

# Feds and Fossils: Meaningful State Participation in the Development of Liquefied Natural Gas

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*Rising natural gas prices and flattening North American natural gas production have led many to conclude that liquefied natural gas (LNG) development is urgently needed to sustain near-term growth of energy capacity in California and across the United States. To streamline and accelerate this development, Congress granted exclusive jurisdiction over the siting, construction, and operation of LNG terminals to the Federal Energy Regulatory Commission (FERC) in the Energy Policy Act of 2005 (EPAAct), thereby transferring this aspect of intrastate natural gas regulatory authority from the state to the federal government. While this aspect of EPAAct is wholly within Congress' constitutional power, this Comment describes why EPAAct's preemption of state authority may not have been the best action to encourage LNG development and national energy independence. This issue is analyzed by examining the controversy between FERC and the California Public Utilities Commission (CPUC) over jurisdiction of a proposed LNG terminal in Long Beach, California. The Comment argues that the states must play a prominent role in LNG development to properly address economic, environmental, and local safety concerns. Furthermore, innovative state energy policies that encourage renewable energy development and investments in energy efficiency could be less effective without state authority over energy development, to the detriment of national energy*

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*independence goals. The Comment concludes that in spite of EPAct, the states retain tools needed to obstruct LNG development, and that the federal government and industry developers should therefore work cooperatively with the states to accelerate responsible development of LNG facilities. In recognition of this, FERC should ensure that their LNG regulations reserve a central and meaningful role for state participation.*

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#### INTRODUCTION

The economy of the United States depends on a stable supply of natural gas to meet the demands of utility electricity generation, industrial manufacturing, and residential heating. Over the last few years this stability has eroded as increasing energy demands were fueled almost exclusively by natural gas, resulting in a volatile market.<sup>1</sup> Wellhead prices for natural gas have more than doubled in the past three years, and Hurricanes Katrina and Rita led to a further temporary doubling of the price.<sup>2</sup> Similar dramatic fluctuations in natural gas prices in California

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1. See, e.g., DEP'T OF ENERGY, LIQUEFIED NATURAL GAS: UNDERSTANDING THE BASIC FACTS 2 (2005) [hereinafter *DOE LNG Primer*]; CAL. ENERGY COMM'N, DOC. NO. CEC-100-2005-007-CFM, 2005 INTEGRATED ENERGY POLICY REPORT 127-28 [hereinafter *2005 IEPR*] (providing a comprehensive analysis of California's energy needs and policy recommendations).

2. See CONG. RES. SERV., OIL AND GAS DISRUPTION FROM HURRICANES KATRINA AND RITA (2005); Energy Info. Admin., DOE, U.S. Natural Gas Prices, [http://tonto.eia.doe.gov/dnav/ng/ng\\_pri\\_sum\\_dcu\\_nus\\_a.htm](http://tonto.eia.doe.gov/dnav/ng/ng_pri_sum_dcu_nus_a.htm) (last visited July 16, 2006).

also contributed to the state's 2000 to 2002 energy crisis.<sup>3</sup> Throughout this period of volatile natural gas prices, national energy independence has become a top priority for policymakers.

To meet increased energy demand with clean and cost-effective fuels without increasing dependence on foreign sources of energy, policymakers are trying to encourage increases in the domestic development of conventional fossil fuels, nuclear energy, clean coal technology, biofuels, and renewable energy facilities. The Energy Policy Act of 2005 (EPAcT) contains a number of provisions intended to increase energy supply in the United States in each of these areas.<sup>4</sup> While EPAcT's 1700 pages touch on virtually every aspect of the energy industry, the Act favors expansion of energy supply over energy efficiency, primarily by concentrating federal spending on fossil fuel production.<sup>5</sup>

Meeting short-term growth in non-transportation energy demand with any supply other than natural gas presents significant challenges.<sup>6</sup> Consequently, state and federal policies have made liquefied natural gas (LNG) a key component of the nation's energy plan. LNG is a relatively clean and inexpensive fuel source that has the potential to make up for declining North American natural gas production. Some believe that LNG supply is proven and reliable, and that abundant supplies of LNG are available from overseas at low prices.

EPAcT gave the federal government exclusive jurisdiction over the siting, construction, and operation of LNG terminals, while allowing states to retain a limited role.<sup>7</sup> Although Congress intended these jurisdictional provisions to accelerate LNG imports, they actually threaten to slow the development of LNG terminals in the United States by marginalizing the role of the states. This jurisdictional grant, which

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3. See Timothy P. Duane, *Regulation's Rationale: Learning from the California Energy Crisis*, 19 YALE J. ON REG. 471, 511-12 (2002).

4. Pub. L. No. 109-58, 119 Stat. 594 (passed by Congress on July 29 and signed into law on Aug. 8, 2005).

5. See Joseph P. Tomain, *Katrina's Energy Agenda*, 20 NAT. RESOURCES & ENV'T. 43, 45-46 (2006) ("EPAcT 2005 is a continuation of traditional energy policy by paying the most attention to incumbent energy producers."); Mark A. Stein, *Congress Passes an Energy Bill in Time for the Drive Home*, N.Y. TIMES, July 30, 2005, at C3. *But see* President George W. Bush, Address at Energy Policy Act Signing, Sandia National Laboratory, Albuquerque, New Mexico (Aug. 8, 2005) (praising the bill for its "unprecedented commitment" to conservation, provisions to reduce reliance on foreign energy supplies, and promotion of diversity in energy sources). However, some believe that President Bush missed an opportunity to advance federal legislation that would more actively encourage energy independence. Thomas L. Friedman, *Too Much Pork and Too Little Sugar*, N.Y. TIMES, Aug. 5, 2005, at A15.

6. See generally NAT'L COMM'N ON ENERGY POLICY, ENDING THE ENERGY STALEMATE: A BIPARTISAN STRATEGY TO MEET AMERICA'S ENERGY CHALLENGES 44 (2004) (discussing other options for electricity generation, including nuclear, coal, biofuels, wind, solar, and hydropower).

7. See discussion *infra* Part IV.

extends to all LNG terminal proposals including those on state-controlled lands onshore, upsets the traditional authority of the states to oversee local land use patterns, protect citizen safety, and manage the public trust.<sup>8</sup> Furthermore, these jurisdictional provisions limit the ability of the states to oversee financially-prudent energy investment and innovative energy policy based on local considerations.

The debate over federal or state control of LNG facilities has important implications for California, which is in a prime location for receiving LNG from overseas and has a large and growing natural gas demand. However, California is still reeling from its recent energy crisis and is determined to control its own future by developing an energy policy that will avoid a costly reoccurrence while adequately protecting the safety of its citizens. California also recognizes that the devastating energy crisis was exacerbated by federal regulatory policy.

This Comment argues that states should be given a central and meaningful role in LNG development in order to promote safety, prudent energy infrastructure investment, and the environment, and that the benefits of allowing states to retain significant jurisdiction over LNG terminal development outweigh the benefits gained through a grant of exclusive federal control. This Comment evaluates the national implications of LNG development by analyzing the issue through the lens of California's recent experience with the proposal for an onshore facility in Long Beach.<sup>9</sup> Other states have had experiences like California's, and the lack of cooperation between federal and state regulators has delayed well-planned development of LNG facilities.

Part I describes the increase in demand for natural gas that has led to a renewed interest in LNG, and discusses the standoff that developed between the federal government and California regarding jurisdiction over LNG facilities. Part II outlines how Congress attempted to resolve this jurisdictional uncertainty in EPAct, ultimately granting the federal government exclusive jurisdiction. Part III analyzes the interests states have in meaningful participation in LNG development, and argues that active state involvement also advances federal interests. Finally, Part IV outlines the contours of authority retained by the states following EPAct,

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8. See Denise L. Desautels & Peter A. Ray, *The Struggle Between States and the Federal Government on the Siting of LNG Import Terminals: Has a Red Tide Washed Ashore in the Blue States?*, 18 ELECTRICITY J. 81 (2005) (discussing that because the Energy Policy Act of 2005 transferred implementation of some aspects of the public trust doctrine from the state to federal government, the federal government must carefully address public safety and environmental protection of proposed LNG facilities).

9. This Comment focuses on *onshore* development under the Natural Gas Act (as amended by the Energy Policy Act of 2005). Jurisdiction of offshore facilities outside of state control is under the U.S. Coast Guard. Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524 (2006).

and explains how that authority can be used to constructively advance LNG development.

## I. FOUNDATIONS OF THE LNG CONTROVERSY IN CALIFORNIA

California's increasing dependence on natural gas imports from other states influences the price and availability of natural gas across the United States and therefore is a concern for the entire nation. In 2004, California generated 41 percent of its electricity from natural gas, up from 30 percent in 1999.<sup>10</sup> The state already imports 87 percent of the gas it consumes and faces an irreversible decline in production, mirroring the decline in North American production.<sup>11</sup> Its proximity to gas production fields in Asia provides excellent opportunities for LNG imports.<sup>12</sup> However, California also has strong environmental laws that place constraints on development, and the state's citizens and government have demonstrated a commitment to developing alternatives to fossil fuel energy.<sup>13</sup> These factors establish a tension that is not unique to California. Other coastal states with LNG terminal proposals also face tradeoffs between short-term national interests in increasing LNG imports, and local interests in health, safety, and environmental protection.

### A. *The Growing Demand for Natural Gas and LNG*

Natural gas has evolved from being an unwanted byproduct of oil exploration—"the Cinderella of fuels, the forgotten stepchild of oil"<sup>14</sup>—to one of the most important sources of energy in the nation, particularly for California. After the passage of the Clean Air Act in 1970, natural gas grew in popularity because burning natural gas produces fewer regulated emissions than does conventional coal combustion.<sup>15</sup> Increasing consumption coupled with federal price controls on natural gas caused demand to outstrip supply.<sup>16</sup> This market imbalance prompted interest in

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10. 2005 IEPR, *supra* note 1, at 38.

11. *Id.* at 137.

12. *See id.* at 138; Energy Info. Admin., DOE, International Energy Outlook 2006, [http://www.eia.doe.gov/oiaf/ieo/nat\\_gas.html](http://www.eia.doe.gov/oiaf/ieo/nat_gas.html) (last visited July 16, 2006).

13. *See discussion infra* Part III.

14. FRED BOSSELMAN, JIM ROSSI & JACQUELINE LANG WEAVER, ENERGY, ECONOMICS, AND THE ENVIRONMENT: CASES AND MATERIALS 438 (2000). The authors comment that "[m]any Houstonians can still remember driving at night from Houston to the Galveston beach, 30 miles away, through oil fields so brightly illuminated by the gas flares that they could read a newspaper in the car." In the 1970s, Soviet scientists estimated there to be 30,000 years of natural gas supply trapped underground in methane hydrates. Bryan Hodgson, *Natural Gas: The Search Goes On*, 154 NAT'L GEOGRAPHIC 632 (1978).

15. *See* Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671q (2006)); BOSSELMAN ET AL., *supra* note 14, at 438.

16. *See* JOSEPH P. TOMAIN & RICHARD D. CUDAHY, ENERGY LAW IN A NUTSHELL 208 (2004). Congress had given the Federal Power Commission authority to set just and reasonable rates for interstate transmission of natural gas in the Natural Gas Act of 1938. *See* Natural Gas

natural gas importation, resulting in the first LNG imports in 1971.<sup>17</sup> Furthermore, the 1970s national energy crisis drove industry to diversify its energy usage from predominantly oil to include natural gas, in an attempt to lessen the nation's dependence on foreign sources of energy.

Although natural gas is readily available worldwide and is produced in abundance both in gas fields and in tandem with existing oil drilling operations,<sup>18</sup> transporting the fuel from overseas to the United States in its gaseous state is not economical. Suppliers must liquefy natural gas in order to make transport from overseas production sites cost-effective.<sup>19</sup> Today, most LNG tankers arrive in the United States from Trinidad and Tobago, Algeria, and Nigeria.<sup>20</sup> Receiving terminals are typically built to accommodate shipments from two hundred large tankers per year.<sup>21</sup> After delivery from the tankers, the terminals store very large quantities of LNG, endangering nearby communities and businesses by creating local risk of an accidental release of this highly flammable fuel.<sup>22</sup> The

Act, Pub. L. No. 75-688, 52 Stat. 821 (codified as amended at 15 U.S.C. §§ 717-717z (2006)). The FPC's authority to control prices was extended to sales at the wellhead by *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

17. MIGNON MARKS, CAL. ENERGY COMM'N, DOC. NO. 700-03-005, LIQUEFIED NATURAL GAS IN CALIFORNIA: HISTORY, RISKS, AND SITING 7 (2003), available at [http://www.energy.ca.gov/reports/2003-07-17\\_700-03-005.PDF](http://www.energy.ca.gov/reports/2003-07-17_700-03-005.PDF) (documenting the first U.S. shipment of LNG, received from Algeria by Distrigas at its terminal in Everett, Massachusetts). LNG actually has a long history in the United States. The first patent for LNG shipping and handling was awarded in 1914, and the first commercial liquefaction plant was built in West Virginia in 1917. Cal. Energy Comm'n, Significant Events in the History of LNG, [http://www.energy.ca.gov/lng/documents/SIGNIFICANT\\_EVENTS\\_LNG\\_HISTORY.PDF](http://www.energy.ca.gov/lng/documents/SIGNIFICANT_EVENTS_LNG_HISTORY.PDF) (last visited July 17, 2006).

18. See *DOE LNG Primer*, *supra* note 1, at 3 (explaining that most natural gas is "stranded" from consumers); ENERGY INFO. ADMIN., INTERNATIONAL ENERGY OUTLOOK 2005 at 38 [hereinafter *IEO 2005*] (estimating over 6000 trillion cubic feet of proven natural gas reserves worldwide).

19. MARKS, *supra* note 17, at 2 (explaining that liquid shipment is economical because as a liquid, natural gas occupies one six-hundredth of its gaseous volume). The energy consumption associated with liquefaction and regasification processes, coupled with overseas ship transport, are responsible for the relatively higher greenhouse gas emissions from LNG compared to domestically-produced natural gas. See *infra* note 149 and accompanying text.

20. Energy Info. Admin., DOE, World LNG Imports by Origin, 2003 (billion cubic feet), <http://www.eia.doe.gov/emeu/international/LNGimp2003.html> (last visited July 17, 2006). LNG is also imported from Qatar, Oman, and Malaysia. *Id.*

21. See Michael A. Stosser & Michael G. Andrea, *Meeting the Increased Demand for Liquefied Natural Gas*, 19-WTR NAT. RESOURCES & ENV'T 30, 30 (2005). The Long Beach LNG terminal proposed by Sound Energy Solutions, discussed *infra* Part I.B, would accommodate 120 shipments per year. FED. ENERGY REG. COMM'N & PORT OF LONG BEACH, CA, LONG BEACH, LNG IMPORT PROJECT: DRAFT ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT REPORT at ES-10 (2005) [hereinafter *Long Beach DEIS/EIR*], available at <http://www.ferc.gov/industries/lng/enviro/eis/10-07-05-eis.asp> (follow "Executive Summary" hyperlink at bottom of page).

22. ASPEN ENVTL. GROUP, INTERNATIONAL AND NATIONAL EFFORTS TO ADDRESS THE SAFETY AND SECURITY RISKS OF IMPORTING LNG: A COMPENDIUM at iii (2005) (prepared for the Cal. Energy Comm'n, Doc. No. CEC-600-2005-002).

facilities then convert the liquid back into a gas for domestic transmission, a process that presents other safety concerns. The most serious of these hazards involve cryogenic temperatures, the heating associated with depressurization, and the flammability of the gas.<sup>23</sup>

LNG imports into the United States peaked in 1978. In that year, Congress lifted federal wholesale price controls on natural gas and allowed prices to increase. This resulted in a decrease in demand and an increase in domestic production, thus reducing the incentive to import the liquefied fuel.<sup>24</sup>

LNG is once again gaining attention since domestic production of natural gas is not keeping pace with increasing demand for this relatively clean energy source. This time around, price controls are not the reason that domestic producers are struggling to meet demand. Rather, consumption is increasing against the backdrop of declining reserves.<sup>25</sup> California's in-state natural gas production only supplies 13 percent of the state's need, and it is estimated that natural gas will fuel 82 percent of the state's new electricity capacity through 2009.<sup>26</sup>

Increasing natural gas prices over the past few years have already demonstrated the effect of supply shortages in the market. From 1980 to 1999, the year before the California energy crisis, annual average national wellhead prices ranged from \$1.59 to \$2.66 per thousand cubic feet of natural gas.<sup>27</sup> From 2000 to 2005, the range of average annual prices has been \$2.95 to \$7.51, with monthly averages as high as \$11 immediately after Hurricanes Katrina and Rita. Prices have not dropped below \$5 since December 2003.<sup>28</sup>

These sustained price increases, coupled with the fact that there are very few untapped North American gas fields, have stimulated strong interest in the investment community in developing LNG import terminals. Politicians, energy specialists, and industry all recognize the

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23. *Id.* at ii-vi.

24. See Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified as amended at 15 U.S.C. §§ 3301-3432 (2006)) (prescribing a complicated phased-in scheme for decontrolling prices); Richard J. Pierce, Jr., *The Evolution of Natural Gas Regulatory Policy*, 10-SUM NAT. RESOURCES & ENV'T 53, 54-55 (1995) (documenting the regulatory history of the natural gas industry and arguing that deregulation has benefited the industry); Stosser & Andrea, *supra* note 21, at 30 (attributing the declining interest in LNG to the alleviation of the natural gas shortage which resulted from decontrolling wellhead prices).

25. See 2005 *IEPR*, *supra* note 1, at 137.

26. *Id.* (reporting data from 2004); Cal. Energy Comm'n, Database of Proposed Generation Within the Western Electricity Coordinating Council, [http://www.energy.ca.gov/electricity/wscce\\_proposed\\_generation.html](http://www.energy.ca.gov/electricity/wscce_proposed_generation.html) (last visited July 17, 2006) (projecting new capacity for 2005-2009).

27. Energy Info. Admin., DOE, U.S. Natural Gas Wellhead Price, <http://tonto.eia.doe.gov/dnav/ng/hist/n9190us3a.htm> (last visited July 17, 2006).

28. *Id.* (toggle between annual and monthly data next to "View History") (as of Apr. 2006).

importance of LNG development both nationally and particularly in California.<sup>29</sup> The Department of Energy estimates that LNG will grow from one percent of total natural gas supply in 2002 to 21 percent in 2025,<sup>30</sup> and FERC estimates that the United States will have eight or nine new LNG terminals by 2008 to accommodate short term demand.<sup>31</sup> In response, the federal government has already approved seventeen LNG terminal projects and thirty-three additional projects are proposed.<sup>32</sup> Several of these projects are proposed for locations off the California coast.<sup>33</sup>

Industry enthusiasm for LNG development in California is matched by broad political support within the state. Governor Schwarzenegger, the California Energy Commission, and the California Public Utilities Commission (CPUC) all agree that the state needs an LNG terminal on the coast, and they are actively involved in the process of evaluating alternative sites.<sup>34</sup> For example, the CPUC has acted to support LNG development because of the beneficial impact such projects might have on natural gas prices.<sup>35</sup> Currently the cost to import foreign LNG to

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29. Despite the predicted growth in reliance on LNG, DOE estimates assume that no facilities will be built off the coast of California. Their estimates show one plant will be built off the Baja California coast of Mexico, and that the remainder will be located in the Gulf of Mexico. *IEO 2005*, *supra* note 18, at 41.

30. *Id.*

31. Stosser & Andrea, *supra* note 21, at 30.

32. See FERC, Existing and Proposed North American LNG Terminals as of July 5, 2006, <http://ferc.gov/industries/lng/indus-act/terminals/exist-prop-lng.pdf> (last visited July 29, 2006); FERC, Potential North American LNG Terminals as of July 5, 2006, <http://www.ferc.gov/industries/lng/indus-act/terminals/horizon-lng.pdf> (last visited July 29, 2006).

33. California proposals include Pacific Gateway off the Northern California coast (proposed by Excelerate Energy), Cabrillo off the Ventura County shoreline (proposed by BHP Billiton), Clearwater offshore from Oxnard (proposed by Crystal Energy), and Malibu (proposed by Woodside Energy). Semptra is currently building a plant near Ensenada, Mexico, near the Mexico-California border. California Energy Commission, West Coast LNG Projects and Proposals: Status Update as of July 6, 2006, [http://www.energy.ca.gov/lng/documents/2006-07-06\\_PROJECT\\_STATUS\\_WEST\\_COAST.PDF](http://www.energy.ca.gov/lng/documents/2006-07-06_PROJECT_STATUS_WEST_COAST.PDF) (last visited July 29, 2006).

34. See *Liquefied Natural Gas: Hearing Before the Subcomm. on Energy of the S. Comm. on Energy and Natural Resources*, 109th Cong., S. HRG. NO. 109-10 17, 19 (Feb. 15, 2005) [hereinafter *LNG Hearing*] (statement of Michael R. Peevey, President, Cal. Pub. Utils. Comm'n, noting that in December 2003 CEC and CPUC jointly held a workshop which showed "the clear need for LNG facilities in the near future"); *2005 IEPR*, *supra* note 1, at 137-38; Press Release, Cal. Pub. Utils. Comm'n, PUC Acts to Ensure Reliable, Long-Term Supplies of Natural Gas for California (Sept. 2, 2004) (reporting on a regulatory proceeding decision which "sent the signal that LNG suppliers will be able to deliver their gas to California"); David R. Baker & Mark Martin, *New Fuel Battle Ignited in State: Intense Debate Over Liquefied Natural Gas Terminals Along Coast*, S.F. CHRON., Jan 23, 2005, at B1 (discussing Governor Schwarzenegger's interest in LNG development).

35. See Order Instituting Rulemaking to Establish Policies and Rules to Ensure Reliable, Long-Term Supplies of Natural Gas to California, Cal. Pub. Utils. Comm'n Decision No. 04-09-022, at 95 (Jan. 22, 2004) ("We . . . order PG&E, SoCalGas and SDG&E to submit non-discriminatory open access tariffs for all new sources of supply, including potential LNG supplies.").



California is estimated to be well below its market price and LNG has the potential to save the state over \$1 billion per year.<sup>36</sup> North American prices have increased substantially in recent years and many experts believe that prices will increase further if additional demand growth in natural gas is supplied from other states rather than by foreign LNG.<sup>37</sup>

### B. *The Conflict Between FERC and CPUC*

Despite the substantial benefits of LNG development and broad support for increasing LNG imports, these projects raise many concerns at the local level. First, safety concerns are of paramount importance to citizens and local governments. Also, regulators want to ensure that LNG development does not increase electricity prices for ratepayers. Such increases could result from dependence on a small number of suppliers or foreign sources, or through development of fossil fuel infrastructure that will be subjected to higher costs after greenhouse gas regulation. In fact, not everyone subscribes to the prediction that an expansion in LNG infrastructure will substantially reduce domestic natural gas prices.<sup>38</sup> Finally, some public interest groups are concerned about the environmental consequences of expanding infrastructure for a power source that contributes to the greenhouse gas emissions that cause global warming instead of promoting renewable energy development.<sup>39</sup> Part III describes these issues in more detail. Despite these concerns, both the state and federal governments have concluded that natural gas is currently one of the most promising fuel sources for meeting large-scale energy demand growth while protecting the environment.

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36. 2005 IEPR, *supra* note 1, at 139.

37. See *Energy Policy Act of 2005: Hearings Before the Subcomm. on Energy and Air Quality of the H. Energy and Commerce Comm.*, 109th Cong., SER. NO. 109-1 393, 398 (Feb. 16, 2005) (statement of Laurence M. Downes, Chairman, Am. Gas Ass'n) [hereinafter *Downes Statement*] (“[T]he impact of [LNG] imports upon U.S. natural gas prices will be material and significant.”); *Natural Gas Supply and Demand Issues: Hearing Before the H. Comm. on Energy and Natural Resources*, 108th Cong., SER. NO. 108-26 91, 93–94 (July 10, 2003) (statement of Alan Greenspan, Chairman, Federal Reserve) (testifying that the environmental benefits of natural gas can only be realized with new investments in domestic LNG facilities); Interview, *CALPINE: On the Record: Peter Cartwright*, S.F. CHRON., May 23, 2004, at J-3 (Calpine’s CEO estimating that California will pay about 50 percent more for LNG-derived natural gas delivered from Texas).

38. Dale Nesbitt, *What Will LNG Imports Do to North American Gas Prices?*, 21 NATURAL GAS & ELEC. 8 (Mar. 2005) (predicting that natural gas prices will remain high even if new LNG terminals are built, and that the price will be nearly the same whether or not terminals are built).

39. See Letter from David Gordon, Executive Director, Pacific Environment et al., to Governor Arnold Schwarzenegger, State of California (Feb. 23, 2006) [hereinafter *Pacific Environment Letter*]. Even though natural gas has very low emissions of criteria pollutants (except NO<sub>x</sub>) that are regulated by the Clean Air Act, it is a non-renewable fossil fuel that emits greenhouse gases. See *infra* note 149 and accompanying text.

Although development of LNG terminals in California had broad state support, a conflict arose in 2003 between the California Public Utilities Commission (CPUC) and the Federal Energy Regulatory Commission (FERC) when both agencies asserted jurisdiction over a proposed LNG terminal in Long Beach, California. This section briefly discusses this conflict, the regulatory background of LNG jurisdiction, and the events leading up to the EPAct provision giving FERC exclusive jurisdiction over the siting, construction, and operation of all LNG terminals.

Since passage of the Natural Gas Act (NGA) in 1938, the natural gas industry has been simultaneously regulated by both the federal and state governments.<sup>40</sup> The NGA gave authority to FERC, known as the Federal Power Commission at the time, to regulate interstate sales of natural gas to protect consumers.<sup>41</sup> The intent was to supplement the states' intrastate jurisdiction by filling the regulatory gap that existed in the interstate natural gas market.<sup>42</sup> The NGA established dual jurisdiction, with the federal government regulating interstate sales of natural gas, and the states retaining responsibility for ensuring reliable utility service at reasonable prices and for protecting the public's safety by siting, permitting, and enforcing environmental regulations.<sup>43</sup> For example, in California a proposed natural gas facility must undergo environmental review under the California Environmental Quality Act.<sup>44</sup> Then the developer must apply for and receive a Certificate of Public Convenience and Necessity (CPCN) from CPUC before constructing facilities.<sup>45</sup> Until recently, the state played the central role in such siting determinations, including those for onshore LNG facilities.

FERC's active facilitation of LNG development began in 2002, when it issued an important deregulation decision intended to encourage investment in new LNG facilities.<sup>46</sup> The decision lifted the requirement

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40. See 15 U.S.C. § 717 (2006); see also Monica Berry, *Liquefied Natural Gas Import Terminals: Jurisdiction Over Siting, Construction, and Operation in the Context of Commerce Clause Jurisprudence*, 26 ENERGY L.J. 135 (2005) (providing a thorough review of LNG jurisdiction and regulation).

41. Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 609–10 (1944).

42. *Id.* at 610.

43. See, e.g., 2004 FED. ENERGY REGULATORY COMM'N ANN. REP. 6; FERC, What FERC Does, <http://ferc.gov/about/ferc-does.asp> (last visited July 29, 2006).

44. California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE §§ 21000–21177 (2005).

45. CAL. PUB. UTIL. CODE § 1001 (2005) (“No . . . gas corporation . . . shall begin the construction of . . . a line, plant, or system . . . without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.”).

46. See Hackberry LNG Terminal, LLC, 101 F.E.R.C. ¶ 61,294 (2002) (“Preliminary Decision on Non-environmental Issues”). But see *infra* note 140 for a discussion of market manipulation concerns.

that LNG terminals provide “open access” service to their facilities.<sup>47</sup> No longer would the operators of private LNG terminals be required to accept LNG shipments from any supplier. Instead, the entire capacity of the LNG terminal could be reserved for deliveries from its owner. The ruling had the intended effect of stimulating new project proposals.<sup>48</sup>

In response to this deregulation, Sound Energy Solutions (SES)—a venture of Mitsubishi Corporation, later to be joined by ConocoPhillips—initiated an informal pre-filing process with FERC in September 2003 for a LNG terminal to be located in the Port of Long Beach in Los Angeles County.<sup>49</sup> The proposed terminal would be capable of receiving 700 million standard cubic feet per day of natural gas at a 1100 foot-long LNG ship berth.<sup>50</sup> The facility would have two LNG storage tanks, each having a capacity of 160,000 cubic meters, and a new 2.3 mile gas line would connect the facility to the existing natural gas transmission network.<sup>51</sup> The proposed 25-acre site is two miles from downtown Long Beach, California’s fifth largest city.

CPUC believed that SES should have made its pre-filing application to the CPUC instead of FERC. CPUC responded to SES’s Long Beach terminal application to FERC by filing a notice of intervention and protest with FERC, challenging FERC’s exclusive jurisdiction over the project.<sup>52</sup> In March 2004, FERC issued a declaratory order asserting its exclusive jurisdiction, stating that its decision “serves the public interest by providing uniform federal oversight of siting, construction, operation, and safety of facilities to be used to import foreign LNG to meet the nation’s critical energy needs.”<sup>53</sup> FERC found jurisdiction over this project in NGA section 3 which gives it authority over imports from foreign countries.<sup>54</sup> CPUC subsequently filed an appeal with the D.C. Circuit, which was consolidated with a related case before the Ninth

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47. *Hackberry*, 101 F.E.R.C. at 62,176.

48. For examples, see *supra* note 33.

49. Opening Brief of Petitioner at 10–11, *Californians for Renewable Energy, Inc. v. Fed. Energy Regulatory Comm’n (CPUC v. FERC)*, No. 04-73650, 2004 WL 2848283 (9th Cir. Nov. 1, 2004). SES had not complied with the CPUC’s letter informing SES that the Long Beach terminal application must be filed with the state agency. See Letter from William Ahern, Executive Director, Cal. Pub. Utils. Comm’n, to Thomas E. Giles, Executive Vice President, Sound Energy Solutions (Oct. 30, 2003), in *Sound Energy Solutions*, No. CP-04-58-000 (Fed. Energy Regulatory Comm’n Feb. 23, 2004) (Notice of Intervention and Protest of the Public Utilities Commission of the State of California, Attachment A).

50. *Long Beach DEIS/EIR*, *supra* note 21, at 2-1, available at <http://www.ferc.gov/industries/lng/enviro/eis/10-07-05-eis.asp> (follow “Section 2” hyperlink at bottom of page).

51. *Id.*

52. *Sound Energy Solutions*, *supra* note 49.

53. *Sound Energy Solutions*, 106 F.E.R.C. ¶ 61,279, *reh’g denied*, 107 F.E.R.C. ¶ 61,263, 62,157 (2004) (quotation from denial of rehearing).

54. Natural Gas Act § 3(a), 15 U.S.C. § 717b(a) (2006) (“[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.”); 107 F.E.R.C. ¶ 61,263, 62,157.

Circuit,<sup>55</sup> and argued that Congress had not given FERC jurisdiction over LNG siting, construction, and operation in the Natural Gas Act (NGA).

CPUC argued that the jurisdiction granted to FERC under section 3 did not extend to the Long Beach proposal because the gas from this project was solely for intrastate consumption.<sup>56</sup> According to CPUC, since NGA section 1(b) restricts FERC's jurisdiction to facilities that involve transportation and sales in interstate commerce, the proposal falls under the state's jurisdiction.<sup>57</sup> Additionally, NGA section 7 gives FERC jurisdiction to issue certificates of public convenience and necessity (CPCNs) to a "natural-gas company," which is defined as "a person engaged in the transportation of natural gas in *interstate* commerce, or the sale in *interstate* commerce of such gas for resale,"<sup>58</sup> where "interstate commerce" is defined to exclude foreign commerce.<sup>59</sup> Since the entirety of the gas being supplied through SES's proposed terminal would be sold, transported, and consumed *intrastate*, CPUC argued that pipelines associated with the LNG terminal were outside of FERC's granted jurisdiction, even though the gas was imported from a foreign country.<sup>60</sup>

FERC's response was that it has always applied its section 7 certification requirements to facilities applying for authorization under section 3, and that Congress intended to grant FERC the ability to assert this jurisdiction.<sup>61</sup> The issues before the Ninth Circuit were the

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55. See *Californians for Renewable Energy, Inc. v. Fed. Energy Reg. Comm'n (CPUC v. FERC)*, Nos. 04-73650 & 04-75240 (9th Cir. Mar. 3, 2004).

56. Opening Brief of Petitioner, *supra* note 49, at 17-19.

57. See Revised Reply Brief of Petitioner at 5-6, *CPUC v. FERC*, Nos. 04-73650 & 04-75240 (May 3, 2005), 2005 WL 1791830; Natural Gas Act § 1(b), 15 U.S.C. § 717(b) (2006) ("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 . . . and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas . . .") (as amended by Energy Policy Act of 2005).

58. 15 U.S.C. § 717a(6) (2006) (defining "natural gas company") (emphasis added); see also *id.* § 717f (giving FERC authority to approval applications for certain natural gas proposals). Congress gave the states jurisdiction over the regulation of intrastate pipelines in the Hinshaw Amendment. See *id.* § 717(c). Intrastate pipelines that fall under this provision are known as Hinshaw Pipelines.

59. *Id.* § 717a(7) ("'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.").

60. Opening Brief of Petitioner, *supra* note 49, at 16.

61. Brief of Respondent at 7-8, *Californians for Renewable Energy, Inc. v. Fed. Energy Regulatory Comm'n (CPUC v. FERC)*, Nos. 04-73650 & 04-75240 (9th Cir. Mar. 3, 2004), 2004 WL 3318082. The CPUC argued that the court has distinguished between FERC's regulatory authority over interstate commerce and foreign commerce. See *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 150-51 (D.C. Cir. 1948). FERC responded by quoting an earlier court decision: "it is fully within the Commission's power, so long as that power is responsibly exercised, to impose on imports of natural gas the equivalent of Section 7 certification requirements both as to facilities and . . . as to sales within and without the state of importation." Brief of Respondent, at 12-13 (quoting *Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1064 (D.C. Cir.), *cert. denied*, 449 U.S. 834 (1974) (omission in original)).

distinctions between foreign, interstate, and intrastate commerce, and the scope of FERC's jurisdiction over LNG terminals under NGA sections 3 and 7.<sup>62</sup> An industry spokesperson characterized these issues as causing a "cloud of uncertainty" over proposed LNG projects.<sup>63</sup>

Before the Ninth Circuit ruled on this case, Congress resolved these issues by granting FERC exclusive jurisdiction in the Energy Policy Act of 2005.

## II. CONGRESS SIDES WITH FERC WHILE PROMOTING FOSSIL FUELS

The uncertainty concerning LNG terminal jurisdiction, coupled with pressure from federal regulators and industry representatives, led Congress to take action.<sup>64</sup> The Energy Policy Act of 2005 (EPAcT) included a provision granting FERC exclusive jurisdiction over the siting, construction, and operation of LNG terminals.<sup>65</sup> EPAcT settled the jurisdictional issue in favor of FERC, attempting to resolve what some saw as Not-In-My-Backyard (NIMBY) concerns that were stalling the development of LNG terminals, particularly in California and on the East Coast.<sup>66</sup> This section outlines EPAcT and describes its provisions affecting LNG development.

### A. Introduction to the Energy Policy Act of 2005

From the outset of his presidency, George W. Bush made national energy policy a priority of his administration. After nearly four years of advocating for the bill,<sup>67</sup> he signed into law the Energy Policy Act of 2005 (EPAcT) on August 8, 2005.<sup>68</sup> The process began in early 2001 with the announcement that Vice President Dick Cheney would lead the

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62. Sound Energy Solutions, 107 F.E.R.C. ¶ 61,263, 62,159 (2004).

63. *Downes Statement*, *supra* note 37, at 399.

64. *See id.*; *LNG Import Terminal and Deepwater Port Siting: Federal and State Roles, Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the Comm. on Government Reform*, 108th Cong., SER. NO. 108-238 38-47 (June 22, 2004) (prepared statement of Pat Wood, III, Chairman, Fed. Energy Regulatory Comm'n).

65. Energy Policy Act of 2005 § 311(c)(2), 15 U.S.C. § 717b(e)(1) (2006).

66. *See, e.g.*, 151 CONG. REC. H6955 (2005) (Representative Gene Green of Texas, speaking before the House on the Conference Report for H.R. 6, July 28, 2005, stating that the "conference report ensures that 'not-in-my-backyard' LNG opposition will not drive electric prices through the roof and drive manufacturing jobs overseas to Asia and Europe in search of affordable natural gas").

67. Earlier incarnations of the Energy Policy Act passed the House in 2001, 2003, and 2005, and the Senate in 2002, 2003, and 2005. It was not until July 2005 that both houses could come to agreement on the bill.

68. Press Release, White House, President Bush Signs Into Law a National Energy Plan (Aug. 8, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/08/20050808-4.html>; Pub. L. No. 109-58, 119 Stat. 594 (2005).

president's Energy Task Force.<sup>69</sup> It was clear from the beginning that the president believed expanding fossil fuel supply and infrastructure was the most important aspect of an energy plan.<sup>70</sup> This sentiment was communicated succinctly by Vice President Cheney in his now infamous Toronto speech: “[c]onservation may be a sign of personal virtue, but it is not a sufficient basis for a sound, comprehensive energy policy.”<sup>71</sup> While the resulting legislation contained a broad range of subsidies for renewable energy and conservation incentives, it focused its incentives on the fossil fuel industry.<sup>72</sup>

EPAct touches on all facets of the energy industry in the United States and even reaches abroad.<sup>73</sup> Congress provided \$5.5 billion in subsidies for coal projects, oil exploration, oil drilling on public lands, refinery expansions, natural gas infrastructure, and offshore drilling. Over \$3 billion is provided for renewable energy incentives over 10 years, and another \$3 billion for electric utilities including the nuclear power industry.<sup>74</sup> EPAct encourages conservation by extending daylight savings

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69. Press Release, White House, Remarks by the President at Energy Policy Meeting (Jan. 29, 2001), available at <http://www.whitehouse.gov/news/releases/20010129-1.html>.

70. The Energy Task Force has been the subject of litigation seeking the release of documents that were provided to the government by the participants. See, e.g., *Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367 (2004) (holding that the White House could not be forced to disclose certain documents from the energy task force). The Task Force was also subject to heavy criticism for its bias towards the fossil fuel industry. Participants included Enron, ExxonMobil, Conoco, Shell Oil, BP, Duke, and the Independent Petroleum Association of America. No public interest organizations were invited to participate. Dana Milbank & Mike Allen, *Energy Contacts Disclosed; Consumer Groups Left Out, Data Show*, WASH. POST, Mar. 26, 2002, at A1; Dana Milbank & Justin Blum, *Document Says Oil Chiefs Met with Cheney Task Force*, WASH. POST, Nov. 16, 2005, at A1.

71. Joseph Kahn, *Cheney Promotes Increasing Supply as Energy Policy*, N.Y. TIMES, May 1, 2001, at A1.

72. Senator John McCain labeled the 2004 version of the Senate's bill the “No-Lobbyist-Left-Behind Act.” Peter van Doren & Jerry Taylor, *A Low-Voltage Energy Bill*, PUB. UTIL. FORT., Oct. 2005, at 52. The authors characterize the bill as “a massive wish list of contradictory requests forwarded by lobbyists to transfer resources from the general public to their employers.” *Id.*

73. International provisions include overseas collaboration and investment nuclear fusion research and greenhouse gas reduction technologies. Energy Policy Act of 2005 §§ 643(c)(2), 1611. Reflecting the present mood in Washington after China National Offshore Oil Corporation's offer to acquire Unocal, the Act calls for a study on the implications of China's increasing energy demand on the “political, strategic, economic, or national security interests of the United States.” *Id.* § 1837.

74. See Stein, *supra* note 5. By one group's estimation, after authorized spending is accounted for, the \$14.5 billion in direct spending inflates to a total of \$88 billion over ten years. *Id.*; Taxpayers for Common Sense, *Cost Analysis of the Energy Policy Act of 2005*, by title, <http://www.taxpayer.net/energy/2005EnergyBillCostAnalysis.htm> (last visited July 29, 2006). Compare the Energy Policy Act's \$3 billion in renewable energy incentives nationwide to the California Solar Initiative (CSI), which was adopted by the CPUC in January 2006. CSI will provide \$2.8 billion in incentives over ten years for solar installations just within the state of California. See Cal. Pub. Utils. Comm'n, *Interim Order Adopting Policies and Funding for the California Solar Initiative*, Decision No. 06-01-024, Rulemaking No. 04-03-017 (Jan. 12, 2006)

time<sup>75</sup> and by requiring utilities to offer their customers smart-metering and net-metering facilities, which will encourage conservation and renewable energy, respectively.<sup>76</sup> To reduce development barriers, EPAct relaxes environmental regulations for certain oil and gas projects.<sup>77</sup> In a major move toward deregulation, it repealed the Public Utilities Company Holding Act of 1935 (PUHCA), freeing the electric utility industry from merger and acquisition restrictions that were enacted to prevent market manipulation during the Depression.<sup>78</sup>

Perhaps EPAct is even more notable for what is absent from the final version. Despite the nation's heavy reliance on imported oil, an effort to increase fuel economy standards for cars and trucks was defeated.<sup>79</sup> Senators McCain and Lieberman's proposal for mandatory caps on greenhouse gas emissions was also defeated, leaving only voluntary measures in the final legislation.<sup>80</sup> Finally, the effort to establish a Renewables Portfolio Standard failed by just two votes in the Senate.<sup>81</sup> The provision would have required that electric utilities provide at least 10 percent renewable energy by 2020.<sup>82</sup> These three rejected proposals represented the most promising opportunities to encourage the development of energy-efficient technologies and conservation in market-friendly ways. Instead of setting national achievement goals for energy consumption and technology, Congress chose to subsidize specific technologies, hoping that this transfer of resources would promote national energy security. Congress will likely revisit these and other proposals soon; six months after the passage of EPAct, President Bush called for clean and reliable energy after reporting that "America is addicted to oil . . . ."<sup>83</sup>

While EPAct has generated both praise and criticism, the purpose here is to identify the main thrust of the Act, so that it may be compared

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[hereinafter *CSI Order*], available at [http://www.cpuc.ca.gov/PUBLISHED/FINAL\\_DECISION/52898.htm](http://www.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/52898.htm).

75. Energy Policy Act of 2005 § 110 (amending 15 U.S.C. § 260a(a) (2000)).

76. *Id.* §§ 1251–1252 (amending PURPA at 16 U.S.C. §§ 2621(d), 2622, 2625, 2634, 2642 (2000)).

77. Certain projects are exempted from the Federal Water Pollution Control Act (Clean Water Act) and the National Environmental Policy Act (NEPA). Energy Policy Act of 2005 §§ 323, 390.

78. *Id.* § 1263 (repealing PUHCA, 15 U.S.C. § 79 (2000)).

79. H.R. 6, Boehlert Amdt., 109th Cong. (rejected by House of Representatives 254 to 177, Apr. 20, 2005). The bill does provide modest incentives for hybrid vehicles. Energy Policy Act of 2005 §§ 711–712.

80. Climate Stewardship and Innovation Act of 2005, H.R. 6, McCain S. Amdt. No. 826 (rejected by Senate 60 to 38, on June 22, 2005).

81. H.R. 6, Bingaman S. Amdt. No. 791 (rejected by Senate 52 to 48, June 16, 2005). Renewables portfolio standards take various forms, but generally require electric utilities to provide a minimum percentage of renewable energy to their consumers by a target year.

82. *Id.*

83. President George W. Bush, State of the Union Speech (Jan. 31, 2006).

with the activities of certain individual states. For example, as discussed further in Part III, many of the provisions that were not ultimately retained in the final version of EAct are currently being enacted in California.<sup>84</sup> The next section describes some of the limitations EAct put on state experimentation in energy policy.

### *B. Provisions of EAct that Disempower the States*

As in many other areas of federal regulation, Congress has historically maintained a substantial role for state governments in regulation of the natural gas industry. This section describes how EAct reduced the role of states in both safety oversight and energy policy development.

Congress imposed federal regulation on the natural gas industry in response to the constitutional prohibition of state regulation of interstate markets. In 1924, the Supreme Court had ruled that the Dormant Commerce Clause prevented states from regulating interstate natural gas shipments, creating what was known as the Attleboro Gap.<sup>85</sup> This regulatory gap fostered growth of monopoly and monopsony powers, and in response the Congress passed the Natural Gas Act of 1938 granting the Federal Power Commission (FPC) jurisdiction over these interstate shipments.<sup>86</sup> The NGA represents classic New Deal legislation, and the Court upheld the law as a valid exercise of Congress' powers under the Commerce Clause.<sup>87</sup> The NGA was interpreted as establishing a system of cooperative federalism where the FPC could exercise its authority to regulate only in areas where the states could not.<sup>88</sup>

EAct's LNG provisions upset this historical apportionment of power between the federal and state governments in the area of natural gas regulation. In response to the controversy over the Long Beach terminal and following a general interest in fostering LNG development,<sup>89</sup> Congress included a provision in EAct granting FERC

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84. See also *infra* note 164.

85. *Missouri ex rel. Barrett v. Kan. Natural Gas Co.*, 265 U.S. 298 (1924). *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.* applied the same principle to interstate electricity transmission. 273 U.S. 83 (1927).

86. Pub. L. No. 75-688, 52 Stat. 821 (codified as amended at 15 U.S.C. §§ 717-717z (2006)). The Federal Power Commission was replaced by Federal Energy Regulatory Commission in 1977.

87. See U.S. CONST. art. I, § 8, cl. 3; *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

88. Congressional attempts to fill the regulatory gap outside state authority have generally been good for both the energy industry and for the protection of consumers. Frank R. Lindh, *Federal Preemption of State Regulation in the Field of Electricity and Natural Gas: A Supreme Court Chronicle*, 10 ENERGY L.J. 277 (1989).

89. See Jim Carlton, *Energy Bill May Tilt Fight over Gas Plants; California Dispute About LNG Terminal Sparks Shift to More Federal, Less State, Sway*, WALL ST. J., Aug. 3, 2005, at A4.



“exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal” under section 3 of the NGA,<sup>90</sup> mooted the key issues in CPUC’s appeal. Recognizing this clear statement of Congress, CPUC voluntarily withdrew its suit.<sup>91</sup> EPAct section 3 expanded federal NGA authority to LNG facilities located within the state, including those facilities that will supply natural gas solely intrastate. Congress weakened the longstanding protections that the NGA provided for state control over intrastate natural gas facilities, running counter to the spirit of the New Deal paradigm that preserved state regulatory authority.<sup>92</sup>

This loss of jurisdiction was a significant blow to the coastal state governors who had asked Congress for concurrent federal-state jurisdiction over LNG terminals.<sup>93</sup> To add insult to injury, local safety concerns raised by coastal states did not carry as much weight with Congress as the military’s concerns over interference with training activities. While EPAct requires FERC to obtain approval from the Secretary of Defense to ensure that a proposed terminal will not affect military exercises,<sup>94</sup> Congress rejected a similar amendment requiring consultation with the state’s governor, despite strong support from nine Republican senators from coastal states.<sup>95</sup>

EPAct also instructs FERC to maintain a consolidated record that will be the exclusive record used for any appeals or reviews.<sup>96</sup> This provision restricts the ability of states to challenge findings in the record upon appeal, in theory allowing for the possibility that states would be unable to effectively raise safety concerns during the appeals process. For example, FERC’s siting process does not currently provide for cross-examination of its experts nor a public hearing, thereby potentially blocking the development of crucial safety information on the record. This information will not be available to a reviewing court.

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90. Energy Policy Act of 2005 § 311(c)(2), 15 U.S.C. § 717b(e)(1) (2006).

91. See Harvey Y. Morris, Assistant Gen. Counsel, Cal. Pub. Utils. Comm’n, Presentation at the 2005 Environmental Law Conference, Yosemite, Cal.: Chasing LNG Terminals in Coastal California (Oct. 23, 2005) (accompanying outline, at 4).

92. See *supra* notes 40–45 and accompanying text. The utility consensus was further eroded by decisions relating to electric power in Order No. 888. 78 F.E.R.C. ¶ 61,220 (Mar. 4, 1997) (“Promoting Wholesale Competition Through Open Access”) was affirmed and extended to retail markets by *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002).

93. See Letter from Governors Schwarzenegger (Cal.), Romney (Mass.), Blanco (La.), Minner (Del.), Carcieri (R.I.), Codey (N.J.), to Pete Domenici, Chairman, Senate Comm. on Energy & Natural Res. (May 25, 2005).

94. Energy Policy Act of 2005 § 311(c)(2), 15 U.S.C. § 717b(f) (2006). The Camp Pendleton military base conducts training exercises in the waters off the coast of Southern California.

95. H.R. 6, Feinstein S. Amdt. 841, 109th Cong. (rejected by Senate 52 to 45, June 22, 2005). Republican Senators from the coastal states of Alabama, Florida, Louisiana, Maine, New Hampshire, Oregon, Rhode Island, South Carolina, and Virginia supported the amendment requiring state consultation.

96. Energy Policy Act of 2005 § 313(a), 15 U.S.C. § 717n(d) (2006).

Although EAct does include some provisions that attempt to protect the ability of states to ensure safety, FERC's promulgated rules may not adequately protect safety.<sup>97</sup> EAct mandates that FERC "encourage applicants to cooperate with State and local officials."<sup>98</sup> FERC's final regulations developed pursuant to this provision require that the applicant only notify the governor-designated state agency of the project application, but do not require FERC to share substantive information about the project.<sup>99</sup> FERC decided that LNG terminal applicants do not need to provide project information to the state agency because the applicant would be voluntarily motivated to do so, and because some states would not want to be overloaded with this project information.<sup>100</sup> FERC also justified its decision in part by noting that application materials are posted to their website.<sup>101</sup> However, a review of the SES Draft Environmental Impact Statement revealed that approximately one of every ten pages was redacted for security purposes.<sup>102</sup>

Congress also instructed FERC to consult with the state regarding local safety considerations prior to approving any project.<sup>103</sup> FERC cites this provision when claiming that EAct expands state powers by giving states the authority to conduct safety inspections of LNG facilities.<sup>104</sup> However, historically there has been a presumption that states would play a dominant role in local safety considerations even without any explicit statement from Congress.<sup>105</sup> Thus, this provision merely confirms existing state powers and transfers final authority over safety concerns to FERC.

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97. See *infra* notes 183–186 and accompanying text.

98. Energy Policy Act of 2005 § 311(d), 15 U.S.C. § 717b-1(a) (2006).

99. See *id.*, 15 U.S.C. § 717b-1(b). Governor Schwarzenegger designated the California Energy Commission.

100. Pre-Filing Procedures for Review of LNG Terminals and Other Natural Gas Facilities, Order No. 665, 113 F.E.R.C. ¶ 61,015, para. 66 (Oct. 7, 2005). FERC's draft rule did not even provide for notification of the state commission. Regulations Implementing Energy Policy Act of 2005, No. RM05-31-000 (Fed. Energy Regulatory Comm'n Sept. 14, 2005) (Notice of Intervention and Comments of the Public Utilities Commission of the State of California). In declining to require the applicant to provide materials to the state, FERC wrote "the Commission wishes to make clear . . . that it does not read the legislation as obligating the prospective applicant to provide state agencies with material that is not clearly required by those state agencies' regulations for the permits or purposes in which those agencies are involved." 113 F.E.R.C. ¶ 61,015, para. 66.

101. 113 F.E.R.C. ¶ 61,015, para. 65 n.16.

102. See *Long Beach DEIS/EIR*, *supra* note 21. Per FERC regulations, the protected information would be available upon written request to FERC.

103. Energy Policy Act of 2005 § 311(d), 15 U.S.C. § 717b-1(b) (2006).

104. Joseph T. Kelliher, *Letter to the Editor: Energy Bill Expands State Inspection Powers*, WALL ST. J., Aug. 8, 2005, at A11; see also Energy Policy Act of 2005 § 311(d), 15 U.S.C. § 717b-1(d) (2006) (providing process for state to conduct safety inspections).

105. Cf. *infra* note 181.

The ability of state and federal agencies to collaborate on safety-related issues recently failed a test run. After the issuance of the Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the Long Beach terminal proposal, the California Energy Commission (CEC) requested key safety documents from FERC. As the lead agency responsible for working with FERC, CEC is responsible for identifying local safety concerns. CEC claimed that FERC denied access to important documents needed to review the safety of the facility.<sup>106</sup> FERC refused to release the documents unless CEC signed a non-disclosure agreement. FERC also refused to extend the comment period on the Draft EIS/EIR so that CEC would have an opportunity to review the safety documents.<sup>107</sup> CEC refused to sign the non-disclosure agreement because doing so would have left it unable to share the results of its safety investigation with the governor and the public.<sup>108</sup> Although this particular issue has been resolved to the satisfaction of both parties after months of comment and conflict,<sup>109</sup> the larger lesson is that the current process appears to have marginalized the ability of the states and localities to participate in the safety review process without engaging in protracted debates.

In addition to the LNG provisions limiting state control, EPA preempted states in other important areas. FERC is given backstop siting authority over transmission line projects, enabling FERC to issue construction permits for projects even if the relevant state permitting commission objects.<sup>110</sup> Developers holding these permits can acquire rights-of-way to private property without the state's consent.<sup>111</sup> Another preemption provision amends the Clean Air Act to prohibit states from implementing requirements for new alternative fuels, potentially frustrating states' attempts to develop innovative strategies for decreasing air pollution.<sup>112</sup> Furthermore, defendants who are sued for actual or

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106. Deborah Schoch, *Report on Liquefied Gas Safety Withheld*, L.A. TIMES, Dec. 7, 2005, at B3.

107. Letter from J. Mark Robinson, Director, Office of Energy Projects, Fed. Energy Reg. Comm'n, to Kenneth L. Glick, Staff Counsel, Cal. Energy Comm'n (Dec. 8, 2000).

108. See Schoch, *supra* note 106.

109. See *California LNG Project Hazard Data Agreement Shuts Out Locals*, RISK POLICY REPORT, Feb. 21, 2006.

110. Energy Policy Act of 2005 § 1221, 16 U.S.C. § 824p(a) (2006). The Secretary of Energy must have first designated a National Electric Transmission Corridor after considering national energy independence, economic vitality, and national energy policy. 16 U.S.C. § 824p(b).

111. See *id.* § 824p(e).

112. See Energy Policy Act of 2005 § 1541(b), 42 U.S.C. § 7545(c)(4)(C) (2006); Letter from S. William Becker, Executive Director, State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officials, to Joe Barton, Chairman, House Comm. on Energy and Commerce et al. (Apr. 11, 2005), available at <http://www.4cleanair.org/HouseEnergyBill-SALetter-041105-lthd.pdf>. Non-attainment areas are localities that consistently exceed the Clean Air Act pollution standards. See Clean Air Act § 107(d), 42 U.S.C. § 7407(d) (2006).

threatened methyl tertiary butyl ether (MTBE) contamination may remove the suit from state to federal court, which is traditionally less sympathetic to plaintiffs in environmental suits.<sup>113</sup>

The next section will show how a regulatory scheme that empowers the states can advance national energy independence in a way that advances for local safety, environmental, and economic concerns.

### III. MEANINGFUL STATE PARTICIPATION PROMOTES BOTH STATE AND NATIONAL INTERESTS

Individual states are strongly motivated to regulate the natural gas industry in a way that protects the safety, economic, and environmental interests of its citizens. Those interests are also advanced by state policies that reduce the state's dependence on imported fossil fuels. For example, California has taken an active role in developing its own energy policy to encourage energy independence and through the efforts of its legislature, CPUC, and CEC, the state has achieved dramatic energy intensity improvements since the 1970 energy crisis.<sup>114</sup> These state interests and strategies are explained in more detail below.

Federal efforts that interfere with this local process threaten to discourage state innovations that will help the nation achieve energy security. Left free to experiment, states will be stimulated to invent and refine useful innovations to address their energy problems. Without a meaningful way to address safety and economic concerns surrounding LNG development, states will instead focus their efforts on subverting federal preemptive policies, as demonstrated throughout this Comment with respect to the situation in California. The states' interests in LNG are described in the first two sections, followed by a discussion of national interests served through meaningful state participation.<sup>115</sup>

#### *A. States' Safety and Environmental Considerations*

States seek to mitigate the impacts of industrial activities to protect health and safety and to limit environmental damage. When six state governors asked Congress to provide concurrent state and local control over LNG terminal siting, operation, and construction, they were

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113. See Energy Policy Act of 2005 § 1503. MTBE is an oxygenate that was commonly added to gasoline, and was later found to have contaminated groundwater. The MTBE provision that was agreed upon is much less protective of industry than previous versions of the bill which provided complete immunity.

114. See 2005 IEPR, *supra* note 1, at 66–7 (“[E]lectricity use per person in California has remained relatively flat over the past 30 years while the nation has seen a 45 percent increase.”).

115. See generally Barry G. Rabe, Mikael Román & Arthur N. Dobelis, *State Competition as a Source Driving Climate Change Mitigation*, 14 N.Y.U. ENVTL. L.J. 1 (2005) (providing an analysis of differentials in state climate change policies).

primarily concerned with the safety of their states' citizens.<sup>116</sup> This section describes why states are not satisfied with FERC's holding exclusive jurisdiction over LNG facilities.

FERC claims an impressive track record with the facilities currently operating under its jurisdiction, noting that no fatalities have occurred in thirty years.<sup>117</sup> However, experience with LNG terminals is fairly limited. Of the five facilities currently operating in the United States, three came online in just the last three years.<sup>118</sup> Although the LNG industry's safety record under FERC is commendable, this limited experience does not warrant abandoning a robust and expansive safety review. Serious accidents have occurred at LNG terminals outside of the United States—most recently at a facility in Algeria in 2004 that resulted in 27 fatalities.<sup>119</sup> The last major LNG accident in the United States occurred in Cleveland in 1944, resulting in 130 fatalities.<sup>120</sup>

Safety has been at the center of the controversy over the Long Beach proposal. Public exposure to the radiant heat resulting from an ignited spill could cause serious burns and possibility fatalities. Sandia National Labs recently characterized the risks of an LNG spill over water in a location like the proposed Long Beach site to be “small and manageable.”<sup>121</sup> FERC relied on this analysis in its Draft EIS/EIR, concluding that a worst-case spill at the proposed terminal could adversely affect areas within 1.5 miles of the facility.<sup>122</sup> CPUC's expert analysis showed that such a spill could affect areas within three miles of

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116. See Letter from Governors, *supra* note 93.

117. *LNG Hearing*, *supra* note 34, at 62 (statement of J. Mark Robinson, Office of Energy Projects Director, Fed. Energy Regulatory Comm'n). A 1979 accident in Lusby, Maryland resulted in one fatality. FED. ENERGY REGULATORY COMM'N, A GUIDE TO LNG: WHAT ALL CITIZENS SHOULD KNOW 3 (2005), available at <http://www.ferc.gov/for-citizens/citizen-guides/citz-guide-lng.pdf>.

118. One of these three facilities is new, and two existing terminals were restarted. ENERGY INFO. ADMIN., U.S. LNG MARKETS AND USES: JUNE 2004 UPDATE 5 (2004).

119. California Energy Commission, Algerian LNG Plant Explosion Fact Sheet, [http://www.energy.ca.gov/lng/news\\_items/2004-01\\_algeria\\_factsheet.html](http://www.energy.ca.gov/lng/news_items/2004-01_algeria_factsheet.html) (last visited July 29, 2006). FERC investigated this accident, finding that such an accident could not happen at the type of facilities in operation in the United States. Nevertheless, it implemented lessons-learned at its U.S. facilities within three months. *LNG Hearing*, *supra* note 34, at 62.

120. Baker & Martin, *supra* note 34.

121. SANDIA NATIONAL LABS, GUIDANCE ON RISK ANALYSIS AND SAFETY IMPLICATIONS OF A LARGE LIQUEFIED NATURAL GAS (LNG) SPILL OVER WATER 14, 21 (2004) [hereinafter SANDIA REPORT].

122. *Long Beach DEIS/EIR*, *supra* note 21, at 4-161 (estimating the hazard range from an unignited vapor cloud caused by an intentional spill to extend to 2500 meters (approx. 1.5 miles)); SANDIA REPORT, *supra* note 121, at 53. The study found that “the most significant impacts on public safety and property exist within approximately 500 meters of a spill due to thermal hazards from a fire, with lower public health and safety impacts at distances beyond approximately 1,600 meters.” *Long Beach DEIS/EIR*, *supra* note 21, at 4-161. See also SANDIA REPORT, *supra* note 121, at 15, 45.

the facility.<sup>123</sup> Despite these discrepancies in expert opinion, the current procedures promulgated by FERC do not give CPUC any opportunity for cross-examination or public hearing on this safety issue. Should FERC decide to retain the Sandia safety determination as the only analysis on the record, CPUC would be unable to effectively challenge the soundness of FERC's basis for concluding that the project does not risk public safety in court.<sup>124</sup>

The downtown district of the City of Long Beach, California's fifth largest city, is just two miles from the proposed terminal, and consequently falls just beyond Sandia's estimated hazard zone, but within the CPUC consultant's hazards zone. Many other important developments lie near or within these hazard zones. Electric facilities, gas pipelines, high density residential developments, dozens of hazardous waste sites, and nineteen public recreational areas—including the Long Beach Aquarium of the Pacific and the Queen Mary—all lie within two miles of the proposed site.<sup>125</sup> These risks are concentrated in areas with predominantly minority and poor populations, raising an environmental justice concern that is dismissed by the Draft EIS/EIR.<sup>126</sup>

In addition, experts for the state of California concluded that numerous deficiencies in FERC's Draft EIS/EIR point to the potential for widespread harm.<sup>127</sup> The state agencies argued that the consequences of an intentional act (i.e., a terrorist attack) have not been properly considered in FERC's Draft EIS/EIR.<sup>128</sup> They also commented that FERC has not conducted a proper alternatives analysis as required by the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA), including consideration of offshore

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123. See Prepared Supplemental Testimony of Dr. Jerry Havens, Comments of the Pub. Utilities Comm'n of the State of Cal. Re: Long Beach LNG Import Project Draft Environmental Impact Statement/Environmental Impact Report and Draft Port Master Plan Amendment No. 20 2-3, 7 (Dec. 7, 2005) [hereinafter *CPUC Comments*].

124. See *supra* note 96 and accompanying text (describing FERC's control over the rulemaking record).

125. *Long Beach DEIS/EIR*, *supra* note 21, at 4-46 to -56.

126. *Id.* at 4-72 to -74 (reporting that 64 percent of the nearby population is non-Caucasian, and median annual household income ranges from \$13,750 to \$43,102).

127. See generally *CPUC Comments*, *supra* note 123; Letter from B.B. Blevins, Exec. Dir., Cal. Energy Comm'n, to Magalie R. Salas, Secretary, Fed. Energy Reg. Comm'n & Robert Kanter, Port of Long Beach (Dec. 8, 2005) [hereinafter *CEC Comments*] (comments of the Cal. Energy Comm'n regarding the Long Beach Import Project Draft EIS/EIR).

128. See *CEC Comments*, *supra* note 127, at 27-30; *CPUC Comments*, *supra* note 123, at 33. See generally ASPEN ENVTL. GROUP, *supra* note 22; RICHARD A. CLARKE, LNG FACILITIES IN URBAN AREAS: A SECURITY RISK MANAGEMENT ANALYSIS FOR ATTORNEY GENERAL PATRICK LYNCH, RHODE ISLAND (2005), available at <http://www.projo.com/extra/2005/lng/clarkereport.pdf>. Recent caselaw holds that terrorist attacks must be considered for vulnerable facilities. See *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016 (9th Cir. 2006) (holding that NRC refusal to consider the environmental effects of a terrorist attack in its NEPA review was unreasonable).

sites away from population centers.<sup>129</sup> The California agencies asserted that there were problems with the seismic analysis,<sup>130</sup> and that numerous environmental impacts were not sufficiently analyzed, including issues of “geology, water resources, biological resources, socioeconomics, transportation, cultural resources, air quality, and noise.”<sup>131</sup>

The Long Beach proposal is not the only project where FERC has been accused of not adequately dealing with the safety issues. An LNG terminal is also proposed for the City of Fall River, Massachusetts, and Fall River recently appealed FERC’s issuance of a CPCN for the project.<sup>132</sup> Fall River asserted that there are material facts in dispute related to safety and terrorism issues that can only be resolved through cross examination in a trial-type evidentiary hearing, and that the paper hearing afforded by FERC was inadequate.<sup>133</sup> FERC was unaccommodating and responded by stating that it is not required to hold such hearings.<sup>134</sup> FERC’s LNG determination proceedings also lack opportunity for conducting depositions and they are not reviewed by an Administrative Law Judge. It remains to be seen whether the courts will interpret EPAAct to require that FERC address state safety concerns in a trial-type hearing.

If these important safety and environmental concerns are not addressed in an open and comprehensive public participation process, local opposition to LNG facilities is certain to be fierce. In fact, LNG project proponents have either cancelled or scaled back many LNG terminal projects due to public opposition.<sup>135</sup> So-called NIMBY-ism can reflect important community values and often presents formidable opposition to industrial projects.<sup>136</sup> Although the federal government may seek to circumvent local opposition by exerting its jurisdiction, states and localities have a better sense of local values and will be better at balancing those values against development. For this reason, the state

129. *CEC Comments, supra* note 127, at 5–7.

130. *Id.* at 8; *CPUC Comments, supra* note 123, at 32–33.

131. *CEC Comments, supra* note 127, at 3.

132. *See Weaver’s Cove Energy, LLC, 114 F.E.R.C. ¶ 61,058 (Jan. 23, 2006) (Order on Rehearing).*

133. *Id.* at para. 45–46.

134. *Id.* at para. 47–50.

135. For example, responding to community opposition, in 2004 Calpine cancelled plans to build a terminal in Humboldt Bay, and a Shell Power-Bechtel consortium cancelled plans for a Vallejo terminal in 2003. *See Stosser & Andrea, supra* note 21, at 32–33; *Baker & Martin, supra* note 34.

136. After Sempra Energy broke ground on its LNG project in Costa Azul, Mexico, near the Mexico-California border, hundreds of surfers wrote a letter of protest to Governor Schwarzenegger because of the destruction of a popular surfing spot known as “Harry’s.” *Carlton, supra* note 89. *See generally* Diane Lindquist, *Nature vs. Natural Gas in Baja California*, 20 CAL. COAST & OCEAN 30, 30 (2004) (discussing LNG development off the coast of Baja California, Mexico).

government can be a better arbitrator to help the developer and local community come to an agreement. Although it has been argued that in the area of LNG siting the nation needs the “predictability and uniformity in regulatory treatment” because of the high level of national interest,<sup>137</sup> it is important to recognize that federal regulation is interfering with the indispensable function of the state regulatory process for ensuring the safety of energy facilities.

### B. States' Economic Considerations

States are also interested in energy policy generally, and LNG development specifically, because of the significant impact it can have on the local economy, both positive and negative. CPUC, like other state public utilities commissions across the nation, is responsible for providing an environment where electricity and natural gas are supplied at the lowest cost.<sup>138</sup> This is one of the primary reasons that the state officially supports responsible LNG development.<sup>139</sup> This section discusses some of the negative implications that LNG terminal development could have for the state economy, focusing on potential ratepayer impacts of market manipulation, the potential costs of a future greenhouse gas policy, and capital energy infrastructure investment. This section also discusses why the states can be good advocates for renewable energy and energy efficiency, thereby promoting national energy independence.

CPUC is concerned about the potential for market manipulation related to the Long Beach LNG project based on its experience in 2000 and 2001 with the electricity markets. CPUC's concern derives from the fact that the Long Beach LNG project gives SES a substantial share of California's natural gas market, and that FERC will be unable or unwilling to intervene to prevent market manipulation.<sup>140</sup>

After California restructured its wholesale electricity market in 2000, the market clearing price that California's three major utilities paid generators for power became significantly more than they were allowed

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137. Berry, *supra* note 40, at 177–78.

138. Cal. Pub. Utils. Comm'n, PUC Mission Statement, <http://www.cpuc.ca.gov/static/aboutcpuc/pucmission.htm> (last visited July 29, 2006) (“We are responsible for ensuring that customers have safe, reliable utility service at reasonable rates, protecting against fraud, and promoting the health of California's economy.”).

139. See *supra* note 36 and accompanying text.

140. Opening Brief of Petitioner, *supra* note 49, at 1, 17, 53–54. The Energy Policy Act of 2005 codified the “Hackberry” rule, lifting the open access restriction which used to require that LNG terminals accept shipments from other companies. See Energy Policy Act of 2005 § 311(c)(2), 15 U.S.C. § 717b(e)(3)(B) (2006). Since the terminal operator does not have to provide open access to its terminal, it is in theory easier for the operator to reduce LNG imports with the intention of driving up prices. FERC responded that market power concerns were “premature and speculative,” citing as support that SES would only supply 10 percent of California's natural gas supply. Brief of Respondent, *supra* note 61, at 9, 41.



to charge their customers, at times reaching over 100 times the average price of a year earlier.<sup>141</sup> Many California regulators and politicians blame the crisis in part on FERC's refusal to intervene to stop the generators' and power brokers' exercise of market power until after the state lost billions of dollars.<sup>142</sup> Following its mission not to interfere with markets, but neglecting its mandate to ensure "just and reasonable rates," FERC refused to authorize refunds for excessive charges from May to October 2000 despite evidence of market manipulation.<sup>143</sup> This ruling had disastrous consequences:

[A]t the critical moment of the California crisis [FERC] walked away from its role as a regulator, leaving the market wide-open for extraction of monopoly rents at California's expense. The result was just what one would expect if the police were to walk away from an angry and drunken crowd that was already in a frenzy: The equivalent of outright looting occurred in plain sight.<sup>144</sup>

All told, one major utility in California went bankrupt, another became insolvent, and the state paid an excess of \$40 billion for electricity generated over the two years of the crisis.<sup>145</sup> Accordingly, when FERC responds to CPUC's concerns over the Long Beach project by stating that federal-state cooperation can alleviate any hardship that might be caused by market manipulation, it is understandable that CPUC is skeptical.<sup>146</sup> The state wants more concrete and structural assurances that SES will not be allowed to abuse its market power.

State public utility commissions are also exploring policies to protect their ratepayers from risks associated with investment in fossil fuel

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141. Duane, *supra* note 3, at 517. The state Department of Water Resources stepped in to buy power from the generators and re-sell to the utilities at the rate they could charge consumers, at a cost of billions of dollars to the state.

142. Poor regulatory design by California lawmakers is also responsible in that it created an environment ripe for market manipulation. Some analyses suggest that inadequate generation capacity, excessive demand, environmental control requirements, and other factors contributed to the crisis. See, e.g., CONG. BUDGET OFFICE, CAUSES AND LESSONS OF THE CALIFORNIA ENERGY CRISIS (Sept. 2001), available at <http://www.cbo.gov/ftpdocs/30xx/doc3062/CaliforniaEnergy.pdf>. But see COMM. ON GOVERNMENT REFORM MINORITY STAFF, U.S. HOUSE OF REPRESENTATIVES, FACT SHEET: THE CALIFORNIA ENERGY CRISIS: MYTHS AND FACTS (June 21, 2002), <http://www.democrats.reform.house.gov/Documents/20040826162949-24024.pdf> (arguing that "[m]arket manipulation, combined with a flawed deregulatory scheme, was the real cause of the energy crisis.").

143. See Federal Power Act § 205, 16 U.S.C. § 824d(a) (2006); San Diego Gas & Elec. Co., 93 F.E.R.C. ¶ 61,121, 61,387 (2000).

144. Duane, *supra* note 3, at 517. Duane's piece provides a comprehensive and compelling analysis of the California energy crisis.

145. The state's expenses for purchasing electricity from generators jumped from \$7 billion in 1999 to \$27 billion in both 2000 and 2001. Duane compares these amounts to a total state budget for education of \$42 billion over 2001 and 2002, and an annual state budget of under \$80 billion for fiscal year 2001–2002. *Id.* at 522–23.

146. See Brief of Respondent, *supra* note 61, at 40.

facilities that will likely be subjected to carbon emissions regulation.<sup>147</sup> For example, in 2005 CPUC adopted a greenhouse gas performance standard that effectively prevents utilities from entering into long-term contracts for electricity supplied by conventional coal-fired power plants.<sup>148</sup> The energy required to bring LNG into the United States—liquefaction, overseas shipment, and regasification—increases greenhouse gas emissions per unit of energy generated approximately 18 to 40 percent above the emissions of domestic gas supplies.<sup>149</sup> Although the resulting emissions are still below those from coal plants, ratepayers face a financial risk from LNG infrastructure investment because these additional greenhouse gas emissions are subject to future regulation.

FERC's decision to approve LNG projects will result in capital investments in natural gas infrastructure that could turn out to be costly for ratepayers. In its grant of siting authority to FERC, Congress implicitly gave FERC the ability to control the number of LNG terminals and the amount of LNG that will be imported into each state. In a regulated market, there is a risk that ratepayers will end up paying for these investments whether they turn out to be prudent or not. This economic analysis is not a part of FERC's permitting process—instead FERC's philosophy is that if the market supports development of LNG terminals, then the investment must be prudent.

California loses not only the ability to decide where terminals should be built, but also its ability to manage its energy policy to promote technology and economic growth. For example, increasing supply of low-cost natural gas has the potential to frustrate efforts to promote renewable energy and energy efficiency. Renewable energy has been shown to generate significantly more jobs than coal or natural gas power plants, and in a growing area of the economy.<sup>150</sup> Furthermore, energy efficiency provides long-term benefits to the state economy. A recent study from Stanford University concluded that California's economy was \$31 billion larger in 1995 due to energy efficiency technology introduced

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147. See, e.g., Regional Greenhouse Gas Initiative, Memorandum of Understanding (Dec. 20, 2005) (committing seven northeast states to greenhouse gas reduction targets), available at [http://rggi.org/docs/mou\\_12\\_20\\_05.pdf](http://rggi.org/docs/mou_12_20_05.pdf).

148. Cal. Pub. Utils. Comm'n, Policy Statement on Greenhouse Gas Performance Standards (Oct. 6, 2005) (specifying a GHG performances standard equal to a natural gas combined cycle power plant), available at [http://www.cpuc.ca.gov/word\\_pdf/REPORT/50432.pdf](http://www.cpuc.ca.gov/word_pdf/REPORT/50432.pdf).

149. See *Pacific Environment Letter*, *supra* note 39.

150. DANIEL M. KAMMEN, KAMAL KAPADIA & MATTHIAS FRIPP, RENEWABLE AND APPROPRIATE ENERGY LABORATORY (RAEL), UNIVERSITY OF CALIFORNIA, BERKELEY, PUTTING RENEWABLES TO WORK: HOW MANY JOBS CAN THE CLEAN ENERGY INDUSTRY GENERATE? (2006), available at <http://rael.berkeley.edu/files/2006/Kammen-Renewable-Jobs-2006.pdf>.

over the preceding twenty years.<sup>151</sup> Many states recognize that renewable energy may represent the most economical long-term investment in energy production after social and environmental externalities are considered.<sup>152</sup>

In contrast, FERC's priorities threaten to worsen the nation's addiction to fossil fuels. FERC is focused squarely on providing a competitive and deregulated environment for investment in energy infrastructure. Its Strategic Plan for 2005 to 2008 does not include a single initiative involving energy efficiency, conservation, energy independence, energy security, or promotion of renewable energy.<sup>153</sup> FERC is neither interested nor involved in addressing long-term transitions in the nation's energy production landscape, yet it has been given the exclusive authority to decide how many LNG import terminals will be built in the United States.

The nation risks execution of an uncoordinated expansion of energy infrastructure that does not meet the long-term needs of the country nor local communities. For example, EPA wisely instructs electric utilities to "develop a plan to minimize dependence on 1 fuel source and to ensure that the electric energy . . . is generated using a diverse range of fuels and technologies, including renewable technologies."<sup>154</sup> However, FERC's alternatives analysis in the Draft EIS/EIR for the Long Beach terminal does not address or analyze conservation in detail, nor mention renewable energy.<sup>155</sup> The federal-state cooperative model must be maintained to meet our current and future energy challenges.

### C. *The National Benefits of State Laboratories of Democracy*

To fully realize LNG's potential for the nation, and to mitigate its drawbacks, states must be given a meaningful role in the LNG siting process. Advancing the important safety, environmental, and economic considerations discussed in the previous two sections directly benefits the nation as a whole. This section reviews some of the arguments supporting state policymaking and cooperative federalism, and it provides examples of how the nation benefits from state activity in the area of energy regulation.

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151. WALTER V. REID ET AL., NO REASON TO WAIT: THE BENEFITS OF GREENHOUSE GAS REDUCTION IN SÃO PAULO AND CALIFORNIA (2005), available at [http://www.climatechange.ca.gov/documents/GOLDEMBERG\\_LLOYD\\_2005-12-02.PDF](http://www.climatechange.ca.gov/documents/GOLDEMBERG_LLOYD_2005-12-02.PDF).

152. See Antonia V. Herzog et al., *Renewable Energy: A Viable Choice*, 43 ENVIRONMENT 8 (2001); Daniel M. Kammen & Sergio Pacca, *Assessing the Costs of Electricity*, 29 ANN. REV. OF ENV'T & RES. 301 (2004).

153. See FERC, Strategic Plan FY 2005 to FY 2008, <http://ferc.gov/about/strat-docs/strat-plan.asp> (last visited July 30, 2007).

154. Energy Policy Act of 2005 § 1251(a), 16 U.S.C. §§ 2621(d)(11)–(13) (2006).

155. *Long Beach DEIS/EIR*, supra note 21, at 3-1.

In principle, support for robust state participation is broad. Just after taking office, President Bush expressed his belief that it is not the role of the federal government to impose its will on states and local communities, but rather “to empower [them] to realize their vast potentials.”<sup>156</sup> The president was echoing the famous sentiment of Justice Brandeis posited in 1932:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.<sup>157</sup>

Brandeis believed that a state legislature could often be more responsive to the needs of its people than the federal government. Legislatures should therefore be empowered to experiment with policies which, if proven successful, could be adopted at the federal level.

Although these enlightened words inspire confidence in state action, they do not represent a universal principle by which the federalism question can be resolved. Consistent federal standards are often needed to advance the policy goals of Congress, and for over sixty years the Supreme Court has rightly upheld federal regulations of interstate commerce under the Commerce Clause, even when they interfere with state policy and the states’ interests in experimentation.<sup>158</sup>

This tension was reflected in *FERC v. Mississippi*, where the Supreme Court held that federal energy policy imposed upon the states by the federal government did not violate the Tenth Amendment.<sup>159</sup> Responding to the 1970s energy crisis, Congress had enacted the Public Utility Regulatory Policies Act (PURPA).<sup>160</sup> This law imposed requirements on the state public utility commissions to encourage energy efficiency and alternative supplies of energy. Mississippi argued that those requirements were a violation of state sovereignty under Tenth Amendment. The Court held that PURPA did not violate the Tenth Amendment because Congress had acted within the bounds of the Commerce Clause.<sup>161</sup>

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156. David Jackson, *Bush Seeks GOP Governors’ Help; President-Elect Says He Will Try to Trim Federal Regulations on States*, DALLAS MORNING NEWS, Jan. 7, 2001, at A4.

157. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

158. See, e.g., *Gonzales v. Raich*, 54 U.S. 1 (2005) (upholding federal regulation of marijuana grown in-state and intended only for in-state consumption); *Wickard v. Fillburn*, 317 U.S. 111 (1942) (upholding federal regulation of home-grown wheat). The 10th Amendment would otherwise protect state sovereignty. See U.S. CONST. amend. X.

159. *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 753 (1982).

160. Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117.

161. *Mississippi*, 456 U.S. at 757-58.

Justice O'Connor's dissent articulated a strong policy argument for state control. Her concerns are directly relevant to the states' loss of jurisdiction over LNG terminal development. She noted that "the power to make decisions and to set policy . . . embraces more than the ultimate authority to enact laws; it also includes the power to decide which proposals are most worthy of consideration."<sup>162</sup> O'Connor was concerned that PURPA would "retard this creative experimentation" that was occurring in the states, and therefore argued for a broader interpretation of the Tenth Amendment.<sup>163</sup> O'Connor did not want to transfer state legislative power to FERC because she believed that would be an unconstitutional infringement on state sovereignty, thereby restricting the great benefits of state policymaking and experimentation. Although O'Connor's minority view is not the law, her dissent presents a notable argument for the role of state flexibility in achieving important national goals.

Demonstrating support for Brandeis and O'Connor's arguments promoting state laboratories for national policy, the states are taking on their individual roles as laboratories and making progress with respect to energy policy. For example, each of the three defeated EPA policy measures described in Part II.A—fuel economy improvements, climate change mitigation, and a renewables portfolio standard—are currently being implemented by California and other states.<sup>164</sup>

California has instituted many programs that take a long-term and comprehensive view of energy security, which benefits the nation as a whole. For example, in 2003 CPUC and CEC adopted California's Energy Action Plan (EAP), which issues a "loading order" describing how electric power needs will be met by the state.<sup>165</sup> The loading order requires the state to first take advantage of energy conservation and demand-response opportunities, then to develop renewable energy, and finally to increase clean fossil fuel power generation.<sup>166</sup> California has adopted aggressive Renewables Portfolio Standard goals<sup>167</sup> and in early 2006 CPUC also ordered a ten-year \$2.8 billion solar incentive

162. *Id.* at 779.

163. *Id.* at 789.

164. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 43000–43023.5 (2005) (regulating greenhouse gas emissions from motor vehicles); Cal. Exec. Order No. S-3-05 (June 1, 2005) (establishing greenhouse gas emissions reduction targets for California); CAL. PUB. UTIL. CODE §§ 399.11–399.17 (2005) (establishing Renewables Portfolio Standard of 20 percent by 2017); Regional Greenhouse Gas Initiative, Memorandum of Understanding (Dec. 20, 2005) (committing seven northeast states to greenhouse gas reduction targets), *available at* [http://rggi.org/docs/mou\\_12\\_20\\_05.pdf](http://rggi.org/docs/mou_12_20_05.pdf).

165. The loading order was renewed in the Energy Action Plan II in 2005. *See* CAL. ENERGY COMM'N & CAL. PUB. UTILS. COMM'N, ENERGY ACTION PLAN II 2 (2005).

166. *Id.*

167. The state is aiming for 20 percent renewables by 2010 and 33 percent by 2020. *Id.* at 5–6.

program.<sup>168</sup> California was also the first to regulate greenhouse gas emissions from cars<sup>169</sup> and will cap greenhouse gas emissions.<sup>170</sup> Beginning in 2006, California car dealers must report vehicle greenhouse gas emissions to consumers alongside fuel economy estimates.<sup>171</sup> Many of these policies could be, and indeed likely will be, successfully adopted at the federal level.<sup>172</sup>

In advocating for the EPAct provisions prior to its enactment, the president declared, “Our dependence on foreign oil is like a foreign tax on the American Dream.”<sup>173</sup> LNG development is extending our reliance on foreign energy sources, with potential local and foreign environmental and social consequences.<sup>174</sup> Although foreign supplies are presently abundant and reasonable in cost, a shift from the domestic to the global marketplace for natural gas has the potential to affect dependability, reliability, and gas quality. Also, indiscriminately promoting electricity production from natural gas could frustrate California’s attempts to achieve fuel source diversity.<sup>175</sup> Without greater involvement in the permitting of new LNG projects, the state is left unable to implement a comprehensive energy policy that includes a major role for renewable energy and conservation.<sup>176</sup> The energy independence goals of the nation would be enhanced if California were given a greater role in the LNG siting process.<sup>177</sup>

168. See *CSI Order*, *supra* note 74.

169. A.B. 1493, 2001–2002 Sess. (Cal. 2001).

170. California Global Warming Solutions Act of 2006, A.B. 32, 2005–2006 Sess. (Cal. 2004).

171. A.B. 1229, 2005–2006 Sess. (Cal. 2005).

172. For example, numerous greenhouse gas emissions control regulations have been proposed in Congress and are currently being debated.

173. Press Release, White House, President Discusses Energy Policy (June 15, 2005), available at <http://www.whitehouse.gov/news/releases/2005/06/20050615-2.html>.

174. Environmental groups have raised concerns about LNG facilities overseas. One group claims that drilling for natural gas in Russia “disturbs habitat for the critically endangered Western Pacific gray whale, of which there are only an estimated 100 remaining worldwide, and harms local fisheries, which are the economic lifeblood for Sakhalin islanders.” Rory Cox, *Liquefied Natural Gas—Not in Anyone’s Backyard*, S.F. CHRON., Apr. 2, 2004, at B9. Another group notes that about one-quarter of our LNG imports currently come from OPEC nations. *The Domestic Supply and Cost for the Approaching Peak Winter Months, Hearing Before the Subcomm. on Competition, Foreign Commerce, and Infrastructure of the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (Oct. 6, 2004) (statement of Wenonah Hauter, Energy Program Director, Public Citizen).

175. See *supra* notes 154–55 and accompanying text.

176. Cox, *supra* note 174. See generally Sidney A. Shapiro & Joseph P. Tomain, *Rethinking Reform of Electricity Markets*, 40 WAKE FOREST L. REV. 497 (2005).

177. A similar debate is presently occurring over what role the federal government should assume in the regulation of corporate governance in the wake of Enron’s bankruptcy. The Sarbanes-Oxley Act abandoned a system of cooperative federalism in favor of federal mandates for corporate governance, effectively preempting application of state corporate law to corporate governance. Professor Romano argues that the states are better regulators in this area because “they are closer to the affected constituents . . . and are less likely to make regulatory mistakes . . . because they operate in a competitive environment . . . . Regulatory competition offers an

## IV. HOW CAN STATES INFLUENCE LNG DEVELOPMENT?

Given the compelling interests states have in meaningful participation in LNG project development, the question remains as to how states can influence the development process to further those interests. At first glance, the congressional grant of exclusive jurisdiction to FERC over LNG terminal projects appears to give FERC centralized control.<sup>178</sup> However, an affected state still has considerable control over LNG proposals through the application of state law.

Although Congress increased federal jurisdictional power over LNG facilities, it did not regulate the entire field of LNG activity and thereby preempt all state regulation of LNG. First, this section explains that the EPAct's LNG provisions are within Congress' power under the Commerce Clause. Then, the section analyzes EPAct provisions where Congress explicitly left room for state authority. Congress legislated a safety review process which calls for state involvement; if properly implemented by FERC,<sup>179</sup> this process could address many of the state's safety concerns regarding LNG terminals. Next, this section reviews existing state laws, again using California as a case study, that give the states further control over LNG development. The section concludes by reviewing proposed state legislation that could be used to effectuate state energy policy despite the LNG provisions of EPAct.

Despite the recent narrowing of the Commerce Clause, the LNG provisions of the EPAct satisfy the test articulated by the Supreme Court: the provisions are economic regulations as opposed to non-economic, and the means employed by Congress are reasonably adapted to the ends.<sup>180</sup> That is, the congressional intent to increase the domestic supply of natural gas is reasonably accomplished by allowing federal jurisdiction over LNG terminal proposals. Congress established a uniform federal system for siting, construction, and operation of LNG facilities, thereby preventing states from exercising authority over LNG facilities in the way that they can over other natural gas facilities.

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advantage over a single regulator because it provides regulators with incentives and the necessary information to be accountable and responsive to the demands of the regulated." Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1597-98 (2005).

178. See Energy Policy Act of 2005 § 311(c)(2), 15 U.S.C. § 717b(e)(1) (2006) ("The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.").

179. See *supra* Part II.B for discussion on disputes over FERC's implementation of these provisions.

180. See *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act because the regulation did not substantially affect interstate commerce); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act because the regulation was non-economic, and because the connection between the means and ends was attenuated).

EPA preempt state regulations that conflict with the safety, siting, construction, or operations procedures pronounced by FERC. When the federal government has promulgated safety regulations for an industry, the state will be preempted from adopting its own regulations, even if they are stronger, without express authorization by Congress.<sup>181</sup> The authority to regulate safety outside the boundaries promulgated by FERC, for example, cannot be asserted with respect to LNG terminal development because EPA contains specific provisions regarding safety requirements.

EPA includes four safety provisions.<sup>182</sup> First, the Act mandates a six-month pre-filing process under NEPA.<sup>183</sup> Second, FERC shall engage in consultation with the states regarding state and local safety considerations prior to the issuance of any order to build an LNG facility.<sup>184</sup> Third, the state may provide FERC with an advisory report on state and local safety considerations, and the state is entitled to specific responses to the issues raised in that report prior to issuance of a siting, construction, expansion, or operation order.<sup>185</sup> Finally, the state may conduct safety inspections after the LNG terminal is operational.<sup>186</sup>

EPA preserves additional substantive rights of the states. The Act states, "Except as specifically provided in this Act, nothing in this Act affects the rights of States under — (1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.); (2) the Clean Air Act (42 U.S.C. 7401 et seq.); or (3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.)."<sup>187</sup> FERC's former chairman conceded that the states' robust regulatory authority remains unaffected.<sup>188</sup> Indeed, dozens of permits would be needed for an LNG terminal in California,<sup>189</sup> and FERC claims

181. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (holding that California could not establish its own safety regulations different from those provided by the Atomic Energy Act). However, since the federal act did not address economic concerns related to the nuclear power facility, the state's nuclear moratorium was not preempted. See also *United States v. Locke*, 529 U.S. 89 (2000) (holding that because the federal government had exercised its authority to regulate an entire field related to oil tanker safety, the State of Washington's vessel regulations were preempted).

182. See *supra* Part III.A on the deficiencies in FERC's procedures.

183. Energy Policy Act of 2005 § 311(d), 15 U.S.C. § 717b-1(a) (2006). See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006).

184. *Id.* § 311(d), 15 U.S.C. § 717b-1(b) (2006).

185. *Id.*, 15 U.S.C. § 717b-1(c).

186. *Id.*, 15 U.S.C. § 717b-1(d).

187. *Id.* § 311(c)(2), 15 U.S.C. § 717b(d) (amending Natural Gas Act § 3(d)).

188. Erica Werner, *Schwarzenegger, 5 Other Governors Press Senators on LNG terminals*, SFGATE.COM, May 25, 2005, <http://sfgate.com/cgi-bin/article.cgi?file=/n/a/2005/05/25/state/n151636D17.DTL> (last visited July 30, 2006) (reporting statement from FERC Chairman Patrick Wood).

189. MARKS, *supra* note 17, at 12 (reporting that over 100 permits were required *before* the passage of the Energy Policy Act of 2005, so today it is likely that fewer would be needed). CEC has compiled a review of some of the required permits. *Id.* at 18–20. FERC has also provided



that states “still have the ability to effectively ‘veto’ an LNG facility by denying permits associated with the Clean Water Act, the Coastal Zone Management Act, and the Clean Air Act.”<sup>190</sup> However, because EPA’s Act could be interpreted to shorten timelines under the Clean Air Act and Clean Water Act permitting processes, states’ ability to exercise this “veto” power may be limited.<sup>191</sup>

State governments can also use state law to control LNG development. The state often owns the lands used for LNG terminals and/or the lands where pipelines will be built to access those terminals. Therefore, the state can condition the leasing of those lands on compliance with state law requirements, requirements that could only be overcome if the federal government were to exert its eminent domain authority to obtain access to the lands.<sup>192</sup> Congress, however, explicitly excluded language from EPA’s Act that would have given FERC eminent domain powers over LNG terminal siting.<sup>193</sup> This gives a state some additional power to block an LNG facility that does not comport with its interests.

Because FERC does not have the power to exercise eminent domain over land proposed for LNG facilities, the LNG terminal developer must lease or purchase the land. The leasing entity, if a state agency or political division, must comply with state law. This is important because most of the California coastal and submerged lands that would be used for LNG terminal development in Long Beach are owned by the state of California.<sup>194</sup> Even if the Port of Long Beach wants the project to move forward, it must comply with state law governing those properties. The most important laws that apply are CEQA and the California Coastal Act.<sup>195</sup> The California Coastal Act prohibits the siting of new hazardous

information on state and local permits required on the Hackberry LNG Project and Freeport LNG Project. *LNG Import Terminal and Deepwater Port Siting: Federal and State Roles, Hearing Before the Subcomm. on Energy Policy, Natural Resources, and Regulatory Affairs of the H. Comm. on Government Reform*, 108th Cong., SER. NO. 108-238, at 48-51 (June 22, 2004).

190. FERC, States’ Rights in Authorization of LNG Facilities, <http://www.ferc.gov/industries/lng/gen-info/laws-regs/state-rights.asp> (last visited July 30, 2006). States may also participate in the NEPA process, although FERC remains the lead agency. *Id.* § 311(d).

191. See Energy Policy Act of 2005 § 311(d), 15 U.S.C. § 717b-1(c) (2006).

192. See *Weaver’s Cove Energy, LLC*, 112 F.E.R.C. ¶ 61,070, 61,546 (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 this Commission.”).

193. Senate Comm. on Energy and Natural Resources, Energy Policy Act Conference Report Summary by Title, at 5 (Aug. 8, 2005), available at [http://energy.senate.gov/public/\\_files/PostConferenceBillSummary.doc](http://energy.senate.gov/public/_files/PostConferenceBillSummary.doc).

194. See *Colberg, Inc. v. State*, 432 P.2d 3 (Cal. 1967); *Morris*, *supra* note 91.

195. California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE §§ 21000-21177 (2005); California Coastal Act, CAL. PUB. RES. CODE §§ 30000-30900.

industrial development near living or recreational areas or in any location that is adverse to the public welfare.<sup>196</sup> The close proximity of the terminal to downtown Long Beach, and the potential for an accident to result in serious burns, could be considered adverse to the public welfare.

California is already exercising its power to require adequate environmental review. CEQA requires a comprehensive analysis of all environmental impacts and mitigation measures associated with the project, and a robust alternatives analysis to consider safer alternatives that will meet the project's goals.<sup>197</sup> As the lead agency performing the environmental review, FERC recently issued a Draft EIS/EIR for the Long Beach terminal project.<sup>198</sup> As described in Part III, CPUC raised numerous concerns about the quality of this environmental review.<sup>199</sup> Litigation over FERC's compliance with CEQA could delay the SES Long Beach project.

Hoping to coordinate the development of LNG facilities, the California legislature has begun to take action. In early 2005, State Senator Joe Simitian introduced SB 426, which would require that before approving any LNG terminal projects, CEC must first determine how much natural gas the state needs and then rank the proposed projects by their ability to best serve those needs.<sup>200</sup> CEC must also consider health, safety, and environmental factors. The bill finds its authority in the fact that Congress did not grant FERC eminent domain power over state lands, preserving the state's sovereign authority over its territory.<sup>201</sup>

The opposition to SB 426 trusts FERC to act responsibly and believes that CEC will waste resources in the process of conducting its review.<sup>202</sup> They think that the bill will delay LNG supply to the state by creating duplicative permitting processes. But it is important to recognize that the purpose of CEC's terminal site selection process is very different from FERC's approval process. CEC is effectuating intentional energy policy, while FERC is allowing the market to determine energy development. California could use CEC's evaluation, in combination with the other tools described above, to address all of its primary concerns with LNG development. However, at the time of this writing, there is no

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196. CAL. PUB. RES. CODE §§ 30250(b), 30253, 30260.

197. CEQA, CAL. PUB. RES. CODE §§ 21000–21177.

198. *Long Beach DEIS/EIR*, *supra* note 21.

199. *CPUC Comments*, *supra* note 123. See discussion *supra* Part III.A.

200. S.B. 426, 2005–2006 Sess. (Cal. 2005).

201. “Based upon the Tenth Amendment to the United States Constitution, federal law neither abrogates a state's property rights within its tide and submerged lands nor provides the power of eminent domain to the Federal Energy Regulatory Commission with respect to the siting liquefied natural gas facilities.” S.B. 426 § 1(h).

202. See Press Release, California State Senate Republic Caucus, Briefing Report: Liquefied Natural Gas (May 4, 2005), available at <http://republican.sen.ca.gov/opeds/99/oped2722.asp>.

indication that the Legislature will vote on SB 426 in the current session, nor any positive indication that Governor Schwarzenegger would sign it if passed.

With the exception of the Simitian bill, the options available to California are obstructionist in nature, and as such do not satisfy the underlying goal of effectuating an energy policy that serves the interests of state citizens. Nevertheless, some of the state's health and safety goals are within reach. The extensive state and local permitting processes will reveal significant environmental information about proposed LNG projects. Cooperation between state and federal authorities on matters involving local safety concerns, if implemented properly, could sufficiently address California's concerns about the process. However, the relationship between FERC and the state is now highly strained, and is undermining progress on LNG in California.

#### CONCLUSION

The debate over who should have the authority to make final decisions about whether and where an LNG facility is built presents recurring issues about the relationship between the federal and state governments. Since the 1970s, the nation has relied heavily on environmental federalism, the system where high-level environmental laws and policy goals are developed by the federal government and the states are tasked with administering the programs to achieve those goals. To date, U.S. energy policy has embraced environmental federalism to varying degrees. For example, Congress has left little room for states to exert any regulatory muscle within the nuclear industry.<sup>203</sup> On the other hand, states are allowed substantial flexibility in regulating the siting of intrastate electric transmission lines. The nation is currently trying to determine the best way to regulate LNG, and good arguments exist for both state and national regulation. LNG has the potential to be a central component of the nation's energy supply, yet it poses significant local safety risks, implicates state economic concerns, and influences alternative energy development.

Congress has elected to impose a highly centralized regulatory structure for LNG siting, construction, and operation. Although states are invited to play a secondary role, FERC will make the final siting decisions. There are numerous problems with this approach. From the outset it creates an adversarial relationship between the federal and state governments. The SES Long Beach terminal application has been held up for over two years while CPUC and FERC battle over jurisdiction and safety considerations. Although Congress resolved one jurisdictional

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203. See *supra* note 181.

issue in an attempt to move the project forward, California's persisting and legitimate concerns about safety will continue to impede development. California acknowledges the importance of LNG to its energy supply, but from a local perspective FERC's process appears to be a haphazard and potentially financially destructive way to implement energy policy.

As identified by Justice O'Connor, the United States has realized substantial benefits through policy experimentation by the states.<sup>204</sup> Many federal environmental laws were modeled on successful policies developed by individual states.<sup>205</sup> California has proven a leader in the development of these innovative policy strategies, including its promulgation of an early version of the Clean Air Act requiring regulation of emissions from motor vehicles.<sup>206</sup> Some policies, once proven at the local level, become ripe for the federal implementation necessary to achieve maximum effectiveness. For example, renewables portfolio standards and emissions trading systems work better on a regional or national level due to the efficiency or fairness advantages of these larger systems.<sup>207</sup>

Uniform federal prescription of LNG development does not serve the nation's goals of energy independence, and instead threatens to compromise safety and economic security. States like California have exercised their unique expertise to develop policy innovations to promote a safe, financially secure, and environmentally sound energy infrastructure. In the spirit of Justice Brandeis' vision of states as laboratories, the federal government would do better to empower California and other states to experiment with the best way to balance the risks and rewards of LNG development.<sup>208</sup>

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204. See Fed. Energy Reg. Comm'n v. Mississippi, 456 U.S. 742 (1982); *supra* notes 162–63 and accompanying text.

205. See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996).

206. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1157 (1995). The state was also a leader with Proposition 65 which requires disclosures of harmful substances. California Initiative Measure of Nov. 4, 1986, codified at CAL. HEALTH & SAFETY CODE §§ 25249.5–25249.13 (2005).

207. See, e.g., PEW CENTER ON GLOBAL CLIMATE CHANGE, LEARNING FROM STATE ACTION ON CLIMATE CHANGE: JUNE 2006 UPDATE 1–2 (2006), available at [http://www.pewclimate.org/policy\\_center/policy\\_reports\\_and\\_analysis/state/index.cfm](http://www.pewclimate.org/policy_center/policy_reports_and_analysis/state/index.cfm).

208. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).