GOVERNING OPEN-LOOP TERMINALS: THE CONTROVERSY IN THE GULF STATES

Meredith B. Cody
John Y. Pearce
Montgomery, Barnett

Importation of liquefied natural gas (LNG) remains problematic for the domestic energy sector and has become the subject of intense controversy along the Gulf Coast. During the last year, officials in Louisiana, Mississippi and Alabama joined with local fishing and environmental groups to oppose proposed LNG terminals in the Gulf of Mexico suggesting that "open-loop" facilities present a considerable threat to indigenous fish and other marine organisms.

Natural gas reserves exist throughout the world but often are not close to existing pipelines or markets. The process of liquefying natural gas facilitates its delivery from remote areas bridging the gap between supply and demand. This access is important given increasing demand and rising prices.

LNG is natural gas condensed to liquid form after being cooled to a temperature at or below minus 260 degrees Fahrenheit. When subsequently warmed, LNG "regasifies" and may be transported and used in the same manner as conventional natural gas. Liquefying the gas reduces its volume as much as 600 times allowing it to be stored and transported more efficiently from countries where natural gas is abundant, such as Indonesia, Russia, Iran, Qatar and Venezuela. Rebecca Mowbray, *Louisiana and LNG? A Natural—State in Good Spot, Forum Experts Say,* THE TIMES-PICAYUNE, Oct. 30, 2004, at Money, 1. LNG is carried on insulated ships to the United States and then stored at terminals. Equipment at the terminals processes the LNG by slowly warming it until it returns to a gaseous state. It then can enter the domestic pipeline system.

Responding to growing demand for natural gas, companies are applying for licenses to build LNG terminals in the Gulf of Mexico. However, approval of these terminals has been challenged by local environmental groups and state officials who criticize the method by which LNG is reheated. They explain that in an "open-loop" system 200 million gallons of Gulf water per day must be run through the system to reheat the gas. Bob Marshall, *Permits have Anglers Boiling Mad,* THE TIMES-PICAYUNE, Apr. 10, 2005 at Sports, 12. Numerous environmental groups, recreational and commercial fishermen, and some state officials have united to protest the open-loop terminals claiming that those systems will kill billions of fish, fish eggs, and other marine organisms. Matthew Brown, *Governors Close Ranks on Open Loops—Blanco, Others Call LNG Ports Risky to Fisheries,* THE TIMES-PICAYUNE, June 22, 2005, at National, 6. Opponents contend that the fish and larvae will die when sucked through the system or crushed against the intake screens. They also argue that fish will die from the sudden drop in water temperature or from exposure to chemicals used in the process.

Some fisheries experts have expressed particular concern regarding construction of terminals in the "Fertile Fisheries Crescent," the area thought to be the most biologically productive in the entire Gulf of Mexico ecosystem. Bob Marshall, *Fisheries Could be Hurt by Streamlined Regulations,* THE TIMES-PICAYUNE, Jan. 16, 2005, at Sports, 12. Species which use this area for breeding grounds and nurseries include redfish, Spanish mackerel, white and brown shrimp, speckled trout, flounder and blue crab. *Id.* Opponents believe that the loss of billions of fish eggs and larvae throughout the Gulf will imperil the 800 million dollar per year Gulf fishing industry. State officials, including the governors of Louisiana, Mississippi and Alabama, have explained that they will not support development of open-loop systems unless they receive satisfactory scientific proof that marine resources will be protected.

Many opponents of open-loop terminals emphasize that they do not oppose LNG terminals altogether; rather, they insist that a "closed-loop" system be used employing gas-fueled burners for reheating. The closed-loop process uses about two percent of the imported natural gas as fuel to reheat the LNG supply but does not present the same potential threats to marine resources as does the open-loop process. Bob

Marshall, *LNG Proposal Deals Blow to Louisiana,* THE TIMES-PICAYUNE, Feb. 20, 2005, at Sports, 14. Proponents reply that closed-loop systems are significantly more expensive to operate than open-loop and that reconfiguring the proposed terminals to closed-loop systems is cost-prohibitive. Proponents are reluctant to switch to closed-loop systems given the considerable time already invested in the various projects; substituting closed for open-loop terminals may result in the loss of two or three years in the permitting process. Matthew Brown, *Governors Close Ranks on Open Loops—Blanco, Others Call LNG Ports Risky to Fisheries,* THE TIMES-PICAYUNE, June 22, 2005, at National, 6. Proponents of open-loop systems further insist that loss of fish and other marine life will be minimal. They explain that the benefits of the new facilities include stabilization of current and future energy prices and the creation of thousands of construction jobs. Thus, open-loop system proponents maintain that the benefits outweigh the potential harm and will help the United States meet critical energy needs in a cost-effective manner.

As mentioned above, Louisiana, Mississippi and Alabama's governors have opposed development of several proposed open-loop LNG ports advising that they will continue to oppose such terminals absent proof that impact on fisheries will be negligible. Although the governors have the right to preclude construction of offshore terminals in federal waters, they do not have express authority to prevent construction of ports on state lands or in state waters. However, they may rely on the permitting requirements of existing federal statutes to block construction on state lands or in state waters.

LNG Facilities Located Offshore in Federal Waters

Under the Deep Water Port Act governors have the right to refuse to approve license applications for LNG ports located offshore in federal waters, *i.e.*, those located beyond the three-mile limit of the state's territorial waters. 33 U.S.C. §1503(c)(8)(West 2005); 151 CONG. REC. S6982 (daily ed. June 22, 2005). In 2002 Congress amended the Deep Water Port Act to regulate the siting of offshore LNG terminals. *See* Maritime Transportation Security Act of 2002, 107 Pub. L. No. 295, § 106, 116 Stat. 2064, 2086-87 (2002). Terminals in federal waters must be approved by the U.S. Maritime Administration, the U.S. Coast Guard, and the governor of the affected adjacent coastal state. 151 CONG. REC. S6982 (daily ed. June 22, 2005). Governors in states along the Gulf Coast may use that power to block construction of proposed terminals in their jurisdictions. It remains to be seen whether one of these governors will actually exercise that power or whether open-loop proponents will agree to monitor and mitigate the effects of the ports on marine life and thereby satisfy the states' concerns. One company, for example, has proposed a port off the Louisiana coast and has agreed to conduct more stringent research on the port's potential effect on fisheries. If an unacceptable impact on marine life is likely to result, that company has agreed to undertake mitigation measures in the area. Such undertakings may reduce or eliminate the competing interests of terminal proponents and environmental groups and make the proposed LNG ports a reality in a time of escalating natural gas pricing.

LNG Facilities Located on State Lands or in State Waters

Under the Energy Policy Act of 2005, the Federal Energy Regulatory Commission (FERC) is granted exclusive authority over the siting of LNG facilities onshore or in state waters. 151 CONG. REC. S6981 (daily ed. June 22, 2005). A recent proposed amendment would have given each state's governor veto power over such LNG facilities. Under that proposed amendment, governors would have had 45 days to approve, veto or attach conditions to an LNG project located onshore or in state waters after FERC issued its final environmental impact statement. 151 CONG. REC. S6981 (daily ed. June 22, 2005). The governors of Louisiana, California, Massachusetts, Rhode Island, New Jersey and Delaware co-authored a letter to the Senate Energy Committee urging the committee's support of concurrent state and federal jurisdiction over LNG facilities rather than exclusive jurisdiction in the FERC. *Id.* Absent state jurisdiction, they explained, "there is no guarantee that a project

will be consistent with the homeland security or environmental requirements for a particular locality." *Id.* Protection of fisheries and the surrounding environment is a concern of those governors as is the possibility that LNG facilities could become terrorist targets. *Id.* at S6983. The amendment failed and consequently states were denied express power to prevent construction of LNG facilities on state lands or in state waters. Notwithstanding that denial, states argue that other authority exists under current federal statutes allowing them to block development of LNG facilities.

For example, under section 1341 of the Clean Water Act, an applicant for a federal license or permit to conduct any activity (including facilities construction and operation) which may result in any discharge into navigable waters must provide the licensing or permitting agency with an approval certification from the state in which the discharge will originate. 33 U.S.C. § 1341(a)(1) (West 2005); 151 CONG. REC. S6982 (daily ed. June 22, 2005). If a state refuses to issue such certification for an LNG project, construction of the project may not be authorized unless the applicant successfully appeals that denial.

Similarly, section 1456(c) of the Coastal Zone Management Act (CZMA) requires an applicant for a federal license or permit to conduct an activity affecting the coastal zone to provide the federal licensing or permitting agency with certification that the proposed activity complies with the policies of the affected state's coastal zone management program. 16 U.S.C. § 1456(c)(3)(West 2005). If the state does not concur with the certification, the federal license or permit may not be issued absent certain circumstances, including appeal. *Id.* Because LNG projects will often be located in the coastal zone, construction of such facilities will be quite problematic if a state does not agree with CZMA certification by an applicant.

Finally, states may effectively block a proposed LNG port under section 502 of the Clean Air Act, which provides that it is unlawful for any person to operate a source of air pollution except in compliance with a lawfully issued permit. 42 U.S.C. § 7661(a)(West 2005); 151 CONG. REC. S6983 (daily ed. June 22, 2005). Some contend that LNG terminals will result in increased air pollution from the influx of tankers and other equipment necessary to construct and secure the operation. By showing that the terminals constitute a source of air pollution, states may attempt to deny an LNG terminal applicant a Clean Air Act permit under this section.

Thus, states may employ several methods to block or attempt to block construction of a proposed LNG terminal on state lands or in state waters. At this time, of course, it is unknown whether governors will take advantage of these several methods, or whether compromises will be reached with the terminal applicants. The friction between environmental concerns and robust demand may well result in litigation testing the licensing of any open-loop ports or the attempt to deny such a license under the statutes mentioned above. In any event, the open-loop LNG facility controversy is not likely to fade, as gas prices and demand continue to increase in the wake of Hurricane Katrina. In fact, gas shortages and elevated prices brought about by this recent disaster may likely make LNG an attractive option for meeting energy needs.