERC, and the CPUC protested the application.⁴⁵

The FERC responded to the CPUC's jurisdictional claims by issuing a declaratory order asserting exclusive jurisdiction and encouraging state and local agencies to cooperate in a non-decisional capacity.⁴⁶ After requesting and being denied rehearing, the CPUC petitioned the U.S. court of appeals to settle the jurisdictional dispute in the consolidated case of *CARE, et al. v. FERC*.⁴⁷ At the same time that the CPUC was challenging the FERC's authority in California, and because local and state opposition was threatening to delay LNG projects across the country, the FERC asked Congress to pass legislation confirming its exclusive authority over the siting of terminals and establishing procedural mechanisms to prevent unnecessary delays in the siting process.⁴⁸

After briefs were filed in *CARE v. FERC*, but before the U.S. Court of Appeals for the Ninth Circuit issued a final order, the President signed the EPAct 2005 into law on August 8, 2005, amending section 3 of the NGA to give the FERC express, exclusive jurisdiction over LNG terminal siting, construction, and operation.⁴⁹ With one sentence, the EPAct 2005 ended the dispute between the CPUC and the FERC, codified the FERC's practice of exercising authority over LNG terminals under section 3 of the NGA, and made clear Congress' intent that the federal government fully occupy the field of LNG terminal siting.⁵⁰ The new section 3(e)(1) codified *Distrigas*, decreeing that "[t]he

42. Sound Energy Solutions, Notice of Intervention and Protest of the Public Utilities Commission of the State of California, No. CP04-58-000 (filed with the FERC Feb. 23, 2004) [hereinafter CPUC Protest].

43. *Id.* at 3.

44. See CPUC Protest, *supra* note 42.

45. *Sound Energy Solutions*, 106 F.E.R.C. ¶ 61,279 (2004) (Application for Authority to Site, Construct, and Operate LNG Import Terminal Facilities); see also CPUC Protest, *supra* note 42.

46. *Sound Energy Solutions*, 106 F.E.R.C. ¶ 61,279 (2004), *order denying reh'g, denying stay, and clarifying prior order*, 107 F.E.R.C. ¶ 61,263 (2004), *order on clarification*, 108 F.E.R.C. ¶ 61,155 (2004), *appeal docketed sub nom.*, *Californians for Renewable Energy, Inc. v. FERC*, No. 04-73650 (9th Cir. filed July 23, 2004).

47. *Public Utilities Comm'n v. FERC*, No. 04-75240 (9th Cir. filed Oct. 14, 2004); *Californians for Renewable Energy, Inc. v. FERC*, No. 04-73650 (9th Cir. filed July 23, 2004).

48. See The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; *Ensuring Jobs for Our Future with Secure and Reliable Energy: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (summary of testimony of Cynthia A. Marlette, General Counsel, Federal Energy Regulatory Commission), available at <http://www.ferc.gov/press-room/cong-test/2005/02-10-05-marlette.pdf> (requesting provisions in the Energy Policy Act of 2005 to confirm exclusive authority).

49. Energy Policy Act of 2005 §§ 311, 313.

50. See Energy Policy Act of 2005 § 3 ("The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal").

Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”⁵¹ The FERC subsequently filed an unopposed motion to dismiss the appeal pending before the Ninth Circuit, and the motion was granted by the Court.⁵²

Because the NGA now expressly gives the FERC exclusive jurisdiction over the siting, construction, and operation of LNG terminals, state laws are preempted by FERC authorizations to the extent that the laws stand as obstacles to the authorization or otherwise attempt to “engage in concurrent site-specific environmental review.”⁵³ The FERC’s preemptive authority includes displacing those state and local laws enacted under police powers traditionally reserved to states, such as zoning laws, building permits, and other regulations regarding public safety.⁵⁴ Although the FERC generally conditions authorization on cooperation with state and local agencies, state and local laws that “prohibit or unreasonably delay” the project are preempted.⁵⁵ However, whether a law prohibits or unreasonably delays a project will remain a question for courts to resolve. Therefore, despite its effect on *CARE v. FERC*, passage of the EPAct 2005 did not mark the end to litigation over federal preemption of state laws.

3. The National Supremacy Loophole: Authority Delegated to States

Section 3(e) of the NGA effectively ended the CPUC’s challenge to FERC jurisdiction, and it expressed clearly the exclusive nature of the FERC’s authority, but it did not end the opportunity for states to exercise decisional authority related to the construction of LNG terminals. In fact, section 3(d) of the NGA, added by the EPAct 2005, expressly reserves for states those powers Congress has delegated to them under the Clean Air Act (CAA), the Federal Water Pollution Control Act, commonly called the Clean Water Act (CWA), and the Coastal Zone Management Act (CZMA).⁵⁶ The authority delegated to states under these statutes provides states with opportunities to regulate projects and

51. Energy Policy Act of 2005 § 311.

52. *Public Utilities Comm’n v. FERC*, No. 04-75240 (9th Cir. Oct. 6, 2005) (order granting voluntary dismissal).

53. *See Northern Natural Gas Co. v. Iowa Utilities. Bd.*, 377 F.3d 817 (8th Cir. 2004) (preempting Iowa law land restoration rules because the FERC completely occupied the field of environmental issues related to the construction of natural gas facilities); *see also National Fuel Gas Supply Corp. v. Pub. Serv. Comm’n*, 894 F.2d 571, 579 (2d Cir. 1990) (prohibiting concurrent, site-specific environmental review by state); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 298 (1988).

54. *See Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49 (D.R.I. 2000) (preempting zoning laws and building permits where the FERC was required to consider land use in its review); Natural Gas Act as amended by the Energy Policy Act of 2005 § 311 (requiring the FERC to consult with a designated state agency regarding state and local safety issues, including “existing and proposed land use near the [facility] location”).

55. *Weaver’s Cove Energy, LLC*, 112 FERC ¶ 61,070 at P 113 (2005) (“Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions in this order. We encourage cooperation between Weaver’s Cove, Mill River, and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by the Commission.”).

56. Energy Policy Act of 2005 § 311(c)(2) (“nothing in this Act affects the rights of States” under the CWA, CAA, or CZMA).

thereby creates the potential for delay, obstruction, and federal-state jurisdictional conflicts.⁵⁷

Although state actions that frustrate the goals of federal decisions ordinarily will be preempted by the federal decision, a state acting pursuant to authority delegated to it by Congress stands in a peculiar position when confronted with a claim of federal preemption.⁵⁸ As the FERC has acknowledged, because the CZMA is a federal requirement, “the CZMA and the NGA are laws of equal dignity and should be read to complement rather than preempt one another.”⁵⁹ In this way, if a state blocks federal activities under the cloak of its federally delegated authority, it may escape preemption.⁶⁰

This anomaly of state action being of equal dignity to a contrary federal action creates an opportunity for states to delay or halt projects that have been approved by the FERC. A battle between Islander East Pipeline Company (Islander East) and Connecticut highlighted the ability of states to disrupt federally approved activities using the authority vested in states under the CWA.⁶¹ The conflict between Islander East and Connecticut ultimately led Congress to channel to the federal courts all challenges to agency decisions issued under federal authority such as the CWA.⁶²

4. The CWA

Unsatisfied with their cooperative role in the FERC review process, states may try to use state regulations to delay or halt projects that have been approved by the FERC. Generally, once the FERC has authorized a project, state regulations to the contrary are preempted and may not be used to interfere with the project.⁶³ The power of the state to stop a project becomes less clear, however, when the state’s role as regulator is authorized by a federal statute, such as the CWA. For example, in Connecticut, the state has been able to delay indefinitely the construction of a pipeline proposed by Islander East, in part by

57. See *Islander East Petition*, *supra* note 8 (developer seeking review in federal court after delay in state court).

58. U.S. CONST. art. V. This issue has been raised by the CPUC in the SES docket in response to the FERC’s declaration that the FERC has exclusive jurisdiction over LNG import terminals; FERC has explained the position of state regulatory activities authorized by federal law. *Sound Energy Solutions*, 108 F.E.R.C. ¶ 61,155 at PP 8-13 (2004).

59. 108 F.E.R.C. ¶ 61,155 at PP 8-13.

60. *Northern Natural Gas Co. v. Iowa Utilities Bd.*, 377 F.3d 817 (8th Cir. 2004) (preempting Iowa law land restoration rules because the FERC completely occupied the field of environmental issues related to the construction of natural gas facilities); see also *National Fuel Gas Supply Corp. v. Pub. Serv. Comm’n*, 894 F.2d 571, 579 (2d Cir. 1990) (prohibiting concurrent, site-specific environmental review by state); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 298 (1988). It should be noted that with regard to offshore terminals, governors of coastal states have the authority to approve, reject, or approve with conditions projects proposed under the Deep Water Ports Act (DWPA), which was not changed by the Energy Policy Act of 2005.

61. See *Islander East Petition*, *supra* note 8 (challenging Connecticut’s refusal to issue necessary permit under CWA).

62. See Energy Policy Act of 2005 §§ 717r(d)(1), (2).

63. *Northern Natural Gas Co.*, 377 F.3d at 817 (preempting Iowa law land restoration rules because the FERC completely occupied the field of environmental issues related to the construction of natural gas facilities); see also *National Fuel Gas Supply Corp.*, 894 F.2d at 579 (prohibiting concurrent, site-specific environmental review by state); *Hines*, 312 U.S. at 67; *Schneidewind*, 485 U.S. at 298.

using its permitting authority under the CWA to block the project. This type of conflict is resolved under the EPAct 2005 by enabling federal review of a state's denial of a water permit under the authority of the CWA.⁶⁴

The CWA empowers states to develop and enforce water quality standards under the supervision of the U.S. Environmental Protection Agency (EPA).⁶⁵ Once the EPA has approved a state's water quality program pursuant to the CWA, all federal permit recipients whose projects may result in the discharge of pollutants into navigable waters are required to be certified by the state as compliant with the state's water quality program.⁶⁶ The state agency's enforcement of the water quality standards is not preempted, so a federal agency issuing a permit or authorization must withhold authorization until, or condition its issuance on, receipt of this "section 401 water quality certificate" (WQC).⁶⁷

The EPA retains ultimate oversight and supervision of the state programs, and can overrule a state agency if it objects to a WQC issued by the state.⁶⁸ However, there is no clear authority for the EPA to overrule a state's decision not to grant a WQC.⁶⁹ The EPA has the extraordinary power to withdraw its approval of a state's water quality plan if it is not being administered properly, but the EPA is to "exercise this... power with restraint and reserve it for only extreme situations [and] it is extremely doubtful that the unsatisfactory handling of a single permit would ever warrant EPA revocation of a state's... authority."⁷⁰ Moreover, prior to the EPAct 2005, under the CWA, judicial review was exercised according to state law.⁷¹ Therefore, before the EPAct 2005, applicants unable to secure a WQC under the CWA were at the mercy of the state review process.

The Islander East pipeline project is the poster child for state obstruction of FERC projects using the WQC permitting authority of the CWA. Although it involves a natural gas pipeline authorized under section 7 of the NGA, and not an LNG terminal under section 3, the tactics used by Connecticut to block the project are equally applicable to LNG projects, which also require a WQC, and the state's use of its authority under the CWA prompted Congress to federalize the process for challenging agency decisions under the CWA and other federal laws.⁷²

On September 19, 2002, the FERC issued certificates of public convenience and necessity authorizing Islander East to construct a pipeline from North

64. Energy Policy Act of 2005 §§ 717r(d)(1), (2).

65. Clean Water Act, 33 U.S.C. §§ 1251(a), (b) (2000).

66. *Id.* § 1341(a)(1).

67. Clean Water Act § 1341(a)(1).

68. *Id.* § 1342(d)(2).

69. *See* Clean Water Act § 1342(a)(1) (providing only an opportunity to object to state issuances, but not denials).

70. *United States v. Cargill, Inc.*, 508 F. Supp. 734, 740 (D. Del. 1981) (citing *Save the Bay, Inc. v. Adm'r of EPA*, 556 F.2d 1282, 1284-87, 1290 (5th Cir. 1977)).

71. 40 C.F.R. § 123.30 (2005) (requiring state administrators to provide an opportunity for judicial review in state court of the final approval or denial of permits, and the review must be equivalent to that allowed in federal court for federally-issued water permits).

72. Energy Policy Act of 2005 §§ 717r(d)(1), (2) (creating federal review of permitting decisions). *Islander E. Pipeline Co. v. Conn. Env'tl. Prot. Comm'r*, No. HHD-CV-04-4022253-S (Conn. filed June 21, 2004) (requesting federal review under Energy Policy Act of 2005).

Haven, Connecticut, across the Long Island Sound to Long Island, New York.⁷³ Connecticut initially challenged the FERC decision in federal court, but ultimately abandoned its appeal.⁷⁴ Instead, the state used its federally delegated authority under the CZMA and the CWA to oppose the project.⁷⁵ Connecticut first objected to the project pursuant to the CZMA, but Islander East used the CZMA's administrative review process to obtain review by the Secretary of Commerce (Secretary), who ultimately overruled the state's objection.⁷⁶ Connecticut appealed the Secretary's decision to the U.S. District Court in Connecticut which is still pending,⁷⁷ but during the appeal Connecticut has continued to prevent construction of the pipeline by refusing to issue a CWA permit.⁷⁸

The Islander East project requires a state WQC pursuant to the CWA. After Islander East withdrew and resubmitted its WQC application during negotiations over the state's CZMA determination, the Connecticut Department of Environmental Protection (CDEP) ultimately denied the certificate.⁷⁹ With no access to federal judicial review, Islander East brought an action for declaratory judgment in Connecticut's State Superior Court.⁸⁰ The CDEP, Islander East argued, improperly based its denial of the WQC on requirements extraneous to its CWA authority, including consistency with Connecticut's coastal management plan which had already been decided and overruled by the Secretary.⁸¹ By August 8, 2005, the case had been pending in state court for over a year, and Islander East still lacked the required WQC almost three years after the FERC had authorized the project.⁸²

The EPAct 2005 was enacted on August 8, 2005, giving project developers immediate access to the federal judiciary by providing for expedited review in federal court of any order or action, or alleged inaction, by a federal or state agency acting under the authority of federal law.⁸³ New section 19(d) of the NGA grants exclusive and original jurisdiction to the U.S. courts of appeals over challenges to state and federal agency orders and actions made pursuant to

73. *Islander East Pipeline Co., L.L.C.*, 100 F.E.R.C. ¶ 61,276 at P 143 (2002).

74. *See* Islander East Petition, *supra* note 8.

75. *Id.* at 10-13. In addition to state regulations authorized under federal statutes, Connecticut passed a moratorium on Long Island Sound energy projects until June 3, 2005. CONN. GEN. STAT. § 25-157 (2004). The moratorium was not extended and expired June 3, 2005.

76. Decision and Finding of the Secretary of Commerce on the Consistency Appeal of Islander East Pipeline Company L.L.C. (Sept. 18, 2006), *available at* <http://www.publicaffairs.noaa.gov/pdf/islander-decision.pdf>.

77. *Connecticut v. U.S. Dep't of Commerce*, No. 3:04-CV-01271 (D. Conn. filed July 30, 2004).

78. *See* Letter From Conn. Dept. of Env'tl. Prot., to Islander East, Water Quality Certificate App. #200300937 (Feb. 5, 2004) (denying WQC application).

79. *Id.* According to Islander East, this denial came after the CDEP broke a "gentlemen's agreement" to promptly act upon the application, "[withholding] official action on the application for a full six months after it published notice of its intent to deny, thus precluding the initiation of judicial review." *Islander E. Pipeline Co. v. Conn. Dept. of Env'tl. Prot.*, No. 05-4139-AG (2nd Cir. filed Aug. 8, 2005) (Reply of Islander East).

80. *Islander E. Pipeline Co. v. Conn. Env'tl. Prot. Comm'r*, No. HHD-CV-04-4022253-S (Conn. filed June 21, 2004).

81. Brief for Islander Petitioner at 14, *Islander E. Pipeline Co. v. Conn. Env'tl. Prot. Comm'r*, No. HHD-CV-04-04022253-S (Conn. June 21, 2004).

82. *Id.* at 6-13.

83. Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 717r(d)(1), (d)(2), 119 Stat. 594.

federal law, except decisions of the FERC and decisions under the CZMA.⁸⁴ This change allows aggrieved parties to bring appeals in federal court for expedited review, avoiding potential conflicts with state courts.⁸⁵ To further facilitate efficiency in the review process for natural gas facilities, including LNG terminals, the EFACT 2005 also authorized the FERC to establish a schedule for all federal authorizations for natural gas applicants.⁸⁶ If a state fails to follow the schedule set by the FERC, the applicant can pursue expedited judicial review in federal appellate court.⁸⁷ The day the EFACT 2005 became law, Islander East petitioned the U.S. Court of Appeals for the Second Circuit for review of the CDEP's denial of a WQC, alleging that its decision was inconsistent with federal law.⁸⁸

5. The CZMA Process

The EFACT 2005 also preserved states' delegated authority under the CZMA, but did not prescribe the same appellate review it required for challenges to other agency decisions similarly issued under federal authority.⁸⁹ It is reasonable to argue that the channeling was unnecessary because the CZMA already included a review process that vested ultimate authority under the law in the federal government. However, a closer look at the CZMA reveals the potential for states to use their limited authority under the law to block projects without giving the federal government an opportunity to overrule their decisions.

The CZMA essentially provides states with the power to veto federal permitting activities that affect their coastal zones, but the Secretary can override a state's veto.⁹⁰ Although this hierarchy prevents the state from making the final determination on the merits, the CZMA process can produce what amounts to a stalemate between the state agency and the applicant for CZMA certification which can delay or prevent a project, and for which no federal review process has been articulated.⁹¹

84. *Id.* The venue for challenges to agency actions is the circuit court in which a natural gas facility is proposed to be constructed, expanded, or operated.

85. *See* Islander East Petition, *supra* note 8. As of the submission of this article, the court has not issued a final order. Connecticut is challenging the constitutionality of the EFACT 2005's channeling provision under the Eleventh Amendment. *See* Islander E. Pipeline Co. v. Conn. Dept. of Env'tl. Prot., No. 05-4139-AG (2nd Cir. filed Sept. 27, 2005) (Respondent's Motion to Dismiss Appeal).

86. Energy Policy Act of 2005 § 313(c). On May 18, 2006, the FERC issued a Notice of Proposed Rule Making proposing a rule to coordinate the processing of necessary authorizations under federal law for section 3 and section 7 natural gas projects, and to assemble a complete consolidated record of all decisions and actions taken regarding those authorizations. Notice of Proposed Rulemaking, *Regulations Implementing the Energy Policy Act of 2005: Coordinating the Processing of Federal Authorizations for Applications under Sections 3 and 7 of the Natural Gas Act and Maintaining a Complete Consolidated Record*, IV F.E.R.C. STATS. & REGS. ¶ 32,601, 71 Fed. Reg. 30,632 (2006).

87. Energy Policy Act of 2005 § 313 (authorizing the FERC to institute a schedule for review of applications authorized under federal law unless the organic statute already provides a schedule). The venue for challenges to delay from inaction is in the D.C. Circuit. *Id.* at § 717r(d).

88. *See* Islander East Petition, *supra* note 8.

89. *Id.* § 717r(d)(1) (excepting the CZMA from the new judicial review provision).

90. Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A) (2000).

91. *Weaver's Cove Energy, LLC*, 114 F.E.R.C. ¶ 61,058 (Jan. 23, 2006).

The CZMA gives states the right to create individual coastal management programs to be approved by the Secretary, including comprehensive plans for the use and development of land in areas designated as coastal zones.⁹² Once the Secretary approves a state's program, applicants for federal permits affecting the state's coastal zone are required to submit to the federal permitting agency a CZMA consistency certification, stating that the project is consistent with the state's coastal management program.⁹³ The applicant must also submit the certification to the state, and the state has the right to object to the proposed project by finding that the project is inconsistent with the state's coastal management program.⁹⁴ If a state objects to a project within six months of receiving from the applicant the necessary data and information (NDI) to conduct its review, no federal agency may issue a permit or license for the project unless the Secretary overrules the state's objection.⁹⁵ If the state fails to concur or object within six months of receiving the applicant's certification, the state's concurrence is presumed unless the state notifies the applicant within thirty days of the submission that it does not have the NDI.⁹⁶

Thus, the CZMA authorizes states to exercise what amounts to a veto against projects impacting their coastal zones, but the ability of the Secretary to overrule state objections means the federal government ultimately controls the fate of the project. In this way, the CZMA process avoids the unusual circumstance addressed by the EPAct 2005's channeling provision where a valid state agency decision can withstand a contrary decision from a federal agency.

Although the CZMA provides for its own federal review process, the law fails to address a dilemma that has arisen in two specific LNG projects.⁹⁷ Because the CZMA requires a positive consistency determination in order for the project to proceed, and because only state objections can be appealed to the Secretary, the statute does not provide a remedy where the state asserts it has not

92. 16 U.S.C. § 1455(d) (2000).

93. 16 U.S.C. § 1456(c)(3)(A) (2000).

94. *Id.*

95. 16 U.S.C. § 1456(c)(3)(A) (2000). In order to overrule a state's objection, the Secretary of Commerce must conclude that the project is consistent with the objectives of the CZMA or otherwise necessary for national security. *Id.* To find that the project is consistent with the objectives of the CZMA, the Secretary must conclude: (1) that it furthers the national interest in effectively managing the coastal zone, (2) that the national interest outweighs any negative coastal effects, and (3) that there is no reasonable alternative to the project available. 15 C.F.R. § 930.121 (2004). If the Secretary overrules a state's CZMA objection to a project, then the state may seek judicial review to prevent the Secretary's order from being enforced. 15 C.F.R. § 930.130(c) (2005) (identifying Secretary's decision as a final agency action), 5 U.S.C. § 704 (2000) (all "final agency action" subject to judicial review). Such an appeal will be governed by the Administrative Procedure Act (APA) (subjecting all "final agency action" to judicial review). *Id.*

96. 15 C.F.R. §§ 930.54, 930.60 (2004) (concurrence by the state is "conclusively presumed in the absence of [an] objection within six months [from the state receiving notice of the activity] or within three months from receipt of the applicant's . . . certification and necessary data and information, whichever period terminates last."); see also *Georgia Straight Crossing Pipeline L.P.*, 108 F.E.R.C. ¶ 61,053 (2004) (recognizing concurrence of state that failed to object within six months and failed to notify applicant of deficiencies in application).

97. See *Weaver's Cove Energy, LLC*, 114 F.E.R.C. ¶ 61,058 (Jan. 23, 2006); *Crown Landing LLC*, 155 F.E.R.C. ¶ 61,348 (June 20, 2006). Because terminals require a federal permit from the FERC or the USCG/MARAD, as well as the U.S. Army Corps of Engineers and possibly other federal agencies, the CZMA applies to LNG terminals. See *Sound Energy Solutions*, 107 F.E.R.C. ¶ 61,263 (2004) (the FERC recognized applicability of the CZMA to LNG terminal authorizations).

received the NDI and neither approves nor objects to a consistency certification. The CZMA provides for a presumption of concurrence, but only if the state fails to act on a completed application or fails to notify the applicant of missing NDI.⁹⁸ If a state rejects a consistency application as incomplete, the applicant could find itself in regulatory limbo: it needs the state to advance the process before the Secretary will consider overruling an objection.⁹⁹ Unless this stalemate is broken, a state can successfully block a federally approved project essentially by refusing to evaluate it on the merits.

6. The Regulatory Limbo of the CZMA: Weaver's Cove

The CZMA and its implementing regulations do not expressly provide a means for federal review of a state's determination that an applicant has failed to provide the NDI to evaluate its consistency certification. Under the implementing rules promulgated by the National Oceanic and Atmospheric Administration (NOAA), the state determines when the NDI has been provided.¹⁰⁰ Because the CZMA includes no agency process for federal review of a state's inaction based on a lack of NDI, the state's determination currently is the last word, resulting in a scenario akin to the CWA struggle in Islander East, which led Congress to channel to federal courts all appeals from certain agency decisions.

Since July 2004, a battle has been brewing between Weaver's Cove and the Rhode Island Coastal Resources Management Council (RICRMC) over the state's determination that Weaver's Cove has not filed the NDI related to its federal consistency certification under the CZMA.¹⁰¹ Weaver's Cove first filed an application with the RICRMC requesting Rhode Island's assent on July 19, 2004.¹⁰² According to the RICRMC, it notified Weaver's Cove within thirty days of receiving the application that review would not begin until additional NDI was provided.¹⁰³ Weaver's Cove promptly resubmitted its application in early August, addressing one of the three alleged inadequacies, but insisting that the remaining two requests for information—a dredge disposal plan and a water

98. 16 U.S.C. § 1456(c)(3)(A) (2000).

99. See Letter from Conrad C. Lautenbacher, Jr., Vice Admiral, U.S. Navy (ret.), Under Secretary of Commerce for Oceans and Atmosphere, to Bruce F. Kiely, Counsel for Weaver's Cove Energy, LLC, Dismissal of the Consistency Appeal of Weaver's Cove Energy, LLC (Oct. 10, 2005) [hereinafter Weaver's Cove Consistency Appeal Letter]; *Weaver's Cove Energy, LLC*, 112 F.E.R.C. ¶ 61,070 (2005) (dismissing Weaver's Cove's consistency appeal, explaining that the appeal was not ripe because Connecticut had not objected).

100. 15 C.F.R. § 930.60(a) (2006).

101. See Letter from Baker Botts, Counsel for Weaver's Cove Energy, LLC, to Mr. Eldon Hout, Director, Office of Ocean and Coastal Resource Management, NOAA, Request for Interpretation of NOAA Regulations (Dec. 16, 2005) [hereinafter NOAA Interpretation Request]; *Weaver's Cove Energy, LLC*, 112 F.E.R.C. ¶ 61,070 (2005).

102. *Id.*

103. See Letter from Grover J. Fugate, Exec. Dir., Coastal Res. Mgmt. Council, to Magali R. Salas, Secretary, FERC, Weaver's Cove Energy LLC (Sept. 9, 2005); *Weaver's Cove Energy, LLC*, 112 F.E.R.C. ¶ 61,070 (2005).

permit under the CWA—were not necessary.¹⁰⁴ The RICRMC again responded by indicating that the application remained incomplete.¹⁰⁵

Almost one year later, on July 15, 2005, the FERC issued an order authorizing the construction of the Weaver's Cove terminal, but conditioning the authorization on Weaver's Cove receiving a positive consistency determination from Rhode Island.¹⁰⁶ In a request for rehearing, Weaver's Cove asked the FERC to remove the condition, arguing that Rhode Island is presumed to have assented because it failed to take action on the consistency application within six months of Weaver's Cove's application.¹⁰⁷ The RICRMC filed comments opposing the requested removal.¹⁰⁸ The FERC refused to remove the condition, concluding that "[t]he Commission's only responsibility under the CZMA is to withhold construction authorization for a project until the state finds that the project is consistent with [its coastal management plan]."¹⁰⁹ Although the FERC is willing to conclude that CZMA consistency has been presumed when the state's acquiescence is undisputed, the FERC described the disputed consistency determination as "a matter for the [CRMC], the NOAA, and the Department of Commerce, not this Commission."¹¹⁰

In October 2005, while the FERC was considering Weaver's Cove's request for rehearing, Weaver's Cove filed with the Secretary a notice of appeal pursuant to NOAA regulations.¹¹¹ The company's appeal asked the Secretary to treat the RICRMC's comments in the FERC proceeding as an objection, but the Secretary refused.¹¹² The Secretary dismissed the appeal, explaining that "[a]bsent an objection by Rhode Island, there is no basis for an appeal to the Secretary of Commerce...."¹¹³

Having been rebuffed by the FERC and denied review by the Secretary, Weaver's Cove turned to NOAA in December 2005, requesting an "authoritative interpretation" of NOAA's regulations under the CZMA and asking NOAA to determine that because the CRMC's failure to act is "unexcused as a matter of law, Rhode Island's concurrence with the Consistency Certification is conclusively presumed."¹¹⁴

104. *Id.*

105. See Letter from RICRMC, to the FERC, Memorandum of Law (Sept. 14, 2005); *Weaver's Cove Energy, LLC*, 112 F.E.R.C. ¶ 61,070 (2005).

106. *Weaver's Cove Energy, LLC*, 112 F.E.R.C. ¶ 61,070 (2005), *order on reh'g*, 114 F.E.R.C. ¶ 61,058 (Jan. 23, 2006), *order denying motions to reopen the record*, 115 F.E.R.C. ¶ 61,058 (Apr. 17, 2006).

107. See Request for Clarification and/or Rehearing of Weaver's Cove Energy, LLC & Mill River Pipeline, LLC, Doc. Nos. CP04-36-001, CP04-41-001, CP04-42-001, CP04-43-001 (Aug. 15, 2005), *Weaver's Cove Energy, LLC*, 114 F.E.R.C. ¶ 61,058 (2005).

108. See Letter from RICRMC, to the FERC, Memorandum of Law (Sept. 14, 2005); *Weaver's Cove Energy, LLC*, 112 F.E.R.C. ¶ 61,070 (2005).

109. 114 F.E.R.C. ¶ 61,058 at P 127.

110. *Id.* at PP 127-28.

111. See Weaver's Cove Consistency Appeal Letter, *supra* note 99 (dismissing Weaver's Cove consistency appeal); *Weaver's Cove Energy, LLC*, 112 F.E.R.C. ¶ 61,070 (2005) (dismissing Weaver's Cove consistency appeal).

112. See Weaver's Cove Consistency Appeal Letter, *supra* note 99.

113. *Id.*

114. See NOAA Interpretation Request, *supra* note 101.

As of the submission of this article, NOAA has not officially responded to that request, but Weaver's Cove has indicated that it has "become aware that NOAA will not act on [its] request."¹¹⁵ As a result, Weaver's Cove filed an appeal to the Secretary on June 22, 2006, brought under the CZMA itself rather than under the NOAA regulations invoked in its October 2005 appeal.¹¹⁶ Weaver's Cove distinguished this appeal from the earlier appeal by noting that while the regulations require a state to object before an applicant may appeal, the CZMA states only that approval by the state is required unless the Secretary finds that the proposed activity "is consistent with the objectives of [the CZMA]... [or is] otherwise necessary in the interest of national security."¹¹⁷ According to Weaver's Cove, the project can move forward regardless of the CRMC's consistency determination (or lack thereof) if the Secretary determines that the project is consistent with the objectives of the Act or otherwise necessary in the interest of national security.¹¹⁸

In a July 24, 2006, letter to Weaver's Cove, the Secretary dismissed Weaver's Cove's second appeal, furthering the CZMA regulatory limbo.¹¹⁹ The Secretary refused to entertain the appeal, explaining "[t]he plain meaning of the term 'appeal' requires a state objection as a necessary predicate for an appeal to the Secretary."¹²⁰ Therefore, "[i]n the context of the CZMA, absent a state objection, there would be nothing for an applicant to 'appeal.'"¹²¹ With this dismissal, Weaver's Cove is in a stalemate potentially similar to the one experienced by Islander East prior to the EPAct 2005. The result may be new litigation, either via an appeal of the Secretary's order in federal court,¹²² or through a petition for a declaratory order or writ of mandamus in state court.¹²³ In any case, the CZMA process under the Secretary's decision provides states further opportunity to delay projects.

7. The Regulatory Limbo of the CZMA: Crown Landing

A similar problem surfaced in Delaware when the Department of Natural Resources and Environmental Conservation (DNREC) denied a coastal zone status request by Crown Landing, LLC, a subsidiary of BP America, regarding its proposed Crown Landing LNG terminal on the Delaware River. Delaware's

115. See Appeal of Weaver's Cove Energy, LLC Under the CZMA at 23, Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council, No. CP04-36-000 (Dept. of Commerce June 28, 2006) [hereinafter CZMA Appeal].

116. *Id.* at 23-24.

117. See CZMA Appeal, *supra* note 115 (noting that the appeal is under the CZMA, not under the NOAA regulations).

118. *Id.* at 3-4 ("the Act does not require that the State reviewing agency object to a consistency certification before the applicant may appeal to the Secretary").

119. See Letter from Conrad C. Lautenbacher, Jr., Vice-Admiral, U.S. Navy (ret.), Under Secretary of Commerce for Oceans and Atmosphere, to Bruce F. Kiely, Counsel for Weaver's Cove Energy, LLC, Consistency Appeal of Weaver's Cove Energy, LLC (July 24, 2006) [hereinafter Weaver's Cove Appeal II].

120. *Id.* at 2.

121. See Weaver's Cove Appeal II, *supra* note 119.

122. See 5 U.S.C. § 704 (2000) (subjecting all "final agency action" to judicial review).

123. See *Martone v. Johnston Sch. Comm.*, 824 A.2d 426, 429 (R.I. 2003) (identifying writ of mandamus as appropriate tool to force ministerial duty where clear legal right is demonstrated); R.I. GEN. LAWS § 9-30-1 to 9-30-16 (2005) (authorizing declaratory judgments).

coastal zone law requires applicants for federal permits covered by the CZMA to apply for a status determination through which the Delaware DNREC decides whether the potential applicant is eligible to apply for a consistency determination. Under Delaware's Coastal Zone Act, permitting new "heavy industry" is prohibited in the coastal zone. Because Delaware found an LNG terminal to be heavy industry, and not within any exception to the prohibition, it denied Crown Landing's status request, preventing Crown Landing from even applying for a consistency determination. Thus, there was no consistency certification, nor a denial of consistency. This precursor step appears to have placed Crown Landing in procedural limbo, since there was no decision on the merits for it to appeal to the Secretary of Commerce. While it is unclear exactly what recourse Crown Landing had under the CZMA, in any event it decided not to pursue a judicial appeal of the status decision by the DNREC, apparently opting to rely on the jurisdictional challenge levied by New Jersey against Delaware discussed *infra* in subpart B.1.

8. States to Regulate Despite Preemption

Finally, despite the FERC's clear authority to preempt state and local laws related to the siting, construction, and operation of LNG terminals, states' attempts to block projects may still result in new litigation. The FERC routinely requires applicants to cooperate with state and local agencies and has indicated that state and local laws requiring "something more or different from the Commission," even if causing increased costs and delays, do not automatically result in preemption.¹²⁴ According to the FERC, "[a] rule of reason must govern both the state's and local authorities' exercise of their power and an applicant's bona fide attempts to comply with state and local requirements."¹²⁵ Although the FERC has the authority to modify its orders under section 3, it has indicated that it "cannot act as a referee" in disputes between applicants and state and local officials.¹²⁶ Instead, the FERC instructs parties to settle conflicts between applicants and state or local permitting agencies in court.¹²⁷ Although state and local governments are preempted from using state and local laws to block federally approved LNG projects, authorities opposed to projects can delay construction and increase costs by imposing additional requirements or restrictions on the developer,¹²⁸ and failure to comply with such additional requirements also can result in protracted litigation in state courts. Therefore, local opposition remains an important calculation when evaluating a terminal site, and state and local officials remain key stakeholders for both proponents and opponents to engage.

124. *Weaver's Cove Energy LLC*, 114 F.E.R.C. ¶ 61,058 at PP 143-44 (2006).

125. *Id.* at P 144.

126. *Weaver's Cove Energy LLC*, 114 F.E.R.C. ¶ 61,058 at P 145.

127. *Id.*

128. *See, e.g.*, R.I. GEN. LAWS § 39-1-2.1 (2005) (prohibiting LNG vessels from coming within certain distances of state assets).

B. *State v. State: Disputed Jurisdiction and Concurrent Authority*

One potential class of conflicts not directly addressed by the EPAct 2005 is disputes over what state or states have jurisdiction over a project. Although state boundary lines usually delineate jurisdiction, as several developers on the East Coast are learning, mailing addresses may not always result in the undisputed allocation of authority. The proposed Crown Landing LNG terminal on the New Jersey side of the Delaware River and Broadwater LNG's proposal for a floating LNG terminal in the Long Island Sound have demonstrated that jurisdiction may not always be clearly defined by lines on a map. Although state boundary disputes are unlikely to arise, these jurisdictional disputes can cause significant delays and can result in undesirable changes to the state regulatory scheme and agencies affecting a project.

1. New Jersey v. Delaware: the Crown Landing Experience

In the fall of 2004, BP proposed a terminal at Crown Landing, in Logan Township, New Jersey, on the Delaware River.¹²⁹ With the U.S. Northeast starving for energy, BP's proposal for an LNG terminal in a relatively unpopulated area in New Jersey close to a power plant and three regional pipelines appeared very likely to succeed.¹³⁰ However, a jurisdictional dispute¹³¹ more than 300 years old was revived between New Jersey and Delaware when the Delaware Department of Natural Resources and Environmental Control (DNREC) decided that the proposed facility would violate a ban on "[h]eavy industry uses of any kind" within the state's coastal zone,¹³² and Delaware's Coastal Zone Industrial Control Board upheld the decision on appeal.¹³³ Frustrated with Delaware's decision to withhold a permit and effectively block a project on New Jersey's shore, New Jersey petitioned the U.S. Supreme Court seeking a declaration that New Jersey has "[exclusive] riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within [a disputed zone] free from regulation by Delaware."¹³⁴ Meanwhile, rather than pursue further appeals in

129. Application of Crown Landing LLC For Section 3 Authorization to Construct Liquefied Natural Gas Import Facility, No. CP04-411 (F.E.R.C. filed Sept. 16, 2004).

130. *Id.* at 6.

131. Styled *New Jersey v. Delaware*, the case centers on the interpretation of a 1934 Supreme Court decision settling the border between the states, subject to a compact entered into by the states in 1905 (Compact of 1905). *New Jersey v. Delaware*, 291 U.S. 361 (1934) (settling dispute over New Jersey-Delaware border on the Delaware River); Pub. L. No. 32, 34 Stat. 858 (1907) (ratifying the Compact of 1905). The Court in 1934 established the border at the middle of the channel, except that Delaware's territory would include a twelve-mile radius from New Castle, Delaware (the "Twelve-Mile Circle"), reaching the mean low-water line on the New Jersey shore, "subject to the Compact of 1905." *New Jersey*, 291 U.S. at 385. The Twelve-Mile Circle was derived from a disputed deed from the Duke of York to William Penn. *Id.* at 364. New Jersey asserts that the Compact of 1905 granted it exclusive authority over structures appurtenant to the New Jersey shore. Motion to Reopen at 8. The proposed site of the BP terminal falls within New Jersey territory, but the planned pier appurtenant to the plant is almost entirely in Delaware's territory within the Twelve-Mile Circle. *Id.* at 13.

132. Letter Re: Coastal Zone Act Status Decision, DNREC (Feb. 3, 2005).

133. Decision and Order, Coastal Zone Industrial Control Board of the State of Delaware, No. 2005-01 (Mar. 31, 2005).

134. Motion to Reopen and for a Supplemental Decree, Petition, Brief and Appendix in Support of Motion at 17, *N.J. v. Del.*, 126 S. Ct. 713 (July 28, 2005) (No. 11) [hereinafter *New Jersey Motion*]. The

Delaware, BP elected to ask the FERC to continue the review process and condition any order on a determination that Delaware lacked jurisdiction over the project.¹³⁵

New Jersey asked the Court to set the case for argument in the October 2005 term, but on January 23, 2006, the Court appointed a Special Master who issued a case management plan under which discovery would be completed as late as October 30, 2006.¹³⁶ Other recent border disputes heard by the Supreme Court have taken anywhere from three to nearly twenty years to reach a decision on the merits.¹³⁷ With the case still pending in the Supreme Court, the FERC has issued a certificate authorizing the Crown Landing project, "subject to its filing, prior to construction, documentation of concurrence from the DNREC that the projects are consistent with applicable Delaware law, in conformance with CZMA."¹³⁸ Therefore, although BP has received a certificate from the FERC authorizing construction, the project is delayed at least until the court reaches a decision.

Although the Crown Landing experience is unique and unlikely to be repeated by other developers, it illustrates the importance of anticipating jurisdictional issues among states. The lesson for proponents and opponents is to carefully identify every avenue available for government agencies to exert jurisdictional claims and to factor those possibilities into their strategies. Any time jurisdiction is in question, a project may be stalled by litigation to determine the appropriate role of state agencies.

2. The CZMA, Again

A similar question regarding the reach of state agencies' authority beyond their borders might arise regarding a state's authority under the CZMA to prevent permitting activities in the jurisdiction of another state.¹³⁹ Although not currently the subject of LNG-related litigation, a provision of the CZMA that enables states to exercise their CZMA veto power over activities within the sovereign jurisdiction of other states could lead to a court challenge.

At issue in such a challenge would be whether and to what extent a state can be allowed to prevent an activity from being permitted within the sovereign territory of another state. Two potential conflicts might arise over the scope of a state's CZMA authority: (1) a state might challenge limitations set by regulation on the scope of the authority; or (2) a state might challenge the perceived

Supreme Court has original jurisdiction over the case because it is between two states. U.S. CONST. art. III, § 2; 28 U.S.C. § 1251(a).

135. See Letter from Attorney for Crown Landing LLC, to F.E.R.C (Dec. 2, 2005).

136. Brief in Support of Motion to Reopen at 34, No. 11 (U.S. Jul. 27, 2005) (requesting argument in Oct. 2005 Term); Order Granting Motion for Appointment of Special Master, No. 220134 (U.S. Jan. 23, 2006); Case Management Plan at C-2 (U.S. Feb. 8, 2006), available at www.pierceatwood.com.

137. See *Virginia v. Maryland*, 534 U.S. 807 (2003) (three years); *New Jersey v. New York*, 524 U.S. 968 (1998) (five years); *Kansas v. Colorado*, 543 U.S. 86 (2004) (nearly twenty years); *New Hampshire v. Maine*, 532 U.S. 742 (2001) (proceeded approximately one year before being dismissed).

138. *Crown Landing LLC*, 115 FERC ¶ 61,348 at P 31 (June 20, 2006).

139. 16 U.S.C. § 1456(c)(1) (2000) (allowing states to require consistency determination for federal permitting activities in or outside of their coastal zone, affecting their coastal zone); 15 C.F.R. § 930.154 (2006) (allowing states to generate a list of permitting activities occurring in other states over which the state will require CZMA consistency).

invasion of its sovereignty by a neighboring state blocking a project in the first state's jurisdiction.¹⁴⁰

Concern over LNG terminals is prompting Northeastern states to seek to review LNG projects in their neighbors' coastal zones. For example, Connecticut has expressed its desire to extend its CZMA review beyond its territorial boundaries, claiming to have authority to review the Broadwater LNG project located in the state waters of New York.¹⁴¹ In fact, New York, New Jersey, Connecticut, and Pennsylvania are preparing plans to enable them to review projects in their neighbors' jurisdictions under the CZMA.¹⁴²

The CZMA authorizes states to make consistency determinations for federal permitting activities in and outside of their coastal zones so long as the activity may impact their coastal management zone.¹⁴³ Under regulations issued by NOAA, states are required to generate a list of activities outside of their territory that they intend to review, identifying the type and location of the activities.¹⁴⁴ If NOAA approves a state's list, then it can exercise the same CZMA review over federally permitted activities on the list as it can exercise over activities within the state.¹⁴⁵ A state without an approved list might challenge NOAA regulations as overly restrictive; conversely, a developer, or a state with a proposed facility in its territory, might challenge the CZMA's authorization to allow a neighboring state to block the construction of the facility in the state.¹⁴⁶

These issues are not currently and may never be litigated, but the multi-state nature of the CZMA may generate conflicts. Therefore, proponents and opponents alike should consider all states in a region where a terminal is proposed to identify stakeholders who may champion their cause and those who will present the greatest challenges.

III. BY ANY MEANS NECESSARY: THE LAST RESORT FOR LNG OPPONENTS

In addition to the opportunities for litigation already discussed, opponents might attempt to frustrate or stop projects by undercutting the viability of the project separate from challenges to FERC decisions. This tactic creates the least predictable source of litigation and may involve legal questions outside of the administrative law context. Defending against such attacks requires meticulous preparation on the part of the developer to avoid the opportunity for conflict, considering the opportunity is most likely to result from an oversight by the developer, either by failing to follow necessary procedures, failing to conduct

140. New Jersey Motion, *supra* note 134, at 13 (claiming Delaware is interfering with New Jersey's "sovereign right" by exercising jurisdiction over activities on New Jersey shore of Delaware River).

141. See Letter from Conn. Dept. of Env'tl. Prot., to Broadwater Energy, L.L.C. (Feb. 28, 2006) (requesting Broadwater submit a Connecticut consistency certification).

142. Telephone Interview with David Kaiser, Esq., Senior Policy Analyst, NOAA (May 19, 2006).

143. 16 U.S.C. § 1456(c)(1) (2000) (allowing states to require consistency determination for federal permitting activities in or outside of their coastal zone, affecting their coastal zone).

144. 15 C.F.R. § 930.154 (2006) (allowing states to generate a list of permitting activities occurring in other states over which the state will require CZMA consistency, i.e., LNG terminal siting in the Long Island Sound).

145. *Id.*

146. 15 C.F.R. § 930.154 (2006). Currently, no state has an approved list. Therefore, at this time, no state is eligible to review activities beyond their borders.

due diligence regarding all related transactions, or failing to successfully engage all stakeholders. Recent attempts to undercut the viability of projects independent of the FERC's application process have fallen into two general modes: (1) preventing the developer from exercising site control; and (2) attacking the downstream market opportunities and profitability of the project.¹⁴⁷

A. Site Control

Opponents may find solace in the use of section 3 of the NGA rather than section 7 because section 3 authorizations do not include the power of eminent domain.¹⁴⁸ Therefore, a proposal will fail if a developer is unable to acquire control over the property necessary to construct the terminal.¹⁴⁹ Disputes over the validity of a lease or challenges to the developer's ownership interest in the property can result in litigation that can delay projects. Developers should be able to mitigate the risk of this type of litigation through extensive investigation into the ownership of and burdens on the property needed for the proposed terminal.

1. Weaver's Cove & KeySpan

Two separate disagreements over the ownership of land related to the Weaver's Cove project illustrate the challenges that developers can face in light of their inability to use eminent domain to secure their project sites. The FERC included two conditions related to property control in its July 15 order authorizing the project, each posing a threat of litigation. First, Shell and Weaver's Cove dispute the scope of the deed conveying to Weaver's Cove the property on which the terminal is to be built. The deed includes restrictions on future use of the property and may grant Shell, the former property owner, a right to prevent the placing of dredged material on the site as planned by Weaver's Cove.¹⁵⁰ The FERC described the dispute between Shell and Weaver's Cove as "a threshold issue in [the FERC proceeding]," indicating that until Weaver's Cove demonstrates that it may lawfully use the site as proposed, "all other issues in this proceeding are academic."¹⁵¹ The FERC has assured

147. A third strategy unrelated to litigation is to enact federal legislation to block construction of a terminal as was attempted in the Weaver's Cove Project. See Safe, Accountable, Flexible, Efficient Transportation Equity Act, Pub. L. No. 109-59, § 1948, 119 Stat. 1144 (2005) (SAFETEA) (prohibiting use of federal funds for demolition of the Brightman Street bridge to enable large LNG tanker passage to Weaver's Cove proposed terminal). The provision was added to the bill by Rep. James P. McGovern (D-Mass) and was supported by other federal legislators from Massachusetts and the Mayor of the City of Fall River, Massachusetts. A provision which would repeal SAFETEA section 1948 is pending in Senate bill 2755, § 3021. In addition, the U.S. Coast Guard has introduced a proposed rule to assess navigational challenges for tanker transit between the existing Brightman Street bridge and a proposed new bridge. Notice of Proposed Rulemaking, Regulated Navigation Area: Narragansett Bay, RI and Mount Hope Bay, MA, including the Providence River and Tauton River, 71 Fed. Reg. 30,108 (May 25, 2006).

148. See 15 U.S.C. § 717b (2000).

149. See *Weaver's Cove Energy, LLC*, 112 F.E.R.C. at ¶ 61,070 at P 111 (2005).

150. See *id.* at P 77.

151. See *Weaver's Cove Energy, LLC*, 114 F.E.R.C. ¶ 61,058 at P 133 (Jan. 23, 2006).

Shell that “no property will be disturbed” until Weaver’s Cove settles the disputed deed, either by agreement with Shell, or by order of a court.¹⁵²

The second challenge Weaver’s Cove faces could also be resolved in court. Federal regulations require the operator of an LNG terminal to demonstrate legal control over all activities within certain exclusion zones designated by the Department of Transportation (DOT).¹⁵³ During the application process, Weaver’s Cove was unable to identify the owner of a 1.19-acre “wedge” lot that falls within a designated exclusion zone.¹⁵⁴ The FERC conditioned its order authorizing the project on Weaver’s Cove obtaining legal control of the property or acquiring a waiver from the DOT.¹⁵⁵ Since that order, however, a private citizen has claimed to hold title to a portion of the wedge lot.¹⁵⁶ With the title disputed, if Weaver’s Cove is unable to receive a waiver from the DOT, it may be relegated to court to determine the ownership of the wedge lot.

In addition to these two potential legal battles over property rights related to the Weaver’s Cove project, a third property-related challenge has been floated by local politicians in Massachusetts. U.S. Representative Barney Frank and former Fall River, Massachusetts mayoral candidate, F. George Jacome, have suggested the use of eminent domain to seize control of the project site for Weaver’s Cove’s LNG terminal in an attempt to prevent construction of the terminal.¹⁵⁷ The exercise of eminent domain by the state or local government would likely be preempted by the FERC’s order,¹⁵⁸ but that did not worry Mr. Jacome who predicted the seizure would fail after years of litigation have delayed construction, causing Hess to abandon the project.¹⁵⁹

A similar issue arose with regard to KeySpan LNG’s proposed terminal in Providence, Rhode Island.¹⁶⁰ In its order denying section 3 authorization, the FERC held that KeySpan did not have adequate site control because “thermal radiation and flammable vapor exclusion zones would extend offsite onto adjacent properties....”¹⁶¹ This violation of current federal safety standards could

152. *Id.* (explaining that Condition 77 “reminds Weaver’s Cove of its responsibility to obtain undisputed right under the deed to use the property . . .”).

153. 49 C.F.R. § 193.2007 (2005) (control requirement); 49 C.F.R. § 193.2057 (2005) (exclusion zones defined).

154. 114 F.E.R.C. ¶ 61,058 at P 136.

155. *Id.*

156. See Letter from David William Frederick, to F.E.R.C. Secretary (May 1, 2006).

157. David Fowler, *Jacome: Take LNG Land*, THE HERALD NEWS, Jan. 24, 2006, available at http://www.heraldnews.com/site/index.cfm?newsid=15986710&BRD=1710&PAG=461&dept_id=99784&rfti=8 [hereinafter *Take LNG Land*].

158. Although untested in the field of LNG terminal siting where the FERC does not have the power of eminent domain, the exercise of eminent domain that frustrates a FERC decision is likely to be preempted. See *Morgan City v. S. La. Elec. Coop. Ass’n*, 31 F.3d 319 (5th Cir. 1994) (preempting state-law condemnation proceeding (“because [it] would frustrate the federal purpose of providing low-cost, reliable electric service . . .”)); *UGI Utilities, Inc. v. Amtrak*, 1:CV-02-1230, 2004 U.S. Dist. LEXIS 29035, at *15 (D. Penn. July 2, 2004) (preempting local utility’s attempt to condemn property Congress had determined should be conveyed to Amtrak).

159. See *Take LNG Land*, *supra* note 156.

160. *KeySpan LNG, LP*, 112 F.E.R.C. ¶ 61,028 at P 49 (2005), *reh’g denied*, 114 F.E.R.C. ¶ 61,054 (Jan. 20, 2006).

161. *Id.* at P 49.

only be resolved through acquisition of a legal ownership interest capable of giving KeySpan control over the exclusion zones.¹⁶²

These battles to secure the property rights necessary for construction of an import terminal highlight a weakness in the FERC's section 3 authority and a potential for continued litigation. Although the FERC can preempt zoning laws and other public constraints on land use, its lack of eminent domain authority under section 3 leaves its order authorizing Weaver's Cove at the mercy of individual property disputes. Nevertheless, developers can significantly reduce their exposure to property disputes by exhaustively reviewing the records of property impacting their proposals.

2. BP's Pelican Island

BP has experienced a different kind of property dispute, which has resulted in litigation delaying its proposal to build an LNG terminal on Pelican Island in Galveston, Texas.¹⁶³ Before ultimately being shelved by BP, the Pelican Island terminal was delayed more than a year because of a citizen's challenge to BP's lease option agreement with the Galveston wharves board for the proposed terminal site.¹⁶⁴ The plaintiff alleged that the wharves board violated the Texas Open Meetings Act when it negotiated a secret lease agreement with BP for the site of its proposed terminal.¹⁶⁵ On March 22, 2006, Judge John Ellisor of the 122nd State District Court ruled that a lease entered into by BP, the City of Galveston, and the wharves board violated the law, and therefore was null and void.¹⁶⁶ Five months after the decision, BP announced that it would not proceed with the project "at this time," but indicated that its decision was unrelated to the litigation.¹⁶⁷

The challenges raised against the Weaver's Cove and Pelican Island projects demonstrate the potential for state laws of general applicability to prevent projects from moving forward by regulating issues over which the FERC does not have authority.

B. *Attacking the Downstream Access*

Lawyers should always remember that securing each segment of the supply chain, including upstream supply and downstream market access, can be as important to the survival of a project as overcoming the legal hurdles during the

162. 112 F.E.R.C. ¶ 61,028 at P 50.

163. Laura Elder, *BP Awaits Lawsuit's Outcome*, GALVESTON COUNTY DAILY NEWS, August 17, 2005, available at <http://news.galvestondailynews.com/story.lasso?ewed=a69a9ebd12d50641be0e1a6c6b06fa93> (reporting BP planned to file application with the FERC in August 2005, but elected to wait for outcome of pending litigation) [hereinafter *BP Awaits*].

164. *Id.*

165. *BP Awaits*, *supra* note 163.

166. Greg Barr, *BP, Wharves Board File LNG Appeals*, GALVESTON COUNTY DAILY NEWS, July 2, 2006, available at <http://news.galvestondailynews.com/story.lasso?ewcd=f621c3e665ba5613d9b7874bbf06f3df> (reporting pending appeal of district court decision). The court held that a second lease agreement between BP and the wharves board was valid, but it still requires approval by the city council. *Id.*

167. Laura Elder, *BP Shelves Isle LNG Project*, GALVESTON COUNTY DAILY NEWS, Aug. 22, 2006, available at <http://news.galvestondailynews.com/story.lasso?ewcd=7fe07fe4051dbc7ca302ff2f6929f075>.

FERC process.¹⁶⁸ Attacking any segment of the supply chain may result in abandonment of a project, or may cause the FERC to find that the project is against the public interest.¹⁶⁹ However, with demand for LNG extremely high, and grounds for disrupting market access very limited, this tactic is unlikely to be successful.

This approach was tested and failed when Ratepayers for Affordable Clean Energy (RACE) challenged three decisions by the CPUC that permitted two subsidiaries of San Diego-based Sempra Energy to buy LNG from Sempra's Costa Azul LNG terminal under construction in Baja California, Mexico.¹⁷⁰ RACE charged that the CPUC had violated the law when it established a new process for approving new tariffs related to LNG supply and authorized the Sempra subsidiaries to terminate domestic natural-gas supply contracts and enter into new contracts for LNG from Sempra's Costa Azul terminal.¹⁷¹ RACE sought to overturn the CPUC's decisions based on alleged procedural shortcomings, but its petition was denied.¹⁷²

Although RACE was unsuccessful, it is possible to imagine a scenario where preventing access to local markets could frustrate a developer's plans. For example, had Sempra sought the same authorizations from the CPUC in connection with a terminal to be constructed onshore in California, then opponents of the terminal may have found a friend in the CPUC, leading to denials of the requests and frustrating developers' plans.

V. CONCLUSION

Beyond legal precedent, LNG litigation to date offers strategic guidance to the lawyer, whether he or she is engaged to advance or oppose a terminal project. Like bees to honey, an LNG project attracts lawsuits by displeased parties, private or governmental, who doubt their ability to block the project through the administrative process, as well as by promoters who seek to remove state or local obstacles to the federal permitting process. Early in this setting, therefore,

168. *Without Long-Term Supply Contracts, Anadarko Considers Shelving Bear Head LNG Project*, INSIDE FERC, June 5, 2006 (developer considered shelving project after \$100 million invested due to lack of supply); Thomas Elias, *At Long Last, Someone Acts to Slow LNG Juggernaut*, SAN DIEGO DAILY TRANSCRIPT, Sept. 23, 2005, available at http://www.sddt.com/Commentary/article.cfm?Commentary_ID=109&SourceCode=20050923tza (describing how a decrease in natural gas demand in the 1980s made economically impractical a proposed terminal at Point Conception in Santa Barbara County, California).

169. Not considered here are possible challenges to supply sources. Opponents may raise issues regarding sanctions against imports from countries against which the U.S. has trade sanctions, or may raise disputes through other international agreements and institutions based on concerns such as environmental deficiencies. See Diane Lindquist, *LNG Plans Challenged Via NAFTA, Environmental Groups Try New Tactic in Baja*, SAN DIEGO UNION-TRIBUNE, May 4, 2005 (reporting challenge filed under the North American Free Trade Agreement, alleging proposed terminal in Mexico violates Agreement, but noting that the provision invoked has no enforcement mechanism).

170. Petition for Writ of Review, *Ratepayers for Affordable Clean Energy v. Cal. Public Utilities Comm'n*, No. R04-01-025 (Cal. Ct. App. Aug. 16, 2005); Memorandum of Points and Authorities, *Ratepayers for Affordable Clean Energy v. Cal. Public Utilities* (Cal. Ct. App. Aug. 12, 2005).

171. Memorandum of Points and Authorities, *Ratepayers for Affordable Clean Energy v. Cal. Public Utilities at 2* (Cal. Ct. App. Aug. 12, 2005).

172. Order Denying Petition Filed, *Ratepayers for Affordable Clean Energy v. Cal. Pub. Utilities Comm'n*, No. D046994 (Cal. Ct. App. Aug. 16, 2005).

the role of the lawyer is to evaluate the litigation options and risks and to help integrate them into their clients' project execution or opposition strategy.

As illustrated in this article, the most significant factor that a lawyer must integrate into his or her litigation-related guidance is where the state stands on the project or issue in question. All else being equal, lawsuits by private or even municipal groups have been less successful in blocking or delaying the permitting process for LNG terminals than legal challenges prosecuted or supported by state governments. With the exercise of unpreempted state prerogatives, states have effectively blocked several projects. Indeed, there is no case to date where a project has been successfully executed in the face of firm state opposition.

The views of state elected officials towards a particular project, in turn, are most likely to be driven by public reaction to the project. Where public reaction is positive or mixed, the state apparatus is less likely to form a negative view of the project, and less likely to engage in litigation to block the project. But where public reaction is vehemently opposed to the project, the state machinery is likely to be mobilized in opposition and litigation will be inevitable. And, as shown here, the state's arsenal can be potent. The wise counselor, therefore, would start his or her litigation risk analysis with gauging the public's mood about the project, as the prospects and likely effects of litigation may prove to be a reflection of that mood.