

**THE 2005 ENERGY POLICY ACT: ANALYSIS OF
THE JURISDICTIONAL BASIS FOR
FEDERAL SITING OF LNG FACILITIES**

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I. INTRODUCTION

The U.S. natural gas industry is entering an international phase. For well over a century, the U.S. has had the luxury of being able to satisfy demand for natural gas with almost entirely domestic supplies. The twentieth century, however, brought increasing demand, and in the twenty-first century the trend will continue. While demand is increasing, domestic supply is predicted to decrease, as natural gas obtained through traditional drilling methods in the U.S. has seemingly reached its peak. Thus, U.S. suppliers must establish new sources of natural gas to satisfy demand. Imported liquefied natural gas (“LNG” or liquid natural gas) is one such source.

Although LNG has been traversing the seas for over forty-five years, because of the historically adequate domestic supply of natural gas in the U.S., it has not been economical for companies to construct LNG import

facilities. For example, while Japan has amassed some forty LNG facilities, the U.S. currently has only five.¹ Since projections show that domestic supply will soon fail to meet growing demand, companies, investors, and financiers have actively sought to permit and construct new LNG facilities. Currently, billions of dollars are invested in the construction of new LNG facilities.²

One issue is where these facilities will be sited, and, more importantly, who gets to decide. On first look, it would appear that states have greater interest in the siting of LNG facilities and should therefore be vested with authority to choose where or whether to site an LNG facility. The facility would occupy state land, and arguably impact the local environment, economy, community, and security. On the other hand, the nation's supply of natural gas is a national concern, and federal regulation can produce greater uniformity, efficiency, and predictability in the LNG industry.

The recently-passed 2005 Energy Policy Act, Section 311, grants the Federal Energy Regulation Commission ("FERC") the authority to site LNG facilities, and also makes FERC the lead agency in the coordination efforts between federal, state, and local regulatory bodies in the process of siting and construction. States may attempt to influence FERC's authority by providing information and analysis of environmental and safety concerns, and states also retain their rights under various acts implicated in the siting process (the Clean Air Act, the Clean Water Act, and the Coastal Zone Management Act). However, state agencies are not given power to seek court enforcement of violations of federal regulations, and states may themselves face legal action for any noncompliance with FERC scheduling. This article does not address the merits of federal versus state regulation of the LNG industry. Rather, this article is concerned with the legal justification for federal regulation of the LNG industry. Part of that analysis includes determining what arguments, if any, might convince courts to uphold state legislation in the LNG industry, and what arguments, if any, LNG importing companies might make to avoid federal regulations. As a caveat, although many people doubtless believe that federal siting of LNG facilities is clearly unconstitutional, because this article is also not concerned with public opinion polls or metaphysical arguments, the analysis is confined to the legal parameters that have been set by courts and by Congress.

To set the stage, this article provides background information explaining what LNG is, why the U.S. needs LNG, the federal and state interests

1. See *infra* note 14.

2. Spencer Jakab, *Energy: Energy Firms Have Big Bets on LNG Imports*, THE WALL ST. J., March 14, 2006, at A13.

in regulating LNG, and also provides specific examples of local opposition to LNG facilities. To contextualize the legal analysis, the article then provides a basic primer on Congressional authority to legislate under the Commerce Clause and describes the regulatory framework of the natural gas industry in the U.S. Next, as there have been a handful of cases directly relevant to the siting of LNG facilities, the facts and holdings of these cases are described in some detail. Finally, although at this point it is obvious that federal regulation of the natural gas industry (including LNG facilities) is not only pervasive but has consistently been upheld in court, the last section of the article is devoted to identifying loose threads that remain to challenge federal regulation of aspects of the LNG industry.

II. LNG OVERVIEW

A. *What is LNG?*

LNG is natural gas that has been cooled to approximately negative 260 degrees Fahrenheit.³ At this temperature, LNG changes from a gas to a clear, colorless, odorless liquid, and its volume is reduced by a factor of 600 to one.⁴ Thus, unlike in its gaseous state, LNG can be stored for long periods of time, which allows it to be shipped from those areas of the world with an abundant supply of natural gas (the Middle East, Trinidad and Tobago) to those areas of the world with excess demand (Europe, United States).⁵ LNG can also be stored to satisfy future periods of high demand.⁶

Although LNG has only recently begun to appear regularly in the headlines, the first LNG facility was constructed in 1912 in West Virginia to liquefy gas produced in that state for transportation elsewhere.⁷ The first import facility would be constructed approximately sixty years later. Between 1971 and 1980, four LNG importation terminals were constructed in the United States.⁸ The late 1970's saw a gas surplus in North America, and the resulting sharp decline in prices caused two of the four U.S. LNG facilities to shut down, and the other two to be under-utilized.⁹

3. Federal Energy Regulatory Commission, A Guide to LNG: What all Citizens Should Know 2, <http://www.ferc.gov/for-citizens/citizen-guides/citz-guide-lng.pdf> (last visited Aug. 17, 2006) [hereinafter A Guide to LNG].

4. *Id.*

5. DAMIEN GAUL & LILLIAN YOUNG, US LNG MARKETS AND USES 1 (2003) available at http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2003/lng/lng2003.pdf [hereinafter US LNG Markets and Uses].

6. *Id.*

7. Kathryn E. Kransdorf, *Not On My Coastline: The Jurisdictional Battle Over the Siting of LNG Import Terminals*, 17 FORDHAM ENVTL. LAW J. 37, 41 (2005).

8. *Id.* at 42.

9. *Id.*

In 2003, with natural gas prices on the rise, FERC authorized construction of an LNG facility in Hackberry, Louisiana.¹⁰

B. Why the U.S. Needs LNG

Stated simply, the U.S. needs LNG to increase the supply of natural gas to stabilize consumer prices. Natural gas accounts for almost one-fourth of all energy consumed in the United States and therefore plays a vital role in the U.S. economy.¹¹ Additionally, natural gas is desirable because it burns cleaner and produces fewer pollutants than oil or coal.¹² Because it has historically not needed to draw upon LNG to meet domestic demand, the U.S. has not developed the infrastructure to accommodate large imports of natural gas. The U.S. imported only 4% of worldwide LNG exports, and only five LNG import facilities exist in the U.S.¹³ Currently, LNG imports provide only 2.8% of the natural gas consumed in the U.S.,¹⁴ but this percentage is expected to increase.

The U.S. Energy Information Administration forecasts that natural gas consumption will increase from 22.4 trillion cubic feet (“Tcf”) in 2004 to 26.5 Tcf in 2017, and to 26.9 Tcf by 2030.¹⁵ Simultaneously, domestic supply is expected to decline as new reservoir discoveries are expected to be smaller and deeper, and thus more expensive and riskier to develop and produce.¹⁶

Thus, domestic supplies of natural gas will likely not satisfy future demand in the United States. Indeed, the diminishing supply of natural gas

10. *Id.* at 44.

11. A Guide to LNG, *supra* note 3, at 1.

12. *Id.*

13. MIGNON MARKS, LIQUEFIED NATURAL GAS IN CALIFORNIA: HISTORY, RISKS AND SITING (2003), http://www.energy.ca.gov/reports/2003-07-17_700-03-005.pdf [hereinafter Liquefied Natural Gas in California]; Four of the facilities are located at Everett, Massachusetts (constructed in 1971), Cove Point, Maryland (1980), Elba Island, Georgia (1980), and Lake Charles, Louisiana (1982). See US LNG Markets and Uses, *supra* note 5, at 3. Construction of the Hackberry, Louisiana facility was authorized by FERC in 2003. Kransdorf, *supra*, note 7, at 43. Operations ceased at the Cove Point and Elba Island terminals in 1980, but eventually reopened in 1995 and 2001, respectively. See US LNG Markets and Uses, *supra* note 5, at 3. The Lake Charles facility closed shortly after construction, but reopened in 1989. *Id.* There are also approximately 151 LNG tankers in operation and 55 ships are under construction. See Federal Energy Regulatory Commission, LNG-Overview of LNG Industry, <http://www.ferc.gov/industries/lng/indus-act/overview-lng.asp> (last visited Aug., 14 2006) [hereinafter LNG Overview].

14. The Center for LNG, LNG Future, <http://www.lngfacts.org/LNG-future/default.asp> (last visited Oct. 21, 2006).

15. See ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK 2006 85 available at http://www.eia.doe.gov/oiaf/aeo/pdf/trend_4.pdf [hereinafter Energy Outlook]. This projection is in fact reduced from prior years because, as dictated by rudimentary economics, high prices are stunting demand. For example, currently, high natural gas prices are discouraging the investment in electric generation facilities fired by natural gas. See *id.*

16. A Guide to LNG, *supra* note 3, at 1; *Id.* at 86 (stating that, in the lower 48 states, natural gas production is expected to come from unconventional sources such as coalbed methane, tight sandstones, and gas shales).

has caused wellhead prices to soar from approximately \$2 per thousand cubic feet (“Mcf”) just five years ago to approximately \$8 per Mcf in 2006.¹⁷ While long pipelines from Mexico and Canada are planned to import more natural gas, LNG is required to satisfy the growing demand.¹⁸

C. From export to import – the life span of LNG.

Foreign natural gas is liquefied at export facilities called liquefaction plants.¹⁹ Typically, the natural gas will also be processed (cleaned for ultimate consumer use) at foreign facilities. The LNG is then pumped into tankers specially designed to allow for the storage and transport of LNG over long distances.²⁰ These tankers consist of an outer hull, an inner hull, and a cargo containment system.²¹ Of the two designs generally used, one contains the cargo by use of a stainless steel double-walled liner that is structurally supported by the vessel’s inner hull;²² the other design uses structurally independent spherical or prismatic-shaped tanks constructed of either stainless steel or an aluminum alloy.²³ Large tankers hold up to approximately 130,000 cubic meters of LNG in liquid form, or about 2.8 billion cubic feet (“Bcf”) of regasified LNG.²⁴

When the LNG tanker arrives at an import facility, the LNG is pumped from the ship to an insulated storage tank at the terminal.²⁵ LNG is stored at very low pressures in double-walled, insulated tanks.²⁶ The inner tank contains the LNG, while the outer tank contains the insulation and prevents natural gas vapor from escaping.²⁷ All new LNG facilities are required to have a dike or impounding wall capable of containing 100% of the maximum LNG storage capacity to prevent any overflow from the site.²⁸

Although the storage tanks at an LNG marine terminal may be used to store the gas until periods of peak demand, the principal operation of an import terminal is not for gas storage, but for receiving the LNG imports and either regasifying LNG for immediate shipment via pipelines or

17. See Energy Outlook, *supra* note 15, at 87.

18. See *id.* at 86.

19. A Guide to LNG, *supra* note 3, at 2. The principal countries that export LNG include Algeria, Indonesia, Malaysia, Qatar, and Trinidad and Tobago. *Id.* Japan is likely the world’s leader in LNG imports, as 97% of the natural gas consumed in Japan is imported LNG. See *id.* Japan has 40 LNG facilities, 24 of which are located near major cities. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. U.S. LNG Markets and Uses, *supra* note 5, at 4.

25. A Guide to LNG, *supra* note 3, at 2.

26. *Id.*

27. *Id.*

28. *Id.*

transferring the LNG to tanker trucks for delivery to customers.²⁹ An LNG tanker truck typically carries between 10,000 and 12,000 gallons of LNG – enough to supply the daily needs of approximately 1,000 homes.³⁰

III. WHAT IS AT STAKE: COMPETING FEDERAL AND STATE INTERESTS

A. Federal Interests

The federal government is interested in streamlining, clarifying, simplifying, coordinating, and unifying the process of siting and constructing LNG facilities. Courts note the strong federal interest in establishing a uniform system of regulation designed to implement a national policy of ensuring an adequate supply of natural gas at reasonable prices, and further, that individual states are incapable of adequately and affectively regulating for the interest of the nation as a whole.³¹

B. State Interests

1. Safety

LNG is considered a hazardous material, and a spill potentially could be fatal for several reasons. First, the extreme cold of LNG can cause bodily harm.³² Second, when LNG is warmed by coming into contact with either water or air, it evaporates very rapidly as it returns to its original gaseous state.³³ As LNG vaporizes, a vapor cloud resembling ground fog will initially form under calm atmospheric conditions.³⁴ When the vapor cloud absorbs more heat, it becomes lighter than air, rises, and can be carried away by the wind.³⁵ Although not poisonous, exposure to

29. U.S. LNG Markets and Uses, *supra* note 5, at 4.

30. A Guide to LNG, *supra* note 3, at 2.

31. *See, e.g.*, *Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49, 52 (D.R.I. 2000); Sound Energy Solutions, Declaratory Order Asserting Exclusive Jurisdiction, 106 F.E.R.C. 61,279 (2004); FPL Energy Maine Hydro LLC, Order Approving Recreation Monitoring Report, 106 F.E.R.C. 62,017 (2004). Whether LNG is more effectively regulated by federal or state authorities is a debatable issue outside the scope of this paper. *But see generally* Kransdorf, *supra*, note 7 (providing an in-depth analysis of the merits of federal versus state regulation of LNG facilities). Of interest, however, is that the developers of the Cove Point, Maryland LNG terminal had to obtain over 140 permits. *See* COMPTROLLER GEN. OF THE U.S., REP. NO. EMD-81-34, IMPLICATIONS OF THE U.S. – ALGERIAN LIQUEFIED NATURAL GAS PRICE DISPUTE AND LNG IMPORTS app. II at 15 (1980). Also, in the early 1970's, California's gas utilities were planning to build an LNG import and identified three possible sites. Liquefied Natural Gas in California, *supra* note 14, at 1. However, the three state agencies involved in site approval could not agree on a preferred site. *See id.* The project proponents eventually appealed to the state legislature, which responded by passing a bill to simplify the process. *See id.* By the time a site was approved, the project was no longer economical and had to be canceled. *See id.*

32. Liquefied Natural Gas in California, *supra* note 13, at 2.

33. *Id.*

34. *Id.*

35. *Id.*

the center of a vapor cloud could cause asphyxiation because of the absence of oxygen.³⁶ Finally, although an LNG vapor cloud will not explode simply by being in the open atmosphere, if an ignition source is present, the vapor cloud is flammable when it is at a five percent to fifteen percent concentration in the air.³⁷ An ignited LNG vapor cloud has a tremendous heat radiant output that has the potential to extensively jeopardize life and property.³⁸ In today's age of terror threats, an LNG facility makes a likely target.

2. Environment

Another concern is the environmental impact of LNG facilities. The main impact is simply the change in the physical landscape. A considerable amount of dredging and filling is necessitated by the size of the LNG tankers, which could adversely affect the marine water-quality and local marine life.³⁹

Additionally, LNG regasification terminals that use the "open-rack" or "open-loop" system course seawater through radiator-like racks to warm and re-gasify the LNG. Just one such terminal alone can use up to 200 million gallons of water a day.⁴⁰ The resulting temperature change and physical damage caused by the process could destroy fish eggs and larvae and jeopardize essential habitat for local marine life.⁴¹ Supposedly, more expensive closed-system facilities alleviate some of the damage to marine life.⁴²

However, unlike crude oil, if LNG is spilled in water, it evaporates and leaves no residue.⁴³ Additionally, air emissions are not a concern, as LNG facilities do not flare natural gas except during an emergency.⁴⁴ The primary source of air emissions is diesel-fired generators only used as emergency equipment if electricity from the grid is interrupted.⁴⁵

36. *Id.*

37. *Id.*; Kransdorf, *supra* note 7, at 45.

38. Liquefied Natural Gas in California, *supra* note 13, at 2.

39. *Id.* at 15.

40. Sierra Club Delta, Gumbo Alliance Tells Coast Guard, McMoran: NO FISH FOR FUEL, <http://louisiana.sierraclub.org/lng.asp> (last visited Oct. 21, 2006) [hereinafter NO FISH FOR FUEL].

41. *See id.*; Liquefied Natural Gas in California, *supra* note 13, at 1 (noting that the cold-water discharges associated with the heat-exchanger regasification systems could adversely affect aquatic environments).

42. *See* NO FISH FOR FUEL, *supra* note 40.

43. Kransdorf, *supra* note 7, at 45; Liquefied Natural Gas in California, *supra* note 14, at 3.

44. Liquefied Natural Gas in California, *supra* note 14, at 15.

45. *Id.*

3. Accident Record of LNG Facilities and Tankers

LNG has been crossing the oceans for more than forty-five years, and no serious accidents involving an LNG terminal facility in the U.S. have occurred in the past twenty-five years.⁴⁶ To date, there have been only two incidents in the U.S.⁴⁷ In 1944, an LNG storage facility in Cleveland, Ohio failed and spilled LNG into the streets and the storm sewer system.⁴⁸ The resulting explosion killed 128 people.⁴⁹ That tank, however, lacked an impoundment dike and was built using a poor quality steel produced during World War II metal rationing.⁵⁰ In 1979, at the Cove Point LNG import facility in Maryland, gas vapors leaked into an electrical conduit and settled in a confined space after a pump seal failed.⁵¹ A worker unwittingly switched off a circuit breaker, igniting the gas and causing a fatality and heavy property damage.⁵²

Worldwide, in 2004, there was a catastrophic accident at a LNG liquefaction plant in Algeria killing approximately 100 people.⁵³

Since 1959, when LNG maritime transportation began, there have been only eight incidents of significance involving LNG tankers, and none resulted in spills from cargo tank ruptures.⁵⁴ There have been no cargo explosions, fires, or shipboard deaths.⁵⁵

4. Local Sentiment and Legislation Over LNG Facilities

As might be expected, most residents who live near a proposed LNG facility do not subscribe to the justifications for federal siting of LNG facilities and they do not view the goal of lower natural gas prices as worth the costs associated with living in close proximity to an LNG facility. The examples below provide a flavor of the local perspective in certain areas.

a. Passamaquoddy Bay, Maine

One proposed, although not yet approved, site for an LNG facility is Passamaquoddy Bay, Maine. On July 14, 2006, a FERC official and representatives of the development company Quoddy Bay L.L.C. took a group of approximately 90 local residents on a tour of the proposed site, which also happens to be on Passamaquoddy tribal lands.⁵⁶ The mood

46. A Guide to LNG, *supra* note 3, at 4.

47. *Id.*

48. *Id.*; Liquefied Natural Gas in California, *supra* note 14, at 8.

49. Liquefied Natural Gas in California, *supra* note 14, at 8.

50. A Guide to LNG, *supra* note 3, at 4.

51. *Id.*; Liquefied Natural Gas in California, *supra* note 14, at 8.

52. Liquefied Natural Gas in California, *supra* note 14, at 8.

53. A Guide to LNG, *supra* note 3, at 4.

54. *Id.*

55. Liquefied Natural Gas in California, *supra* note 14, at 9.

56. Bill Trotter, *Opponent's speak out during fed official's tour; Foes of proposed LNG facili-*

was set early as the local residents directed accusatory and hostile questions and comments at the FERC official and corporate representatives shortly after the appointed morning meeting time. An informal vote had been taken earlier among local residents regarding support for Quoddy Bay's LNG construction plans. The result was 279-214 against Quoddy Bay. Some of the tour members accused Quoddy Bay of reneging on a promise to abort the proposed LNG facility if the majority of voters opposed it. Passamaquoddy tribal members protested the visit by chanting. The tribe has filed a lawsuit in federal court in Bangor challenging FERC's approval of Quoddy Bay's lease agreement with the tribe.

b. Sparrow's Point, Maryland

Opposition is also present at a proposed site at Sparrows Point, Maryland.⁵⁷ The project, proposed by AES Corp., is a \$400 million shipping terminal and processing plant and an 87-mile natural gas pipeline from Sparrows Point to southern Pennsylvania. Local residents and elected officials have opposed the LNG project, claiming it would harm the environment, create a terrorist target, and negatively affect the economy and quality of life.

A lawyer for Baltimore County, Maryland residents opposed to an LNG terminal there argues that construction of the LNG facility would violate an agreement requiring the clean up of the nearby former Bethlehem Steel shipyard. There is a 1998 consent decree between the federal government and the defunct steel giant requiring its owners to continue cleanup efforts and prohibiting activities that could exacerbate environmental problems. The Baltimore County lawyer contends that an LNG facility would violate those terms because its construction would necessitate dredging the Patapsco River to accommodate LNG tankers, and dredging would disturb toxic substances settled deep in the river bed.

AES Corp. has been denied access to county easements along the proposed pipeline for survey work, and a county executive representative has stated that "we're not going to do anything to facilitate [the project] moving forward." The county has also approved a ban on LNG facilities within five miles of homes. The LNG plant at Sparrows Point would be built less than 1 ½ miles from the nearest homes.

ties participate in site visit, BANGOR DAILY NEWS, July 14, 2006, at A1.

57. Laura Barnhardt, *U.S. attorney asked to stop LNG project; Opponents' lawyer says facility would violate U.S.-Beth Steel cleanup agreement of 1998*, THE BALTIMORE SUN, July 14, 2006, at 4B.

c. Rhode Island

Rhode Island residents have also become embroiled in the LNG debate.⁵⁸ In July, 2006, Rhode Island governor Carcieri signed into law legislation that would block LNG tankers from using Rhode Island waters to reach a proposed terminal, already approved by FERC, in Fall River, Massachusetts.⁵⁹ The purpose of the law is to effectively prohibit massive LNG tankers from passing through state waters by enforcing strict security zones with which the ships would not be able to comply. The law is based on language in the Federal Port and Waterways Safety Act. Rhode Island politicians believe the tankers traveling to the proposed terminal would be safety hazards. Although the proposed site is not actually physically located in Rhode Island, tankers must pass through state waters, and Rhode Island lawmakers claim to have “every right to protect our Bay.”

IV. SECTION 311 OF THE 2005 ENERGY POLICY ACT

On August 8, 2005, President Bush signed into law the Energy Policy Act.⁶⁰ The 2005 Energy Policy Act affects many sectors of the United States energy industry, including the expanding LNG market.

Section 311 of the 2005 Energy Policy Act amends the jurisdictional statement in the NGA (15 U.S.C. 717(b)) to include “the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation.”⁶¹ Section 311 also includes a definition for “LNG terminal,” which states:

‘LNG Terminal’ includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign county, exported to a foreign county from the United States, or transported in interstate commerce by waterborne vessel, but does not include –

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.⁶²

For purposes of this article, the critical provision is section 311(c)(2). It states: **“The Commission shall have the exclusive authority to approve**

58. Alex Kuffner, *New Law would Block LNG tankers from Bay*, THE PROVIDENCE JOURNAL BULLETIN, July 13, 2006, at D-01.

59. The article notes that similar legislation in Massachusetts is currently being challenged in federal court by federal authorities as unconstitutional.

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

61. *Id.* § 311(a).

62. *Id.* § 311(b).

or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”⁶³ Amended section 3 of the NGA also provides that:

Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall –

- (A) set the matter for hearing;
- (B) give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 3A;
- (C) decide the matter in accordance with this subsection; and
- (D) issue or deny the appropriate order accordingly.⁶⁴

States are also provided the opportunity to designate a state agency to consult with FERC regarding an LNG application.⁶⁵ FERC is directed to consult with the state agency regarding state and local safety considerations before approving an LNG site.⁶⁶ These considerations include:

- (1) the kind and use of the facility;
- (2) the existing and projected population and demographic characteristics of the location;
- (3) the existing and proposed land use near the location;
- (4) the natural and physical aspects of the location;
- (5) the emergency response capabilities near the facility location;
- and
- (6) the need to encourage remote siting.⁶⁷

The state agency may furnish an “advisory report” on such considerations, and the Commission shall review and respond specifically to the issues raised.⁶⁸ After the facility is constructed, the state has authority to conduct safety inspections in conformance with Federal regulations and guidelines upon written notice to the Commission.⁶⁹ However, states may only report violations of federal regulations to FERC; they may not enforce compliance.⁷⁰

Unless otherwise stated in the Act, nothing in the Act affects the rights of states under the Coastal Zone Management Act, the Clean Air Act, or the Federal Water Pollution Control Act.⁷¹ Companies proposing con-

63. *Id.* § 311(c)(2).

64. *Id.*

65. *Id.* § 311(d).

66. *See id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* § 311(c)(2).

struction of an LNG facility are still required to obtain any permits required under these acts.

Despite the granting and reserving of some power to the states, section 3 of the NGA (as amended) directs that FERC is the “lead agency” in the approval process, and that each federal and state agency “shall cooperate with the Commission and comply with the deadlines established by the Commission.”⁷² The Commission shall “establish a schedule for all Federal authorizations,” “ensure expeditious completion of all such proceedings,” and “comply with applicable schedules established by Federal law.”⁷³ If a state agency does not comply with FERC scheduling, it may be sued in the US Court of Appeals for the District of Columbia Circuit.⁷⁴ Additionally, a state agency may face court action if it denies a required permit.⁷⁵ If the court finds that the denial is “inconsistent with the federal law governing such permit” and would “prevent the construction” of an LNG facility, the court may then remand the denial back to the state agency and set a reasonable deadline for the state agency to act.⁷⁶

Thus, it appears that, even though states retain their rights under the Coastal Zone Management Act, Clean Air Act, and Federal Water Pollution Control Act, a state may only prevent construction of the LNG facility pursuant to these acts if it is consistent with applicable federal law as determined by the D.C. Circuit. An amorphous standard, to be sure.

V. COMMERCE CLAUSE 101: THE INTERSECTION OF FEDERAL AND STATE POWER TO REGULATE COMMERCE

Article I, Section 8, Clause 3 of the U.S. Constitution, i.e., the Commerce Clause,⁷⁷ has produced one of the most interesting and complex bodies of jurisprudence in American law. Unlike most democracies, the U.S. legislative branch lacks constitutional authority to enact general welfare legislation; the Constitution vests this power exclusively in the individual states. The Constitution does, however, grant Congress authority to regulate interstate commerce, and due to the breadth with which commerce can be defined,⁷⁸ coupled with the ease with which issues can be said to relate to commerce,⁷⁹ Congress has seized on the Commerce

72. 15 U.S.C. § 717b(d)(2)(B)(i) (2000).

73. *Id.* § 717n(c)(1)-(1)(B).

74. *Id.* § 717r(d)(2) (Supp. 2005).

75. *Id.*

76. *Id.* § 717r(d)(3).

77. *See* U.S. CONST. art. I, § 8, cl. 3 (granting to Congress the power and authority “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

78. *See* *Carter v. Carter Coal Co.*, 298 U.S. 238, 297-98 (1936) (noting that “commerce is a word of extensive import”).

79. *See* *Nuckols v. Athey*, 138 S.E.2d 344, 348 (W.Va. 1964) (stating that the word “commerce” as used in the Constitution has practical and not a technical meaning and includes busi-

Clause as its portal to general welfare legislation. Thus, Commerce Clause cases involve the struggle for power between individual states and the federal government.

A. Federal Power to Regulate Interstate Commerce

The dust has mostly settled from over a century's worth of Commerce Clause battling. Currently, while Congressional legislation is limited in that the subject matter must involve *interstate* commerce, if the subject of Congressional legislation involves any of the below described categories, it qualifies as interstate and will support jurisdiction:

1. the use of channels of interstate commerce;
2. those activities affecting interstate commerce;
3. the instrumentalities of interstate commerce or persons or things in interstate commerce.⁸⁰

States also have the concept of federal preemption to contend with in enacting legislation. Under the Supremacy Clause,⁸¹ federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms.⁸² In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive that it is reasonable to infer that Congress left no room for supplementary state regulation.⁸³ Pre-emption of a whole field also will be inferred where the field is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.⁸⁴ Finally, even if Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law.⁸⁵ A conflict arises when compliance with both federal and state regulation is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.⁸⁶

ness or commercial intercourse in any and all its forms and branches and in all its component parts and may even embrace purely social intercourse between citizens of different states if either persons or communication wires or transmissions cross state boundaries).

80. *Perez v. United States*, 402 U.S. 146, 150 (1971).

81. *See* U.S. CONST. art. VI, para. 2.

82. *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465, 468 (8th Cir. 1987) (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

B. States' Ability to Regulate Interstate Commerce

State legislation may be upheld even though it affects interstate commerce if it “regulates evenhandedly to effectuate a legitimate local public interest . . . and its effects on interstate commerce are only incidental.”⁸⁷ States may not discriminate against out-of-state persons or entities or by drawing geographical distinctions between otherwise similarly situated persons or entities. Additionally, state legislation will not be upheld if the “burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”⁸⁸

However, even when federal law preempts state regulation of certain activities in a given field, state regulation of “distinct activities” in that field, or legislation enacted with a different primary focus from the federal legislation, is permissible when the state regulation does not conflict with the federal law.⁸⁹ A conflict in this context means that adherence to both federal and state law is impossible or that the operation of state law frustrates accomplishment of a federal objective in the field.⁹⁰

C. Federal Power to Regulate Foreign Commerce

The Commerce Clause also grants Congress power to “regulate commerce with foreign nations.”⁹¹ Commerce with foreign nations is defined as “commerce between citizens of the United States and citizens or subjects of foreign governments . . . [i]t means commercial intercourse between nations, and parts of nations, in all its branches.”⁹² As such, interstate commerce and foreign commerce are distinct concepts.⁹³

Congress has plenary power to regulate foreign commerce, and state legislation comes under a higher level of scrutiny when it restrains foreign commerce.⁹⁴ Unlike interstate commerce, foreign commerce is “pre-eminently a matter of national concern,”⁹⁵ and the United States must speak with a “single voice” for effective relations and trade with foreign

87. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 525-26 (1988) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

88. *Id.* at 526.

89. *ANR Pipeline*, 828 F.2d at 471; *see, e.g. Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 586-87 (1987) (upholding state permit requirement for mining on federal land despite federal preemption over land use plans in federal forests because the state statute was enacted for *environmental* protection and was not intended to implement land use plans); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 213-16 (1983) (upholding state permit system imposing nuclear waste disposal certification requirement on proposed nuclear power plants despite federal preemption of nuclear safety because the primary focus of the statute was economic feasibility rather than safety).

90. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988).

91. U.S. CONST. art. I, § 8, cl. 3.

92. *Henderson v. Mayor of the City of New York*, 92 U.S. 259, 270 (1876).

93. *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 150 (D.C. Cir. 1948).

94. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980); *La. Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 821 (5th Cir. 1990).

95. *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979).

nations.⁹⁶ Accordingly, the Supreme Court has not limited federal regulation of foreign commerce through federalism and state sovereignty as it has with interstate commerce.⁹⁷

VI. THE REGULATORY FRAMEWORK OF THE NATURAL GAS INDUSTRY

Regulation of the natural gas industry is divided between federal and state authorities. Further, Congress expressly intended that there be a “bright line easily ascertained” between the two authorities.⁹⁸ With that goal in mind, the NGA was “drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.”⁹⁹ The congressional desire in enacting the statute was to establish a uniform system of regulation to assure an adequate, reliable, and reasonably-priced supply of natural gas for the entire nation.¹⁰⁰

A. Federal Regulation of the Natural Gas Industry

1. Brief History and Jurisdictional Basis of the Natural Gas Act

The natural gas industry in the early 1900’s was predominately regulated by states. At that time, natural gas was typically distributed in the same state in which it was gathered and processed – it was not an interstate industry.¹⁰¹ By the 1930’s, the natural gas industry had become sufficiently interstate to necessitate federal regulation.¹⁰² Congress thus passed the NGA in 1938 to fill the regulatory gap and assist the courts who had been struggling on a case by case basis to define “interstate commerce” as it relates to the natural gas industry.¹⁰³

As explained in more detail below, the NGA was designed to grant federal regulatory power over the natural gas industry’s interstate activities, while leaving the intrastate activities to state regulation. Generally speaking, federal regulations govern “the price at which natural gas may be sold, whether natural gas facilities may be built or modified, where they may be located, the methods by which they are constructed, and the safety standards that must be observed” if the activity is interstate.¹⁰⁴

96. *Reeves*, 447 U.S. at 437 n.9.

97. *Id.* at 448 (Powell, J., dissenting).

98. *Fed. Power Comm’n v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964).

99. *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n of Ind.*, 332 U.S. 507, 517-518 (1947).

100. *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978); *Algonquin*, 79 F. Supp. 2d at 52.

101. Kransdorf, *supra* note 7, at 53-54.

102. *See id.* at 54.

103. *See* Jim Behnke, *Safety Jurisdiction Over Natural Gas Pipelines*, 19 ENERGY L.J. 71, 77 (1998).

104. *Algonquin*, 79 F. Supp. 2d at 51; *See, e.g., Schneidewind*, 485 U.S. at 293 (1988) (holding that Michigan could not regulate rates charged for natural gas); *Nat’l Fuel Gas Supply Corp. v. Pub. Serv. Comm’n of the State of N.Y.*, 894 F.2d 571 (2d Cir. 1990) (holding that New York

The jurisdictional statement for the NGA is found in section 1(b) of the Act. It states that the Act applies to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale.¹⁰⁵ A “natural gas company” 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.”¹⁰⁶ “Interstate commerce” is defined as “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.”¹⁰⁷

Thus, in enacting the NGA, Congress opted to utilize category number three listed *supra* – the instrumentalities of interstate commerce or persons or things in interstate commerce – to ground jurisdiction because the natural gas is physically crossing state borders.

2. Section 3 and Section 7 Certifications

Depending on the type of activity it wishes to engage in, an interstate gas company may need to apply for a section 3 or section 7 certification from FERC.

A section 3 permit is required in order to import or export natural gas. It states:

No person shall export . . . or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.¹⁰⁸

Section 7 of the NGA requires natural gas companies to obtain a Certificate of Public Convenience and Necessity before it may construct, acquire, or operate any facilities or construct any pipeline used in the sale

may not engage in site-specific environmental review of facilities); *N. Border Pipeline Co. v. Jackson County*, 512 F. Supp. 1261 (D. Minn. 1981) (invalidating zoning requirement that pipeline must be buried six feet underground).

105. 15 U.S.C. § 717(b) (2000).

106. *Id.* § 717a(6).

107. *Id.* § 717a(7).

108. *Id.* § 717b(a) (emphasis added).

or transportation of natural gas subject to the FERC's jurisdiction.¹⁰⁹ FERC has promulgated detailed regulations concerning application for Section 7 certificates.¹¹⁰ An applicant must attach exhibits showing the location and dimensions of the new project, flow diagrams representing daily operational capacity with and without the proposed change, and a statement setting forth the arrangement regarding the supervision and management of the new construction.¹¹¹ Additionally, there must be a statement of factors such as the possibility of using existing rights-of-way, factors considered in routing a facility through an officially designated scenic, historic, recreational, or wildlife area.¹¹² Applicants must provide a statement that they have followed the federal guidelines for planning, locating, constructing, and maintaining facilities "in the interest of preserving scenic, historic, wildlife and recreational values, the construction and maintenance . . . should be undertaken in a manner that will minimize adverse effects on these values."¹¹³ Applicants must also submit an environmental impact statement detailing potential adverse effects of the project and alternatives which might avoid those effects.¹¹⁴

3. Preemption of State Law for Safety and Siting of Interstate Gas Pipelines, Including Environmental Review

Due to its authority under section 7 of the NGA, federal law preempts state law in deciding siting of interstate gas pipelines and facilities, including consideration of the environmental implications of the proposed site.¹¹⁵

The certification process usually entails notice and an adjudicative hearing, but FERC may, in an emergency, issue a temporary certificate without notice and hearing in order to provide immediate service to particular customers.¹¹⁶ As described above, FERC is, however, required to conduct a wide ranging review of all aspects of a proposed project, including gas supply, demand for gas, cost of facilities, land use, environmental considerations, and pipeline safety in determining whether to issue a certificate of public convenience and necessity under section 7(c).¹¹⁷ FERC

109. *Id.* § 717(f); *See* *Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1065 (D.C. Cir. 1974) (noting that "[t]he Commission has long regarded Section 3's public interest standard and Section 7's "public convenience and necessity" standard as substantially equivalent").

110. *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n of N.Y.*, 894 F.2d 572, 573 (2nd Cir. 1990).

111. 18 C.F.R. § 157.14(a) (2006).

112. *Id.*; 18 C.F.R. § 157.14(a)(6-a) (2006).

113. *Nat'l Fuel Gas Supply Corp. v. Public Serv. Comm'n of N.Y.*, 894 F.2d 571, 573 (2nd Cir. 1990).

114. *Id.*

115. 49 U.S.C. § 60104(c) (2006); *Nat'l Fuel Gas Supply*, 894 F.2d at 579.

116. 15 U.S.C. § 717f(e)(1)(b) (2006).

117. *Atlantic Refining Co. v. Public Serv. Comm'n of N.Y.*, 360 U.S. 378 (1959); *Nat'l Fuel Gas Supply Corp. v. Public Serv. Comm'n of N.Y.*, 894 F.2d 571 (2d Cir. 1990).

is also required to comply with the National Environmental Policy Act (“NEPA”) prior to approving a facility. As stated by the U.S. Court of Appeals for the Second Circuit:

Congress placed authority regarding the location of interstate pipelines . . . in the FERC, a federal body that can make choices in the interests of energy consumers nationally, with intervention afforded as of right to relevant state commissions. Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review. Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need.¹¹⁸

Congress has expressly preempted state regulation of the safety of interstate gas pipelines.¹¹⁹ Under the Natural Gas Pipeline Safety Act (“NGPSA”),¹²⁰ the Secretary of Transportation is required to establish comprehensive safety standards for all interstate pipeline facilities, and to administer an inspection program designed to ensure industry compliance with applicable safety standards.¹²¹ Additionally, the NGPSA requires interstate pipeline companies to certify to FERC that they “will design, install, inspect, test, construct, operate, replace and maintain” the facilities they propose to construct in accordance with the applicable safety standards of the NGPSA.¹²² The states may adopt additional or more stringent safety standards for *intrastate* pipelines, but states may not adopt or continue in force any standards for interstate transmission facilities.¹²³ Even in regard to intrastate pipelines, federal interest is strong

118. *Nat'l Fuel Gas Supply*, 894 F.2d at 579. *National Fuel* involved a state regulation that required persons proposing to construct natural gas transmission lines that have a certain length and are transported under a certain pressure to obtain a certificate of environmental compatibility and public need. The regulation also allowed a state agency to consider safety factors related to the proposed construction. The court held that the state regulation was preempted by federal regulation of the siting of interstate gas pipelines, including review of environmental and safety considerations. The court was unimpressed by the regulation's assertion that it did not apply to any facility that was under exclusive federal jurisdiction, and that the relevant state agency would not exercise authority preempted under the Supremacy Clause.

119. *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465, 469 (8th Cir. 1987).

120. Natural Gas Pipeline Safety Act of 1968, Pub. L. No. 90-481, 82 Stat. 720.

121. *Id.* §§ 1672, 1677, 1680-81.

122. *Id.* § 1676.

123. *Id.* § 1672(a)(1). *See also* *Nat. Gas Pipeline Co. of America v. Railroad Comm'n*, 679 F.2d 51 (5th Cir. 1982) (striking under the NGPSA the Texas Railroad Commission's rule requiring natural gas companies to provide specified procedures and safeguards to warn and protect the general public against the accidental release of hydrogen sulfide from their facilities); *Northern Border Pipeline Co. v. Jackson County*, 512 F. Supp. 1261 (D.Minn. 1981) (enjoining enforcement of a conditional land use permit issued by a Minnesota county to a pipeline company seeking to construct an interstate pipeline that would require the pipeline being buried at a minimum of six feet while applicable federal standards only require three feet); *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 319 F. Supp. 1138, 1141 (E.D. La. 1970) *aff'd*, 445 F.2d 301 (5th Cir. 1971) (finding that Congress completely preempted the field of interstate pipeline safety and prohibiting the state from doing anything in this regard – it was no defense that

enough to ensure that state regulations meet federal approval.¹²⁴ As stated in the House report on the bill for the NGPSA:

The committee in nowise accepts the declaration that gas safety matters are primarily of local concern and subject to regulation by the States. On the contrary, it is the Federal safety standards which are in effect and the ultimate responsibility for establishment and enforcement of the Federal safety standards is the responsibility of the Secretary. . . . [T]he committee language also takes from the States and gives to the Secretary the regulation of safety of the interstate transmission lines.¹²⁵

Safety of LNG is specifically addressed by the Research and Special Programs Administration (“RSPA”), which is authorized “to promulgate and enforce safety regulations and standards for transportation and storage of LNG in or affecting interstate or foreign commerce under the pipeline safety laws.”¹²⁶ This authority also includes siting LNG facilities.

4. Commingling

“Commingling” refers to the mixing of intrastate and interstate gas and is a theory upon which FERC may exercise jurisdiction.¹²⁷ Commingling can occur through the use of facilities to receive, store, and process gas destined for both interstate and intrastate sales.¹²⁸ “[G]as commingled with other gas indisputably flowing in interstate commerce becomes itself interstate gas, even though the gas in question leaves the interstate stream before it crosses any state border.”¹²⁹ “[W]here a pipeline receives gas in one state, makes some deliveries therein, and then carries the remainder across the border into another, the entire volume of natural gas in question ‘begins its journey in interstate commerce at the well-head.’”¹³⁰

B. State Authority to Regulate Natural Gas

Recall that, in enacting the NGA, Congress “did not envisage federal regulation of the entire natural-gas field to the limit of constitutional

standards were identical to federal).

124. *ANR Pipeline*, 828 F.2d at 469.

125. H.R. Rep. No. 90-1390 at 29, as reprinted in 1968 U.S.C.C.A.N. 3223, 3245.

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

127. *Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1061 (D.C. Cir. 1974).

128. *Id.*

129. *Okla. Natural Gas Co. v. FERC*, 28 F.3d 1281, 1285 (D.C. Cir. 1994).

130. *Id.* at 1286 (citing *Pub. Serv. Comm'n of Kentucky v. FERC*, 610 F.2d 439, 444 (6th Cir. 1979)).

power.”¹³¹ Rather, the NGA “was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.”¹³² Further, state and local laws that have only an indirect effect on interstate gas facilities are not preempted, and local regulation with respect to matters or activities that are separate and distinct from subjects of federal regulation may be permissible if they do not impede or prevent the accomplishment of a legitimate federal objective.¹³³

Because Congress opted to regulate only the instrumentalities of and things in interstate commerce under the NGA, states retain the right to regulate intrastate commerce. Intrastate commerce in the natural gas industry consists of either production, gathering, local distribution, or transportation of natural gas in a purely intrastate pipeline called a “Hinshaw pipeline.”

1. Local Distribution and Production or Gathering

The Natural Gas Act does not apply to “the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.”¹³⁴

Gas that is extracted at the well first flows through a network of gathering lines that converge at processing plants. At the processing plant, the gas undergoes cooling, scrubbing, dehydration, and compression. The cleansed gas then flows through high pressure transmission lines to, for example, local distribution companies (LDCs). The local distributors deliver natural gas to the ultimate consumers, individuals and local businesses, through a third set of lines.¹³⁵ Local distribution refers to this last set of lines, the sale and distribution of gas from the LDCs directly to local consumers.¹³⁶ The LDC facilities and pipelines to local consumers are not subject to federal jurisdiction.

Gathering is the process of taking natural gas from the wells and moving it to a collection point for processing and further movement through a pipeline’s principal transmission system.¹³⁷ States’ authority over gathering is grounded in the traditional state responsibility and right to govern the production of natural resources from a common pool. States have an interest in curbing waste and protecting the correlative rights of owners by prorating production among the various wells operating in a field.¹³⁸

131. Fed. Power Comm’n v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 502 (1949).

132. General Motors Corp. v. Tracy, 519 U.S. 278, 292 (1997) (internal quotations and citations omitted).

133. *Id.*

134. 15 U.S.C. § 717(b) (2000).

135. *Pub. Serv. Comm’n of Kentucky*, 610 F.2d 439, 441 (6th Cir. 1979).

136. *General Motors*, 519 U.S. at 291.

137. *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404 n.1 (10th Cir. 1990).

138. *Champlin Refining Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 233-34 (1932).

The following will typically fall under the gathering exemption: the well, the pipeline from the well to the processing plant, and the processing plant itself.

The line between gathering and interstate transportation of gas is not always clear. The “primary function test”¹³⁹ was developed to assist courts in determining whether the pipeline or facility was interstate or intrastate. It consists of a set of factors tending to indicate whether a facility is devoted to the collection of gas from wells (gathering), or to the further, downstream, long-distance movement of gas after it has been collected (interstate transportation).¹⁴⁰ The six factors are (1) the length and diameter of the relevant lines, (2) the extension of the facility beyond the central point in the field, (3) the lines’ geographic configuration, (4) the location of compressors and processing plants, (5) the location of wells along all or part of the facility, and (6) the operating pressure of the lines.¹⁴¹

2. The Hinshaw Amendment

In 1954 Congress enacted the Hinshaw Amendment, which added section 1(c) to the NGA.¹⁴² Specifically, the Hinshaw Amendment carves out an exemption from FERC jurisdiction for natural gas companies engaged in the transportation of “natural gas received by such [company] from another [company] within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State.”¹⁴³ A “Hinshaw pipeline” can still come under FERC authority if it engages in activities that go beyond the intrastate transport of gas.¹⁴⁴ FERC has interpreted the Hinshaw Amendment as “drawing the line of demarcation between Federal and State regulation at the point when the intrastate company receives the gas from an interstate shipper.”¹⁴⁵

VII. LNG LITIGATION

*A. Border Pipe Line Co. v. Fed. Power Comm.*¹⁴⁶

Border Pipe Line involved a gas pipeline located wholly within the state of Texas. Petitioner, the owner and operator of the pipeline, sold the gas to an industrial customer at the pipeline’s terminus located near

139. Conoco Inc. v. FERC, 90 F.3d 536, 542 (D.C. Cir. 1996).

140. *Id.* at 543.

141. *Id.* at 544.

142. Behnke, *supra* note 103, at 79.

143. 15 U.S.C. § 717(c) (2000).

144. Public Util. Comm. of the State of Cal. v. FERC, 143 F.3d 610, 615 (D.C. Cir. 1998).

145. Union Pac. Fuels, Inc. v. Southern Cal. Gas Co., 76 F.E.R.C. P61,300, 62,495 (1996).

146. Border Pipeline Co. v. Fed. Power Comm’n, 171 F.2d 149 (D.C. Cir. 1948).

the Rio Grande River.¹⁴⁷ The purchaser then transported the gas into Mexico for use there.¹⁴⁸ The petitioner sought review of an order by FERC that petitioner was an interstate gas company and so must have a section 7 Certificate of Public Convenience and Necessity and be subject to all section 7 regulations.¹⁴⁹ The court set aside FERC's order.

The court began its analysis on the premise that “ ‘[i]nterstate commerce’ does not include foreign commerce, unless Congress by definition for the purposes of a particular statute includes them both in the single expression.”¹⁵⁰ The court determined that the Natural Gas Act clearly distinguished between interstate and foreign commerce. The court thought it logical that such a distinction should be made. It stated, “It seems reasonable . . . that Congress should be concerned only with the fact of exportation or importation in the case of foreign commerce, but with rates, practices, accounting, facilities and financing in the case of domestic commerce.”¹⁵¹

The court went on to hold that “the exportation of natural gas from the United States to a foreign country, or the importation of natural gas from a foreign country is not ‘interstate commerce’ as that term is contemplated by the Act.”¹⁵² Because the petitioner's operations did not include either transportation or sale of natural gas in interstate commerce, it was not an interstate company as contemplated by the NGA and did not need a section 7 Certificate of Public Necessity and Convenience.¹⁵³ Accordingly, FERC had overextended its jurisdiction in attempting to regulate all the activities of the petitioner's operation simply because it exported natural gas.¹⁵⁴

*B. Distrigas Corp. v. FERC*¹⁵⁵

Distrigas Corp. and its affiliates (“Distrigas”) sought review of a FERC order requiring it to apply for section 7 certification to construct and operate an LNG terminal and related facilities on Staten Island and in Massachusetts.¹⁵⁶ The imported gas was intended for sale in both intrastate and interstate commerce.¹⁵⁷ Distrigas argued that FERC's order

147. *Id.* at 150.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 151.

152. *Id.*

153. *Id.* at 152.

154. *Id.*

155. 495 F.2d 1057 (D.C. Cir. 1974).

156. *Id.* at 1058.

157. *Id.*

contravened the holding in *Border Pipe Line*.¹⁵⁸ The court upheld FERC's order, but declined to overrule *Border Pipe Line*.

The case had an interesting procedural history. Initially, FERC held that since Distrigas proposed to take delivery of the gas alongside the LNG tanker, foreign commerce and compulsory section 3 jurisdiction ceased after delivery.¹⁵⁹ FERC appeared to follow the line of reasoning in *Border Pipe Line* in holding that the importation of natural gas is not interstate commerce and therefore the storage and regasification of liquefied natural gas were operations "separate and separable" both from the act of importation and from the sale of gas in interstate commerce.¹⁶⁰ Further, while section 7 certification was required for those sales of liquefied and regasified natural gas destined for resale in interstate commerce, FERC jurisdiction only attached at the tailgate of the facility receiving the imported gas.¹⁶¹ Thus, Distrigas' facilities and its transport and sale of natural gas solely within the state were exempt from compulsory jurisdiction and did not require certification.¹⁶²

FERC further held, however, that federal jurisdiction over the facilities and intrastate sales could be grounded in section 3 as part of the "terms and conditions" of authorizing importation.¹⁶³ Thus, the controlling question was whether it was necessary or appropriate to the public interest for FERC to exercise such expansive jurisdiction. FERC thought not. It posited that it was not necessary or appropriate to the public interest that the Commission regulate the facilities and intrastate operations.¹⁶⁴ To the contrary, "exemption of these projects from the federal regulatory umbrella will make them more attractive to private investors and lead to more gas at a lower price to the consumer, and effect this result sooner, than if the Commission controlled every detail and decision related thereto."¹⁶⁵

FERC later retracted its initial opinion and held that section 7 certification was mandated for *all* of Distrigas' facilities, as they would be used for the transportation and sale of gas in interstate commerce.¹⁶⁶ It was this second FERC order that the court reviewed.

The court reaffirmed the *Border Pipe Line* holding that natural gas imports and exports do not fall within interstate commerce, automatically and compulsorily subjecting the LNG facility and intrastate sales to the

158. *Id.* at 1058-59.

159. *Id.* at 1060 (citing *Distrigas Corp.*, 47 F.P.C. 752, 759 (1972)).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 1061.

entire panoply of section 7 requirements.¹⁶⁷ However, the court also held, contrary to *Border Pipe Line*, that, due to the power granted to FERC over section 3 applications, 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.”¹⁶⁸ The court stated, “[W]hile we think that the Commission *may* impose, under Section 3, the equivalent of Section 7 requirements, it may do so only if it affirmatively finds that applying such requirements to imports is ‘necessary or appropriate’ to the public interest.”¹⁶⁹ Since FERC had grounded its jurisdiction on the rationale that the facilities and sales were “interstate,” the court remanded the case to FERC for section 3 findings that the certification and regulation were “necessary or appropriate” to the public interest.¹⁷⁰

*C. Algonquin LNG v. Loqa*¹⁷¹

This case involved an action by Algonquin LNG for declaratory judgment that a state zoning ordinance was inapplicable to proposed modifications to a natural gas facility, and for an injunction prohibiting the city’s building office from requiring that the modifications comply with the provisions of the ordinance or local building codes. Algonquin LNG planned to modify its facility, which had been operating for thirty years, in order to increase the rate at which the gas could be processed and distributed.¹⁷² However, Algonquin was required to apply for a zoning variance, and the variance would not be granted since it would require showing that without the variance Algonquin LNG would be deprived of all beneficial uses of its property.¹⁷³

The court held that, because the Algonquin LNG facility was engaged in interstate transportation and sale of natural gas, it is subject to federal regulation under the Commerce Clause.¹⁷⁴ The court noted the strong federal interest in establishing a uniform system of regulation designed to implement a national policy of ensuring an adequate supply of natural gas at reasonable prices.¹⁷⁵ Further, “[b]ecause the federal regulatory scheme comprehensively regulates the location, construction and modification of natural gas facilities, there is no room for local zoning or building code

167. *Id.* at 1063.

168. *Id.* at 1064.

169. *Id.* at 1066.

170. *Id.*

171. 79 F. Supp. 2d 49 (D.R.I. 2000).

172. *Id.* at 50.

173. *Id.* at 50, 52.

174. *Id.* at 51.

175. *Id.* at 52.

regulations on the same subjects.”¹⁷⁶ “[C]ongress clearly has manifested an intent to occupy the field and has preempted local zoning ordinances and building codes to the extent that they purport to regulate matters addressed by federal law.”¹⁷⁷

Perhaps to mitigate its otherwise harsh opinion, the court noted that “interstate gas facilities are not entirely insulated from local regulation. State and local laws that have only an indirect effect on interstate gas facilities are not preempted.”¹⁷⁸ Also, “local regulation with respect to matters or activities that are separate and distinct from subjects of federal regulation may be permissible if they do not impede or prevent the accomplishment of a legitimate federal objective.”¹⁷⁹ Here, however, the ordinance would directly conflict with federal regulation approving the modification.

D. Two Recent FERC Decisions

1. Dynegy LNG Production Terminal¹⁸⁰

In July 2001, Dynegy announced plans to construct and operate an LNG receiving and gasification facility on the site of its liquefied petroleum gas terminal in Louisiana.¹⁸¹ The plant would include a header pipeline connecting the plant to multiple interstate pipelines.¹⁸² Dynegy asked the commission to disclaim jurisdiction over the siting, construction, and operation of its proposed LNG facility.¹⁸³ Perhaps due to the emphasis in *Distrigas* on finding that the facilities are “necessary and appropriate” to the public interest, Dynegy argued that “the existing regulated LNG import infrastructure is inadequate to play a major role in this country’s energy future.”¹⁸⁴ Among other things, Dynegy claimed that only two of the four existing LNG import facilities in the U.S. were operating at the time of the case, 2001.¹⁸⁵ Dynegy also alleged that the new LNG projects proposed at that time appeared to be structured to avoid federal regulation by, in most instances, siting the facilities in foreign countries with pipelines to the U.S..¹⁸⁶

176. *Id.*

177. *Id.*

178. *Id.* at 52-53.

179. *Id.* at 53.

180. Dynegy LNG Production Terminal, L.P., 97 F.E.R.C. P61,231 (2001) (order addressing petition for declaratory order).

181. *Id.* at 62,048.

182. *Id.*

183. *Id.*

184. *Id.* at 62,051.

185. *Id.*

186. *Id.* at 62,051 n. 26. The proposed projects listed by Dynegy include an El Paso/Phillips Petroleum project in Baja, Mexico with a pipeline to southern California, an El Paso project in North Carolina to serve industrial markets only in that state, a Texaco, Inc. project in the Gulf of

FERC rejected these arguments and others and held that “[t]he siting and construction of LNG facilities that will serve the interstate pipeline grid is appropriately reviewed at the federal level.”¹⁸⁷ In support of this assertion, FERC stated that “states would not be capable of imposing or exercising the necessary regulatory authority, that there were possible constitutional barriers to state regulation, and that competition among the states in attracting projects and inconsistency of regulatory approach would make the protection of distinctly federal interests, such as the interests of consumers in all states, impossible.”¹⁸⁸

2. Sound Energy Solutions¹⁸⁹

In 2004, FERC issued an order asserting exclusive jurisdiction over an LNG import facility proposed in California by Sound Energy Solutions (“SES”). The facility consisted of an LNG ship berth, two storage tanks, an LNG truck loading facility, an LNG vehicle fuel storage tank, and associated facilities.¹⁹⁰ The imported LNG would be regasified and delivered to Southern California Gas Company via truck and a new 2.3-mile pipeline that would connect the import facility with an existing Southern Californian Gas pipeline.¹⁹¹ The LNG terminal would import LNG from foreign nations, but the distribution of gas would be purely intrastate.¹⁹² Thus, the factual scenario mirrored that in *Border Pipe Line*, except that the gas was imported instead of exported.

The Public Utilities Commission of the State of California (“CPUC”) contested federal regulation under section 7 because the facility would not implicate interstate commerce.¹⁹³ CPUC asserted that although section 3 authorization is required to import the LNG, section 3 does not address siting, construction, or operation of LNG facilities.¹⁹⁴ Accordingly, CPUC contended that it, and not FERC, had jurisdiction over the siting and safety of the terminal. CPUC claimed that surrendering state regulatory power would risk the physical and economic safety of California residents and businesses.¹⁹⁵ Also, if left unchecked by state regula-

Mexico (beyond the boundaries of state waters), an Enron Corp. project in the Bahamas with a pipeline to Florida, an AES Corp. project in the Bahamas with a pipeline to Florida, and two El Paso projects in the Bahamas with pipelines to Florida.

187. *Id.* at 62,055.

188. *Id.*

189. Sound Energy Solutions, 106 F.E.R.C. P61,279 (2004) (declaratory order asserting exclusive jurisdiction).

190. *Id.* at 62,014.

191. *Id.*

192. *Id.* at 62,014-15.

193. *Id.* at 62,015.

194. *Id.*

195. *Id.*

tion, possible mergers and acquisitions of companies operating LNG facilities could pave the way to market power abuses.¹⁹⁶

FERC conceded that the facility would not implicate interstate commerce; therefore, as in *Border Pipe Line*, the issue was the extent to which FERC can rely on section 3 to regulate the siting, construction, and operation of import facilities.¹⁹⁷

Although FERC spent much of the opinion discussing case precedent confirming federal authority to regulate LNG facilities, it recognized that those cases were factually distinguishable given that SES proposed entirely intrastate facilities.¹⁹⁸ However, this distinction was easily accommodated by noting the lack of distinction between the principle of preemption in foreign commerce and that in interstate commerce, and by dropping a footnote with a statement by the Supreme Court that foreign commerce “is pre-eminently a matter of national concern.”¹⁹⁹ FERC stated, “[B]ecause the facilities at issue will have no other function than to receive and deliver imported gas from the terminal directly into local facilities” (which is to say they are not interstate), there is a “regulatory gap” which must be avoided by FERC regulation of not only the LNG import terminal, but also the pipeline facilities.²⁰⁰

FERC did assure CPUC that FERC did not intend to interfere with California’s “clear jurisdiction” over the facilities that are exempt from FERC jurisdiction, but did not indicate which facilities fell into that category.²⁰¹

VIII. CHALLENGING FEDERAL REGULATION POST-2005 ENERGY POLICY ACT

A. Summary of the Progression of FERC Regulation of LNG Facilities.

Even prior to the 2005 Energy Policy Act it was clear that federal regulation preempted the siting of interstate natural gas pipelines and facilities. Additionally, as evidenced by *Distrigas* and *SES*, caselaw was moving towards expanding FERC authority to regulate intrastate sales of imported natural gas, as well as the siting of the intrastate LNG facility. Basically, when interstate commerce was not involved, courts grounded FERC jurisdiction on federal authority to regulate foreign commerce and section 3 of the NGA. FERC held that regulation of the siting and operation of the LNG facility was appropriate as part of the “terms and condi-

196. *Id.*

197. *Id.*

198. *Id.* at 62,018.

199. *Id.* at 62,018 n. 25.

200. *Id.* at 62,018.

201. *Id.* at 62,017.

tions” of granting a section 3 application. Likewise, the *Distrigas* court held that section 3 allowed FERC to exercise discretion in whether to regulate intrastate sales of imported LNG to the same extent as interstate sales, provided that their ultimate conclusion was “necessary or appropriate” to the public interest.

SES extended FERC jurisdiction beyond any previous case. Unlike in *Distrigas*, FERC admitted that the proposed LNG facility was intrastate, but this did not prevent FERC from exercising jurisdiction over the siting, construction, and safety of the various related facilities and intrastate pipeline. The *SES I* opinion therefore directly contravenes *Border Pipe Line*,²⁰² which held that although “the fact of importation and exportation” was properly regulated under federal jurisdiction of foreign commerce, FERC was not thereby given carte blanche to regulate the related intrastate facilities and pipelines.

The 2005 Energy Policy Act connects some of the dots bypassed in *SES I*. In *SES I*, CPUC argued that section 3 did not provide for the siting and safety of the LNG facility and therefore could not ground federal regulation of these aspects. As amended, section 3 now has detailed regulations as to both the siting and safety of LNG terminals. In addition, as highlighted in *Border Pipe Line*, the jurisdictional statement in section 1(b) of the NGA did not mention foreign commerce, which influenced the court to hold that FERC’s foreign commerce authority under the NGA was limited to acting as gatekeeper for the importation and exportation of natural gas. As amended, the jurisdictional statement now states that the NGA also applies to “the importation and exportation in foreign commerce of natural gas.”

B. The Issue is Delegation, not Constitutionality.

In considering what arguments remain for states and oil and gas companies wishing to challenge federal jurisdiction in the natural gas industry, it should be clarified that Congress has not maximized its Constitutional authority in promulgating the NGA. Congress has committed itself to a regulatory scheme of the natural gas industry that involves a dual effort of state and federal governments, and further that the line between the two spheres of authority should be “brightly drawn.” Presumably, commitment to this principle has thus far precluded Congress from relying on the fact that the activity in question “affects” interstate commerce. Linking jurisdiction to the effect on commerce would subsume the entire natural gas industry into federal regulation. There is strong case prece-

202. Indeed, in *Distrigas*, FERC urged again that a reviewing court overrule *Border Pipe Line*. *Distrigas Corp. v. Fed. Power Comm’n*, 495 F.2d 1057, 1063 (D.C. Cir. 1974). No court has done so.

dent to support an argument that aggregating even the most local pipelines “affects” interstate commerce by satisfying a market quotient that could otherwise be satisfied by interstate supplies.²⁰³ Further, the word “affect” is inescapably steeped in gradations and so would preclude a bright line being drawn.

Because Congress has not gone to the constitutional limit in promulgating the NGA, the analysis is really over whether the provisions of the NGA and the cases in which those provisions are applied exceed the jurisdiction delegated to FERC in the NGA, and not about whether the provision is unconstitutional per se.

C. The Extent of Foreign Commerce Jurisdiction Should Be Delineated and Contained, and Should Not Include Intrastate Facilities and Pipelines

It is still unclear how far along in the process of importing, regasifying, storing, and transporting LNG foreign commerce jurisdiction reaches. When, as in *SES*, interstate commerce is not involved, this issue becomes critical, as states would retain regulatory power at the point where foreign commerce ends. Moreover, it is important for courts to implement the express Congressional intent that there be a “bright line” between federal and state regulation.

1. How Far Does Foreign Commerce Reach?

Foreign commerce is defined as “commerce between citizens of the United States and citizens or subjects of foreign governments.”²⁰⁴ Thus, one of the parties to the commercial transaction must be foreign-based. Additionally, the *Border Pipe Line* opinion may be read to hold that foreign commerce ends after the importing or exporting transaction. Likewise, FERC’s initial opinion in *Distrigas I* also held that foreign commerce terminated at the ship’s flange upon completion of the sale and when the LNG transferred custody to the domestic company. A slightly different termination point can be constructed from the definition provided in the 2005 Energy Policy Act for “LNG facility.” The definition does not include “any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.” Thus, at least when interstate commerce is involved, FERC authority over LNG facilities under section 3 ends when interstate jurisdiction begins, typically at the tailgate of the LNG facility. As previously discussed, *SES* is an outlier in holding that

203. See Monica Berry, *Liquefied Natural Gas Import Terminals: Jurisdiction Over Siting, Construction, and Operation in the Context of Commerce Clause*, 26 ENERGY L. J. 135 (2005) (arguing that jurisdiction over LNG facilities could clearly be exercised by Congress’s authority to legislate activities that affect commerce).

204. *Henderson v. Mayor of the City of New York*, 92 U.S. 259, 270 (1876).

foreign commerce grounds regulation of the entire LNG system from import facility through the length of the transport pipeline.

2. How Far Should Foreign Commerce Reach?

Clearly, the fact of importation and the actual sales transaction satisfies the definition of “foreign commerce” and is properly grounded in FERC jurisdiction over “the importation and exportation in foreign commerce of natural gas.” Additionally, it seems reasonable that the power to regulate the fact of importation also includes the power to approve the proposed site of an import facility. It would be meaningless to be able to grant permission to import gas if states can forbid the siting of facilities that can accommodate LNG imports.

However, once the LNG is delivered, it is less clear how the construction, operation, and environmental and safety aspects of the import facility, the storage facilities, and the intrastate pipelines used to transport the imported natural gas can be roped into foreign commerce, because the foreign-based party has no legal interest in these activities. Additionally, it may be that the purchase of imported LNG takes place at a foreign port, with the LNG borne by a domestic tanker to an LNG import facility in the U.S. In both scenarios, contrary to the holding in *SES*, the construction, operation, environmental, and safety concerns fall neither within foreign or interstate commerce. Further, also contrary to *SES*, this does not create a regulatory “gap;” it just means that these concerns are constitutionally left to the state housing the LNG facility.

3. Remember Hinshaw

Further support for an argument to contain foreign commerce jurisdiction to the LNG sale transaction is found by analogizing to the Hinshaw Amendment. The Hinshaw Amendment carves out an exception from FERC jurisdiction for natural gas companies engaged in the transportation of “natural gas received . . . within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State.” The line is drawn “at the point when the intrastate company receives the gas from an interstate shipper.” An LNG facility transporting gas only in intrastate commerce should be treated like a Hinshaw pipeline – foreign commerce jurisdiction should terminate upon delivery of the foreign imported LNG.

D. Other Analogical Arguments

The *Dynegy* case drew numerous motions to intervene, mostly from oil and gas companies. An array of creative arguments related to federal regulation of LNG terminals was set forth in these motions.

For example, Chevron argued that LNG facilities should be viewed as a new source of gas to be injected into the pipeline grid, analogous to a new gas field. Chevron turned this into an economic argument that, as a new supply, an LNG facility would have to compete in the marketplace with other gas sources. Chevron counseled that FERC exercise regulatory restraint and should rely upon freely negotiated contracts and market forces to ensure proper growth of the emerging U.S. LNG market. However, comparing LNG facilities to gathering facilities would also place them in state regulatory domain provided courts do not follow *SES* in setting the parameters of foreign commerce.

Exxon Mobil compared LNG facilities to non-jurisdictional gas processing plants. It stated that, like a processing plant, an LNG facility begins with a product unfit for pipeline transportation and converts the raw product into a finished product that can be transported. Thus, FERC regulation should begin downstream of the LNG facility, where the gas begins transportation in interstate commerce. This argument's merit is undercut, however, by the fact that in many instances the LNG will be processed in the foreign country, prior to transport, and further, foreign commerce jurisdiction will still apply to the purchase of even the raw LNG.

E. Challenging FERC Regulation of Interstate LNG Facilities

In the case of an interstate LNG facility, one that transports or sells gas in interstate commerce, federal regulation is continuous. The initial import is governed under foreign commerce and federal jurisdiction will continue for the life of the imported LNG unless and until it reaches a Hinshaw pipeline or an LDC. Thus, very few tactics remain that might successfully challenge federal regulatory authority, and it is clear that they cannot involve a direct attack on federal jurisdiction.

1. Economic Argument

The requirement that federal regulation be "necessary or appropriate" to the public interest provides a foothold for states or companies wishing to avoid FERC regulation and siting determinations. In *Distrigas* (1972), FERC's initial determination not to impose section 7 requirements was based in part on reasoning that it was not necessary or appropriate to the public interest to do so. It stated, "[E]xemption of these projects [i.e., facilities and intrastate operations] from the federal regulatory umbrella will make them more attractive to private investors and lead to more gas at a lower price to the consumer, and effect this result sooner, than if [the Commission] controlled every detail and decision related thereto." Dynegy also took this approach (unsuccessfully) in its encounter with

FERC in 2001, as did other intervenors in that action to varying degrees, including Exxon Mobil, Chevron, Texaco Gas, Enron Marketing and Phillips Petroleum Company.

2. Legislating for a Distinct Purpose

The *Algonquin* opinion states that “local regulation with respect to matters or activities that are separate and distinct from subjects of federal regulation may be permissible if they do not impede or prevent the accomplishment of a legitimate federal objective.” This strategy was successfully implemented in *Pacific Gas and Electric* and *California Coastal*.²⁰⁵

As demonstrated by *Algonquin*, state legislatures will have to be extremely creative in promulgating legislation that will fit these parameters for the natural gas industry. One strategy would be to enact legislation based on power given to the states under federal statutes unrelated to the natural gas industry. For example, the Rhode Island state legislators’ bill to block LNG tankers from passing through state waters is based on the Federal Port and Waterways Safety Act. Thus, in evaluating the constitutionality of the state legislation, a court would have to balance the interests of two federal statutes as opposed to balancing federal interests with raw state police or general welfare power. The 2005 Energy Policy Act specifically mentions the Clean Air Act, the Federal Water Pollution Control Act, and the Coastal Zone Management Act. These may be the first places to look.²⁰⁶

IX. CONCLUSION

Extensive federal regulation of the LNG industry seems likely to be upheld by courts. However, because the regulatory framework erected through case law and legislation is only as strong as the jurisdictional foundation, courts and Congress should be thoughtful and precise about the legislative avenues and legal rationales relied upon in laying that foundation. As in any industry, a weak regulatory structure will have economic costs by inviting challenges and resistance in court, reducing investor confidence, and hindering new business ventures. It will also have social costs by inciting distrust, disloyalty, and anger among local constituencies housing the LNG facilities.

One area of concern is undue reliance on foreign commerce jurisdiction. In the twentieth century, because the natural gas industry went from a largely intrastate industry to a largely interstate one, federal juris-

205. See The Center for LNG, *supra* note 14.

206. Kransdorf, *supra* note 7 at 84-85 (concluding that reserving state authority under these acts vests states with veto power over LNG siting).

diction of interstate commerce was able to ground federal regulation. Because the U.S. natural gas industry is heading to the international stage, federal jurisdiction of foreign commerce appears to be the ticket to federal regulation in the twenty-first century.

As evidenced by the *SES* opinion, an existing temptation is for courts and FERC to overextend foreign commerce jurisdiction in upholding FERC jurisdiction over intrastate activities. This temptation should be resisted. Unlike interstate commerce, federal regulation of foreign commerce is not restrained by federalism concerns. Therefore, to avoid falling down the proverbial “slippery slope,” there is a heightened need for courts and Congress to precisely define the limits of foreign commerce. Further, in the natural gas industry, undue reliance on foreign commerce jurisdiction operates as an end run around the congressional decision not to base jurisdiction on the “affect” on commerce and the commitment to a bright line between federal and state regulation of the natural gas industry.

A second issue that has not yet been tested is whether states could exercise a veto power over siting and construction of LNG facilities through their authority under the Clean Air Act, the Federal Water Pollution Control Act, and the Coastal Zone Management Act. At least one author concludes (and fears) that this may be the case.²⁰⁷ No cases, however, have affirmed or denied that states have this authority. Nonetheless, in light of the 2005 Energy Policy Act, state legislatures may attempt to use the power delegated to them under these acts to create an inroad on federal authority to site LNG facilities.

207. *Id.*