



Chapter 10

OTHER TOPICS

CHAPTER TEN: OTHER TOPICS

This guide covers many, but not all, of the permits that an LNG terminal needs before construction may begin and issues an advocate might consider when challenging an LNG terminal. This chapter touches on some of the permits and topics that were not covered in previous chapters. This includes coastal use permits—highlighting Louisiana’s process (Section 10.A); local land use issues like easements and eminent domain (Section 10.B); how federal law preempts certain state and local laws that might otherwise be used to challenge LNG projects (Section 10.C); how port authorities are involved in LNG project development (Section 10.D); and the basics of permitting deepwater terminals (Section 10.E).

Note that this chapter only provides advocates with a basis from which to start on the permits and topics discussed herein. Advocates that want to engage meaningfully in these proceedings will need to do additional research and, if possible, consult with attorneys experienced in each area.

A. Coastal Use Permits

As introduced in Chapter 3, like the permits and permissions required under the Clean Water Act (Chapters 6 and 7) and Clean Air Act (Chapter 8), LNG applicants that cannot show that their projects will comply with the federal Coastal Zone Management Act (CZMA) will be barred from building their projects.

In other words, states like Louisiana and Texas that participate in the Coastal Zone Management Program under the Coastal Zone Management Act exercise important authority that is not preempted by FERC.¹¹³⁹ Although the state governor does not have direct veto power over onshore or near-shore LNG facilities,¹¹⁴⁰ a participating state’s designated coastal management decision-maker has authority to determine whether a proposed onshore/near-shore LNG project is consistent with the state’s federally-approved coastal management plan (CMP).¹¹⁴¹ A state’s CMP defines the “permissible land uses and water uses” within the state’s coastal zone and establishes “[b]road guidelines on priorities of uses.”¹¹⁴²

FERC cannot approve an onshore/near-shore LNG facility without either a declaration from the state that the project is consistent with the state’s federally approved CMP, or an override of a state denial of consistency from the Department of Commerce Under-Secretary for Oceans and Atmosphere in NOAA. The CZMA specifically prohibits FERC from granting a permit to conduct an activity that will affect “any land or water use or natural resource of the coastal zone” until the state concurs with an applicant’s assertion that the activity “complies with the enforceable policies” of the state’s federally approved coastal management plan.¹¹⁴³

If the state denies a coastal consistency statement, then an applicant may appeal the state’s action to NOAA, which has been delegated the authority to act on behalf of the Secretary of the U.S.

¹¹³⁹ Thirty-five states are eligible for the CZMA program. Only Alaska does not participate, having withdrawn in 2011. “*Alaska Coastal Management Program Withdrawal*.” NOAA. 76 Fed. Reg. 39,857 (July 7, 2011). The CZMA is codified at 16 U.S.C. §§ 1451-1465.

¹¹⁴⁰ Such veto power only exists if the LNG facility is a deepwater port.

¹¹⁴¹ 16 U.S.C. § 1456(c)(3)(A). A state that fails to object is presumed to be concurring with project certification. *Id.*

¹¹⁴² 16 U.S.C. § 1455(d)(2).

¹¹⁴³ 16 U.S.C. § 1456(c)(3)(A).

Department of Commerce.¹¹⁴⁴ NOAA may override the state’s objection upon a finding that the activity is either consistent with the objectives or purposes of the CZMA or is otherwise necessary in the interest of national security.¹¹⁴⁵ If NOAA overrules the state, then FERC and any other relevant federal agency can proceed with approving the project.¹¹⁴⁶ If NOAA does not overrule the state, the project is stopped and the developer’s only recourse is to appeal the NOAA ruling to federal court. (Note that the Secretary of the U.S. Department of Commerce has delegated to the Under-Secretary of Commerce for Oceans and Atmosphere in NOAA the duty to hear and rule on appeals of state denials of consistency determinations.)

NOAA has rarely been asked to review a state’s consistency determination—only a handful of cases in the last decade. One such appeal was for an LNG project; in 2021 NOAA agreed with Oregon that the Jordan Cove LNG project was not consistent with Oregon’s CMP.¹¹⁴⁷

Unless states are sympathetic to environmental concerns or if a state has incorporated strong public-participation and environmentally friendly local ordinances into its Coastal Management Plan, using the CZMA to challenge a project can be difficult. Without consulting with an attorney experienced with your state’s CMP, it can be difficult to determine what, if any, local and state rules have been incorporated into the CMP. Some such rules might be floodplain management regulations: under the National Flood Insurance Act states and local governments must establish and implement such regulations that either meet or exceed the Federal Emergency Management Agency (FEMA) requirements, known as the federal Criteria for Land Management and Use.¹¹⁴⁸ If the state specifically includes these regulations within its federally-approved CMP (rather than merely incorporating them by reference¹¹⁴⁹), they would likely survive preemption.

The following section provides more information on Louisiana’s coastal consistency process, which has a more transparent process than Texas. For more information on Texas, see:

- The General Land Office’s (“GLO”) permitting website, which describes Texas’s coastal management program and links to applicant forms (<https://www.glo.texas.gov/coast/coastal-management/permitting/index.html>). Note that the Railroad Commission handles consistency determinations for applications for Texas LNG facilities as part of its Clean Water Act section 401 water quality certifications,¹¹⁵⁰ but provides little online guidance; and

¹¹⁴⁴ NOAA is delegated the authority to perform functions prescribed in the CZMA, including administering and deciding consistency appeals. Departmental Organizational Order 10-15 § 3.01(u). Secretary of Commerce. (Dec. 12, 2011) https://www.osec.doc.gov/opog/dmp/doors/doo10_15.html.

¹¹⁴⁵ *Id.* Also see 15 C.F.R. § 930.120. This review is *de novo*, meaning that NOAA does not give deference to the state’s determination, but rather makes the decision based on its own expertise, with deference to the views of interested federal agencies regarding their areas of expertise. 15 C.F.R. § 930.127(e)(1).

¹¹⁴⁶ 15 C.F.R. § 930.130(e)(1).

¹¹⁴⁷ Hildebrandt, Brooklyn. “Increase in Consistency Appeals Pursuant to the Coastal Zone Management Act: Are States Taking a More Active Role in Protecting Their Coastal and Marine Resources?” ABA. (Apr. 29, 2021) https://www.americanbar.org/groups/environment_energy_resources/publications/mr/20210429-increase-in-consistency-appeals/.

¹¹⁴⁸ 44 C.F.R. § 60.

¹¹⁴⁹ See Section 10.C.1 (analyzing *Algonquin Gas Transmission, LLC v. Weymouth*, 919 F.3d 54 (1st Cir. 2019)). <https://law.justia.com/cases/federal/appellate-courts/ca1/18-1686/18-1686-2019-03-19.html>.

¹¹⁵⁰ 16 TAC § 3.93(f) (“For an activity within the boundary of the Texas Coastal Management Program (CMP), applicable state water quality requirements include the enforceable goals and policies of the CMP, Title 31, Texas Administrative Code, Chapter 501.”).

- The GLO’s 2019-2020 biennial report (<https://www.glo.texas.gov/coast/coastal-management/forms/files/2019-2020-cmp-biennial-report.pdf>).¹¹⁵¹

For more information on other states, one starting place is NOAA’s summary of the thirty-five active coastal management plans: <https://coast.noaa.gov/czm/mystate/>.

1. Louisiana coastal use permits

The process for ensuring that a project is consistent with the CZMA will vary from state to state. Louisiana’s process involves obtaining a coastal use permit and is highlighted here to demonstrate some issues advocates may need to consider.

- What agency governs?

The Louisiana Department of Natural Resources (“LDNR”) manages the state’s compliance with the federal CZMA through its Office of Coastal Management (“OCM”). It establishes the state’s Coastal Management Plan, which must be approved by NOAA, and decides whether to issue Coastal Use Permits (“CUPs”) for activities that take place on state lands that lie within Louisiana’s designated “coastal zone.”¹¹⁵²

Although parishes can establish a local CMP to process permits that are not of state interest,¹¹⁵³ oil and gas projects are excluded from local control, as are pipelines, energy facilities and projects using state-owned lands or water bottoms.¹¹⁵⁴ Onshore or near-shore LNG projects thus are evaluated by the LDNR.¹¹⁵⁵

Note that *deepwater LNG ports* are not required to obtain a CUP, but their activities “shall be consistent to the maximum extent practicable with the state program and affected approved local programs.”¹¹⁵⁶ As explained in Section 10.D, the governors of adjacent states have veto power over permitting of deepwater LNG ports. The laws of the nearest adjacent coastal state, to the extent consistent with federal law, would also apply to the deepwater port project if the state’s seaward boundaries, if extended beyond three miles, would encompass the port site.

- What basic laws and principles must the LDNR apply?

The Louisiana State and Local Coastal Resources Management Act of 1978 (“SLCRMA”) is the governing state law. Section 701H of the statute states that a project may be permitted if “after a systematic consideration of all pertinent information regarding the use, the site and the impacts of

¹¹⁵¹ Texas has a history of finding every federal license and permit consistent with its CMP, including in 2019 and 2020. “Texas Coastal Management Program Biennial Report 2019 – 2020.” Texas Coastal Management Program. (Dec. 2020) at 19. <https://www.glo.texas.gov/coast/coastal-management/forms/files/2019-2020-cmp-biennial-report.pdf>. This isn’t an anomaly; other years also have had no federal projects deemed inconsistent. E.g., “Texas Coastal Management Program Biennial Report 2013 – 2014.” Texas Coastal Management Program. (Dec. 2014) at 13. <https://www.glo.texas.gov/coast/coastal-management/forms/files/CMP-Biennial-Report-2014.pdf>.

¹¹⁵² Federal lands are excluded from the Louisiana coastal zone, although any activity that takes place on those lands that may affect land or water use or the natural resources of Louisiana’s coastal zone are subject to the CZMA’s consistency provisions. Coastal Zone Management Act § 304(a).

¹¹⁵³ The 12 parishes that have done so are Calcasieu, Cameron, Jefferson, Lafourche, Orleans, Plaquemines, St. Bernard, St. James, St. Charles, St. John the Baptist, St. Tammany and Terrebonne. “Local Coastal Management Programs.” LDNR. <http://www.dnr.louisiana.gov/index.cfm/page/111>.

¹¹⁵⁴ La. R.S.49:214.25(a)(1)(b), (f), (g) and (h).

¹¹⁵⁵ An LNG project applicant must apply for a CUP by using a joint application form, addressed to both LDNR and the U.S. Army Corps of Engineers. SLCRMA, R.S. 49:214.25 and 214.30.

¹¹⁵⁶ La. R.S.49:214.32(A).

the use...and a balancing of their relative significance,” the LDNR finds it meets *all three* of the following tests:

1. The benefits resulting from the use “would clearly outweigh the adverse impacts that would result from compliance with the modified standard;”
2. No “feasible and practical alternative locations, methods, or practices” for the use exist that comply with the standard, and
3. The use meets *one* of the following three criteria:
 - a. “Significant public benefits” will result from the use, *or*
 - b. The use would “serve important regional, state, or national interests,” including “the national interest in resources and the siting of facilities in the coastal zone identified in the coastal resources program,” *or*
 - c. The use is coastal water dependent.¹¹⁵⁷

First test. Louisiana’s regulations declare that the LDNR’s permit decision “shall represent an appropriate balancing of social, environmental and economic factors,”¹¹⁵⁸ but the LDNR clarifies in its Coastal User’s Guide that the first test is not strictly a cost-benefit analysis “because environmental harms generally cannot be quantified in monetary terms,” and is “more in the nature of a subjective test,” weighing “the value of the natural resources and the value to the public from the proposed use.”¹¹⁵⁹ The LDNR further declares that “public benefits must go to the public as a whole, not to just a few individuals in the locality, and must be measurably substantial.”¹¹⁶⁰ The regulations require the LDNR to consider the “extent of long term benefits or adverse impacts.”¹¹⁶¹

The regulations state that a project is of “overriding public interest” if “the public interest benefits of a given activity clearly outweigh the public interest benefits of compensating for wetland values lost as a result of the activity.”¹¹⁶² It suggests, as examples of such projects, “certain mineral extraction, production, and transportation activities,” or flood control measures for existing infrastructure.¹¹⁶³ The LDNR Coastal User’s Guide, similarly, states, “Louisiana’s oil and natural gas industries are important to the state’s economy, providing taxes and jobs. Proven reserves of both resources are ranked among the nation’s largest.”¹¹⁶⁴ A critique of an LNG project, however, could challenge the actual need for the particular project and the question the extent to which the public would actually benefit, in light of the economic decline of the gas industry and the uncertainties of export.

Second test. The LDNR states that consideration of the second test “should be similar to the process provided for under Section 102 of the National Environmental Policy Act.”¹¹⁶⁵ It requires the LDNR to evaluate the “economic need for use and extent of impacts of use on economy of locality” and the

¹¹⁵⁷ La. Admin. Code, Title 43, Part 1, Ch. 7, § 701(H)(1).

¹¹⁵⁸ La. Admin. Code, Title 43, Part 1, Ch. 7, § 723(C)(8).

¹¹⁵⁹ “A Coastal User’s Guide to the Louisiana Coastal Resources Program.” LDNR. (Rev. Jan. 2015) (hereafter, “Coastal User’s Guide”), p. IV-2. <https://data.dnr.la.gov/LCP/LCPHANDBOOK/FinalUsersGuide.pdf>.

¹¹⁶⁰ *Id.*

¹¹⁶¹ La. Admin. Code, Title 43, Part 1, Ch. 7, § 701(F)(19).

¹¹⁶² La. Admin. Code, Title 43, Part 1, Ch. 7, § 700 (Definitions).

¹¹⁶³ *Id.*

¹¹⁶⁴ “Coastal User’s Guide.” p. II-1.

¹¹⁶⁵ “Coastal User’s Guide.” p. IV-2.

“extent of resulting public and private benefits.”¹¹⁶⁶ This second test provides further strong support for the relevance of challenges to the actual need for the LNG project and the extent to which the public would benefit.

The LDNR also opens the door to concerns about the financial resources of the applicant. It emphasizes that the decision maker “is not held to the options economically available to the applicant,” but rather includes the alternatives that “would be available to a reasonable person in a normal situation.” It explains, “An undercapitalized applicant should not be permitted to damage or destroy important public resources when a well-financed one is prevented from doing so.”¹¹⁶⁷

Third test. An LNG port would meet criteria (c) because it is water dependent.

- Other rules to be aware of.

The State of Louisiana seeks to ensure that its coastal management regulations are not interpreted in such a way that landowners are denied all use of their property. The regulations state that the Coastal Use Guidelines “are not intended to nor shall they be interpreted so as to result in an involuntary acquisition or taking of property.”¹¹⁶⁸ This shouldn’t stop a state from finding that an LNG project is inconsistent with its coastal plan, because that would be a narrow finding that would not prohibit other uses for the site.

Some legal language that could be worked into comments come from the guidelines on coastal use for all projects.¹¹⁶⁹ Advocates are encouraged to read these regulations before formulating comments.

As an additional note, Louisiana’s regulations do clarify that coastal use guidelines can be stronger than water and air quality laws and regulations. Compliance with air and water laws “shall be deemed in conformance” with the coastal management program “except to the extent that these guidelines would impose additional requirements.”¹¹⁷⁰

Louisiana’s regulations also extend its jurisdiction more broadly over wetlands than does the federal clean water laws. Louisiana’s coastal use guidelines define “wetlands” as: “open water areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions.”¹¹⁷¹ The definition for wetlands regulated under Section 404 of the Clean Water Act is based instead on specific criteria regarding vegetation, soils and hydrology. The LDNR notes, for example, that a bottomland hardwood site that occurs below the five-foot elevation but does not meet the hydric soils parameter for federal Clean Water Act § 404 regulatory jurisdiction would be considered jurisdictional under the Louisiana Office of Coastal Management but not by the Army Corps.¹¹⁷²

¹¹⁶⁶ La. Admin. Code, Title 43, Part 1, Ch. 7, § 701F(7) and (8).

¹¹⁶⁷ “Coastal User’s Guide.” p. IV-2.

¹¹⁶⁸ La. Admin. Code, Title 43, Part 1, Ch. 7, § 701(D).

¹¹⁶⁹ La. Admin. Code tit. 43 § I-701. A free source copy of the Louisiana Code on coastal use management can be found here: <https://casetext.com/regulation/louisiana-administrative-code/title-43-natural-resources/part-i-office-of-the-secretary/subpart-1-general/chapter-7-coastal-management>.

¹¹⁷⁰ La. Admin. Code, Title 43, Part 1, Ch. 7, § 701B.

¹¹⁷¹ La. Admin. Code, Title 43, Part 1, Ch. 7, § 700 (Definitions).

¹¹⁷² “Frequently Asked Questions (FAQ).” LNDNR Office of Coastal Management. <http://www.dnr.louisiana.gov/index.cfm/page/1387>.

- Which parishes are coastal under the statute?

Certain parishes lie completely within Louisiana’s coastal zone. These include: **Orleans, Jefferson, St. Bernard, Plaquemines, St. John the Baptist, St. James** and **St. Charles**. Other parishes having some portion included in Louisiana’s coastal zone are (from the Texas Border to the Mississippi state line): Calcasieu, Cameron, Vermillion, Iberia, St. Mary, St. Martin, Assumption, Terrebonne Laforche, Ascension, Livingston, Tangipahoa, and St. Tammany.¹¹⁷³ A map of the coastal zone can be accessed online at: <http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=928>. All on-shore LNG terminals are expected to be proposed in this coastal zone.

- Application Process

For coastal projects like LNG terminals, LDNR directs applicants to file a joint permit application for a coastal use permit with its application for Corps permits.¹¹⁷⁴ More information about the application is also available on the LDNR’s webpage here: <http://www.dnr.louisiana.gov/index.cfm/page/93>.

- Deadlines during the permitting process

The LDNR must make its coastal permit decision quickly. The statute states that the decision “shall be made” within 30 days after public notice or within 15 days after a public hearing, whichever is later.¹¹⁷⁵ This short timeframe, it should be noted, is not required by federal law. The CZMA allows the state agency six months to concur with or object to an applicant’s proposed certification.¹¹⁷⁶

Public notice must be provided within 10 days of receipt of the coastal use permit application,¹¹⁷⁷ but neither the statute nor the regulations specify a public comment period. Practically speaking, any comment would have to get to the LDNR extremely quickly to have any meaningful impact on the agency’s decision if that decision is to be issued just 30 days after public notice.

The coastal use permit fast track can be slowed to a somewhat more reasonable pace in two ways—the holding of a *public hearing* or a *request for more information*.

The statute grants the LDNR discretion as to whether to hold a *public hearing*.¹¹⁷⁸ Public notice must be provided at least 30 days in advance of any public hearings, and the hearing file must remain open for 10 days after the close of the hearing.¹¹⁷⁹ But, notwithstanding any other law to the contrary, the decision to approve or deny the permit must be made within 60 days of the date on which the LDNR notified the applicant that the application was complete.¹¹⁸⁰ An advocate would likely want to make an effective case for a public hearing swiftly after receiving public notice. The regulations state:

“Public hearing(s) are appropriate when there is significant public opposition to a proposed use, or there have been requests from legislators or from local governments or other local

¹¹⁷³ “Coastal User’s Guide.” p. III-1.

¹¹⁷⁴ “Joint Permit Application.” LDNR. <http://www.dnr.louisiana.gov/assets/OCM/permits/JPA2010Fillable.pdf>.

¹¹⁷⁵ La. R.S.49:214.30(C)(3).

¹¹⁷⁶ 16 U.S.C. § 1456(c)(3)(A). If not objection or concurrence is made within six months, the state’s concurrence is “presumed.”

Id.

¹¹⁷⁷ La. R.S.49:214.30(C)(2)(a).

¹¹⁷⁸ A public hearing “may” be held. La. R.S.49:214.30(C)(2)(a).

¹¹⁷⁹ La. Admin. Code, Title 43, Part 1, Ch. 7, § 727(B)(1) and (6).

¹¹⁸⁰ La. R.S.49:214.30(C)(2)(b).

authorities, or in controversial cases involving significant economic, social or environmental issues.”¹¹⁸¹

The LDNR may *request more information* of the applicant if it deems that it has not received all the “necessary data and information” required.¹¹⁸² The applicant must respond within 60 days. If the applicant does not timely respond, the LDNR may deny the application without prejudice (meaning the applicant can simply refile), withdraw it, or place it on inactive status.¹¹⁸³ Thus, an advocate would likely want to identify any important missing information in the application swiftly and urge that the LDNR should request and obtain it.

- Asking for reconsideration of or appealing the decision on a coastal use permit.

Once the LDNR has made a decision on a coastal use permit, any person can file a petition to the LDNR secretary for reconsideration of the decision within ten days after public notice or receipt of the final decision. The secretary must rule within 15 days of receipt of the petition and has discretion to stay the permit or notice of determination in the interim. The grounds for reconsideration are:

1. The decision is “clearly contrary to the law or the evidence before the secretary”;
2. The petitioner has discovered important evidence that the petitioner could not, with due diligence, have presented to the secretary prior to the decision;
3. Issues not previously considered, through no fault of the petitioner, should be examined to properly dispose of the matter; or
4. Other grounds exist to examine issues and evidence further in the public interest.¹¹⁸⁴

Any “aggrieved person” or affected local, state or federal agency, or “any other person adversely affected by a coastal use permit decision” may bring an appeal an adverse decision by the secretary in accordance with La. R.S. 49:214.35.¹¹⁸⁵ The appeal may be brought directly to the state district court—whether or not a petition to the secretary for reconsideration has been filed.¹¹⁸⁶ The appeal must be filed within 30 days after the LDNR mails notice of the final decision (not after the individual receives that notice), or, if a petition for reconsideration was filed with the LDNR secretary, then within 30 days after the secretary’s decision on the petition.¹¹⁸⁷

- Deadlines for construction

A project must start construction within two years of the date of permit issuance and be completed within five years of the date of issuance.¹¹⁸⁸ The term may be extended, on a case-by-case basis, by up to two years to start construction and up to 3 years to complete it. A 30-day extension may be granted without public notice, but longer extensions are subject to public notice and comment. Also, extension requests involving project modifications that would result in greater environmental

¹¹⁸¹ La. Admin. Code, Title 43, Part 1, Ch. 7, § 723(C)(6)(c).

¹¹⁸² 15 C.F.R. § 930.60(a). The required data and information is described in 15 C.F.R. § 930.58(a).

¹¹⁸³ La. R.S.49:214.30(C)(7).

¹¹⁸⁴ La. R.S.49:214.35(B).

¹¹⁸⁵ La. R.S.49:214.30(D).

¹¹⁸⁶ La. R.S.49:214.35(D). This is unique to permits sought for LNG terminals, which normally go to the federal circuit courts under 15 U.S.C. § 717r. That statute excludes CMZA orders from the federal circuit review scheme. See 15 U.S.C. § 717r(d)(1) & (2).

¹¹⁸⁷ La. R.S.49:214.35(E). Trial de novo shall be held upon request of any party. La. R.S.49:214.35(F).

¹¹⁸⁸ La. Admin. Code, Title 43, Part 1, Ch. 7, § 723(C)(9)(d).

impacts will be treated as new applications.¹¹⁸⁹ An approval of a permit extension may be appealed on the sole ground that the proposed activity should be treated as a new application.¹¹⁹⁰

- Issues that can be raised in Louisiana’s coastal review process

In addition to specific air and water quality concerns, Louisiana’s regulations allow consideration of several specific issues that can be raised in a coastal review process for an LNG facility. A non-exhaustive list of issues is provided in the following table:

Table 10.1: Selected Issues Relevant in Louisiana’s Coastal Review Permit Process

Cumulative impacts	The regulations require consideration of “Cumulative Impacts,” defined as “impacts increasing in significance due to the collective effects of a number of activities.” ¹¹⁹¹ Significant “adverse effects of cumulative impacts” are defined as adverse impacts to “avoid to the maximum extent practicable.” ¹¹⁹² Consider raising any cumulative impacts that might be relevant, such as wetlands health, coastal erosion, and diminished flood protection capacity.
Emergency risks and preparedness	The regulations for “oil, gas and other mineral activities,” state: “Effective environmental protection and emergency or contingency plans shall be developed and complied with for all mineral operations.” ¹¹⁹³ While the section emphasizes exploration, production and refining, LNG facilities are clearly gas activities. Consider raising issues related to safety for nearby communities and the ecosystem.
Land-based traffic issues	The LDNR must consider the “existence of necessary infrastructure to support the use and public costs resulting from use.” ¹¹⁹⁴ The regulations declare a policy to “avoid to the maximum extent practicable” certain “adverse impacts,” including “adverse economic impacts on the locality” and “adverse disruption of existing social patterns.” ¹¹⁹⁵ Consider impacts in the short-term (e.g., during construction) and long-term (e.g., at full permitted capacity).
Local development plans, navigation, and recreation plans; existing and traditional uses	The regulations state that public and private works projects such as “ports” and “public utilities” are “necessary to protect and support needed development and shall be encouraged,” ¹¹⁹⁶ but that they “shall, to the maximum extent practicable, take place only when . . . consistent with all relevant adopted state, local, and regional plans.” ¹¹⁹⁷ Consider raising how expanding LNG export capacity conflicts with Louisiana’s Coastal Master Plan, for example. ¹¹⁹⁸ In addition, the LDNR must consider the “extent of impacts on existing and traditional uses of the area and on future uses for which the area is suited.” ¹¹⁹⁹ Also, “[u]ses shall to the maximum extent practicable be designed and carried out to permit multiple concurrent uses which are appropriate for the location and to avoid unnecessary conflicts with other uses of the vicinity.” ¹²⁰⁰ Local advocates can provide invaluable input into existing and historic uses.

¹¹⁸⁹ La. Admin. Code, Title 43, Part 1, Ch. 7, § 723(D)(5).

¹¹⁹⁰ La. Admin. Code, Title 43, Part 1, Ch. 7, § 723(D)(5)(d).

¹¹⁹¹ La. Admin. Code, Title 43, Part 1, Ch. 7, § 700 (Definitions).

¹¹⁹² La. Admin. Code, Title 43, Part 1, Ch. 7, § 701(G)(10).

¹¹⁹³ La. Admin. Code, Title 43, Part 1, Ch. 7, § 719(K).

¹¹⁹⁴ La. Admin. Code, Title 43, Part 1, Ch. 7, § 701(F)(10).

¹¹⁹⁵ La. Admin. Code, Title 43, Part 1, Ch. 7, § 701(G)(2) and (6).

¹¹⁹⁶ La. Admin. Code, Title 43, Part 1, Ch. 7, § 711(B).

¹¹⁹⁷ La. Admin. Code, Title 43, Part 1, Ch. 7, § 711(B)(3).

¹¹⁹⁸ “Our Plan: Louisiana’s Coastal Master Plan” Coastal Protection and Restoration Authority. <https://coastal.la.gov/our-plan/>.

¹¹⁹⁹ La. Admin. Code, Title 43, Part 1, Ch. 7, § 701(F)(11).

¹²⁰⁰ La. Admin. Code, Title 43, Part 1, Ch. 7, § 701(I).

Bad actor issues	The law says the LDNR “shall take into consideration the permit applicant’s history of compliance with the provisions of the Louisiana Coastal Resources Program” in making its decision. ¹²⁰¹ Consider whether the applicant has connections to other projects in the state.
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B. Local Land Use Issues: Easements and Eminent Domain

Another issue relevant to LNG facility but largely outside the scope of this guide is local land use issues of easements and eminent domain. Advocates looking to press this issue for a particular terminal should consult experienced counsel before proceeding.

If any part of the LNG facility is sited over or within state-owned lands, including underwater lands, the state lands management agency has the authority to grant or deny an easement for the proposed use. The local parish or county or even municipality may also have authority with regard to easements for crossing authorization if, for example, transport over a levee or piping under a street is involved.

A project applicant that is constructing a terminal will not be able to use eminent domain to take the land needed for the terminal’s construction: LNG export terminals (approved under section 3 of the Natural Gas Act) are not statutorily authorized to use eminent domain to obtain property for their development.¹²⁰² Any state or local agency with public land stewardship authority retains its power to decide whether to approve land lease or easement applications. In some states, such as Texas, the public lands commissioner is independently elected. In other states, such as Louisiana, the position is an executive branch appointment.

However, LNG pipelines are a different matter. Once a project is certified by FERC, the project sponsor can avail itself of the condemnation powers that interstate gas pipeline project sponsors enjoy under 15 U.S.C. § 717f(h), regardless of whether the land is privately or state-owned.¹²⁰³ This is another reason why it is so important to challenge the pipeline part of a project as well.

C. Concerns about preemption

In general, state and local laws cannot be used to override FERC’s decision to certify a project (unless it is under the Clean Water Act, the Clean Air Act, or the Coastal Zone Management Act). For example, although FERC must consult with state agencies regarding local safety considerations,¹²⁰⁴ it would assert that any state or local safety permit issued to an LNG terminal “must be consistent” with its own authorization. FERC emphasizes that while it encourages cooperation between LNG applicants and local authorities, “this does not mean that state and local agencies . . . may prohibit or

¹²⁰¹ La. R.S.49:214.30(C)(9).

¹²⁰² Compare 15 U.S.C. § 717b with 15 U.S.C. § 717.

¹²⁰³ In a pipeline case decided by the U.S. Supreme Court in 2021, the Court held that a developer that has received a FERC certificate to build a pipeline may use eminent domain to obtain both private and state lands that it needs for the pipeline’s construction. *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. ___, No. 19-1039, 2021 WL 2653262, (U.S. June 29, 2021) (“By its terms, [15 U.S.C.] § 717f(h) authorizes FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States.”). It’s interesting to note that even though the PennEast developers won at the Supreme Court, by September 2021 they canceled the pipeline—because the project had not yet received all of its required permits, including a water quality certification in New Jersey! Disavino, Scott. “*PennEast becomes the latest to scuttle a natural gas pipeline project.*” (Sept. 27, 2021). <https://www.reuters.com/business/energy/penneast-end-development-pennsylvania-new-jersey-natgas-pipe-2021-09-27/>.

¹²⁰⁴ Energy Policy Act, P.L. 109-58, § 311(d).

unreasonably delay the construction or operation” of FERC-approved LNG facilities.¹²⁰⁵ What FERC is describing is “conflict preemption.” Conflict preemption exists when compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Practically, this means that advocates pressed for resources should deprioritize fighting local and state permits (*other than* Clean Air Act and Clean Water Act permits) that are likely to be found to be in “conflict preemption” with FERC’s authority to permit LNG terminals and pipelines, even if advocates think they can win those fights. Identifying conflict-preempted laws can be tricky, even for experienced attorneys; Sections 10.C.1 – 10.C.3 provide a basic overview of when a law might be preempted. Advocates shouldn’t completely ignore these laws though: there can be good reasons to be involved with processes that are likely “conflict preempted,” as described in Section 10.C.4.

1. Preemption where a regulation is an obstacle.

The U.S. Supreme Court has found that conflict preemption by the Natural Gas Act may occur when it is impossible to comply with both the federal and state/local regulations, or when the state/local regulation is an obstacle to achieving a federal objective. For example:

- In *Schneidewind v. ANWR Pipeline Co.*, the court preempted a Michigan statute that required a public utility transporting gas in Michigan for public use to obtain the Michigan Public Service Commission’s approval before issuing long-term securities.¹²⁰⁶
- A zoning regulation in Providence, RI, that would have blocked replacement and modernizing of vaporizers at an LNG terminal was deemed preempted.¹²⁰⁷
- A federal district court in 2020 found that the Natural Gas Act preempted a town’s land use ordinances to the extent of precluding the town from preventing construction of a gas pipeline compression station through a building permit denial.¹²⁰⁸

While states supposedly maintain their rights under the Clean Air Act, Clean Water Act and Coastal Zone Management Act, preemption has still, on occasion reached local zoning or wetland ordinances incorporated into a state’s federally approved Coastal Management Plan or Clean Air Act State Implementation Plan. For example:

- The Massachusetts Office of Coastal Zone Management would not grant a coastal consistency statement under the CZMA for a gas compressor station unless the project obtained a Wetlands Protection Act permit from the Massachusetts Department of Environmental Protection, which, in turn, refused to issue such a permit until the Town of Weymouth permitted the project under its local Wetlands Protection Ordinance. The Weymouth Conservation Commission denied the

¹²⁰⁵ *In re Alaska Gasline Development Corp.*, 171 FERC ¶16,174 (May 21, 2020), p. 88.

<https://www.ferc.gov/sites/default/files/2020-06/C-7-052120.pdf>. FERC’s decision cites *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that the Natural Gas Act preempts state and local regulation to the extent it conflicts with federal regulation, or would delay construction and operation of FERC-approved facilities.)

¹²⁰⁶ See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-310 (1988).

<https://supreme.justia.com/cases/federal/us/485/293/>. The court found “field preemption” related to FERC’s rate regulation authority, but also conflict preemption due to the “prospect” of collision between the federal and state action even if actual collision is not inevitable.

¹²⁰⁷ *Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49 (D.R.I. 2000). <https://law.justia.com/cases/federal/district-courts/FSupp2/79/49/2522998/>.

¹²⁰⁸ *Empire Pipeline, Inc. v. Town of Pendleton*, 472 F. Supp. 3d 25 (W.D.N.Y. 2020). <https://casetext.com/case/empire-pipeline-inc-v-town-of-pendleton>.

local permit. The court found the local ordinance to be subject to conflict preemption.¹²⁰⁹ The decision is hard to justify given that the requirements of the local ordinance were likely relevant to the goals of the CZMA, but merely incorporating a statute or ordinance by reference into a state Coastal Management Plan does not appear to be sufficient to ensure exemption from preemption.

- In another case, a Maryland environmental agency refused to process a Clean Air Act permit because Maryland’s air regulations (at Md. Code § 2-404(b)(1)) required a showing that the facility had obtained local zoning approval (which had been denied) or otherwise complied with “applicable” local zoning regulations. Noting that “laws that are part of a state’s [Clean Air Act implementation plan (“SIP”)] are not preempted, unless the NGA says otherwise”—the court found that § 2-404(b)(1) had been incorporated by reference into Maryland’s SIP and “therefore saved from preemption by the NGA.”¹²¹⁰

Unfortunately for Maryland, the language of § 2-404(b)(1) was insufficient to escape the NGA’s preemptive reach because the second clause of the regulation looped the NGA back in. The second clause of § 2-404(b)(1) asked whether the applicant had failed to comply with “applicable” local zoning laws—the only way Maryland’s refusal to process the permit could be justified. Interpreting “applicable” to mean “not preempted by the NGA,” the court remanded the case to Maryland’s environmental agency to identify a local zoning law that had not been preempted that could justify the agency’s inaction.¹²¹¹

2. Preemption where related infrastructure is part of LNG facility construction or operation.

The extent to which any state utility authority or other state regulatory agency has jurisdiction over intrastate pipelines or other construction related to an LNG facility depends on whether the infrastructure is deemed to be part of the construction or operation of the LNG facility. The First Circuit Court of Appeals denied Rhode Island’s attempt to exercise its permitting authority over coastal dredging in connection with an LNG terminal. The court ruled that the incident dredging was “part of the construction and operation” of the LNG terminal, and thus any state agency permitting power was preempted by FERC’s jurisdiction.¹²¹²

3. Potential avoidance of preemption based on indirect effect and different purpose.

State and local laws that have only an indirect effect on interstate gas facilities generally are not preempted. 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.”¹²¹³ While state and local governments may be

¹²⁰⁹ *Algonquin Gas Transmission, LLC v. Weymouth*, 919 F.3d 54 (1st Cir. 2019). <https://law.justia.com/cases/federal/appellate-courts/ca1/18-1686/18-1686-2019-03-19.html>.

¹²¹⁰ *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 244 (D.C. Cir.), judgment entered, 529 F. App’x 3 (D.C. Cir. 2013).

¹²¹¹ *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013). <https://casetext.com/case/dominion-transmission-inc-v-summers>.

¹²¹² *Weaver’s Cove Energy LLC v. Rhode Is. Coastal Resources Mgt. Council*, 589 F.2d 458, 472-74 (1st Cir. 2009). Also see the following cases finding conflict preemption: *National Fuel Gas Supply Corp. v. Town of Wales*, No. 12-CV-034S, 2013 WL 5739033 (W.D.N.Y. Oct. 22, 2013) (noise levels); *Dominion Transmission v. Town of Myersville Town Council*, 982 F. Supp. 2d 570 (D.Md. 2013) (stormwater management, soil erosion); *Colorado Interstate Gas Co. v. Wright*, 707 F. Supp. 2d 1169 (D. Kan. 2010) (natural gas storage); *Northern Nat. Gas Co. v. Munns*, 254 F. Supp. 2d 1103 (S.D. Iowa 2003) (maintenance of agricultural land); *Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49 (D.R.I. 2000) (zoning safety, and construction).

¹²¹³ *Algonquin LNG v. Loqa*, 79 F. Supp. 2d at 53. Also see *Schneidewind*, 485 U.S. at 308.

preempted from establishing LNG setback rules for safety purposes,¹²¹⁴ for example, a state or local government may be able to apply setback rules to preserve the aesthetics of an area if the rule is included in its Coastal Management Plan.¹²¹⁵

4. Relevance of state or local law to NEPA or CZMA review even when preempted.

Even where a local or state standard may be preempted by FERC, a concerned local government or advocate may wish to raise it as evidence of risk as part of the public interest review under the Natural Gas Act, the environmental review under NEPA or the CZMA balancing of risks and impacts. While FERC, as lead agency under NEPA, has chosen at times to ignore state laws requiring more stringent analysis of risk,¹²¹⁶ such dismissal of safety policies could be subject to challenge. The local government, after all, typically provides staff and resources for emergency response and may well be the first line of defense in a disaster, while the local community is likely to be the hardest hit by the disaster's impacts.

D. What about port authorities?

While port authorities in Louisiana and Texas do not have permit-granting powers for LNG facilities, they do play key roles in LNG siting. Port authorities typically lease facilities for LNG terminals. For example, Tellurian, Inc. announced that it will soon sign a long-term lease with the Louisiana Port Authority for its proposed Driftwood LNG terminal, so that the company can prepare the site for construction.¹²¹⁷

Their harbor dredging and maintenance activities can facilitate initiatives that involve larger ships. The Port of South Louisiana,¹²¹⁸ for example, recently persuaded the Army Corps to conduct dredging to deepen the Mississippi River Ship Channel from Baton Rouge to the Gulf of Mexico by 50 feet, to accommodate larger shipping vessels.¹²¹⁹

Port authorities develop capital improvement plans as well as operational plans that may involve multimodal transportation assets both on and off the immediate port property of relevance to LNG

¹²¹⁴ Federal regulations establish safety setbacks for LNG facilities. Each LNG container and transfer system must have a thermal radiation protection zone beyond the impoundment (spill control) area, and a flammable vapor dispersion exclusion zone around the facility large enough to address the part of a potential vapor cloud that could be flammable. 49 C.F.R. §§ 193.2057 and 193.2059. Similarly, FERC's rules for environmental review require the applicant to quantify "existing noise levels at noise-sensitive areas," including "any areas covered by relevant state or local noise ordinances," and show the project will comply with both federal and local "applicable noise regulations." 10 C.F.R. § 380.12(k)(2) and (4)(v).

¹²¹⁵ While not a Natural Gas Act case, a federal court upheld the power of the city of Grand Prairie, TX, to impose a setback rule despite the Pipeline Safety Act's express preemption of safety rules, 49 U.S.C. § 60104(c), finding the local law was "not a safety standard in letter, purpose, or effect." *Texas Midstream Gas v. City of Grand Prairie*, 608 F.3d 200 (5th Cir. 2010).

¹²¹⁶ One journal article noted, for example, that in the EIS process for an LNG project, the California Coastal Act required the hazard analysis to include consideration of worst-case events, but FERC did not include such analysis in its draft EIS, as its practice is to screen out low probability risks. The project, Sound Energy Resource's proposed Long Beach Terminal, was abandoned for other reasons. Similarly, FERC dismissed worst-case concerns in deliberations over the restart of the Cove Point LNG terminal where local citizens raised concern about the close proximity of the Calvert Cliffs Nuclear Plant. Nafday, Avinash. "Regulatory Compliance for Marine LNG Import Terminals in California." *J Leg. Aff. Dispute Resolut. Eng. Constr.* 4(3):55-66, 58 (2012). <https://ascelibrary.org/doi/pdf/10.1061/%28ASCE%29LA.1943-4170.0000090>.

¹²¹⁷ Weber, Harry. "Tellurian to prepare Driftwood LNG site for construction, build new pipeline." S&P Global. (June 22, 2021) <https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/062221-tellurian-to-prepare-driftwood-lng-site-for-full-construction-build-new-pipeline>.

¹²¹⁸ The Port of South Louisiana is governed by a seven-member Board of Commissioners. Its jurisdiction covers three parishes – St. Charles, St. James and St. John the Baptist.

¹²¹⁹ McCormack, Frank. "Lower Miss deepening will have regional, national impacts." *Waterways Journal*. (Oct. 16, 2020) <https://www.waterwaysjournal.net/2020/10/16/lower-miss-deepening-will-have-regional-national-impacts/>.

facilities. Monitoring of port authority development plans can provide insights into the potential for future private projects such as LNG terminals.

E. What permitting requirements apply to deepwater terminals?

This guide has largely focused on the permits required by on-shore LNG terminals. This guidance does not necessarily apply to deepwater (offshore) facilities. Deepwater ports are located beyond the territorial limits of the United States (generally beyond three nautical miles from the U.S. baseline which is typically the mean low-water mark, but the threshold is nine nautical miles in Louisiana and on the Gulf Coast of Mexico).¹²²⁰ Facilities closer to the shore are regulated by FERC—review the documentation for the specific project to determine which rules apply.

Deepwater LNG facilities benefit from an expedited license process established under the Deepwater Port Act (DPA).¹²²¹ The statute states that its mission is to “promote the construction and operation of deepwater ports as a safe and effective means of importing crude oil and gas into the United States while minimizing tanker traffic and risks attendant thereto,” while also protecting the marine and coastal environment, “to prevent or minimize any adverse impact which might occur as a consequence of the development of such ports.”¹²²² Deepwater terminals require authorization by: MARAD, EPA, the governors of adjacent coastal states, and FERC, as the next sections explain. Advocates looking to challenge a deepwater terminal should consult with an experienced attorney to determine which actors may be most sympathetic to advocates’ concerns about the project before proceeding with a challenge.

1. The U.S. Maritime Administration (MARAD), the Coast Guard, and other agencies

MARAD, which is part of the Department of Transportation (DOT), is empowered to decide whether to grant a Deepwater Port Act (DPA) license.¹²²³ The application for a DPA license must include not only the Deepwater Port Act application but all EPA permits/approvals applications.¹²²⁴

The U.S. Coast Guard administers the application process for a DPA license—including project engineering, operations, safety,¹²²⁵ and environmental reviews, and serves as lead agency for compliance with NEPA.¹²²⁶ MARAD reviews the financial information, prepares the record of decision, and makes the substantive decision. The Secretary of Transportation issues any DPA license.¹²²⁷ (A May 20, 2004 White House Task Force on Energy Project Streamlining memorandum

¹²²⁰ 33 U.S.C. § 1501(a)(1); see also 33 U.S.C. § 1502(9)(A). The territorial limits can vary state-by-state.

¹²²¹ Deepwater Port Act, 33 U.S.C. §§ 1501-1524.

¹²²² 33 U.S.C. § 1501(a). Note that although the statute emphasizes import facilities, it governs export facilities too.

¹²²³ The statute grants the power to the USDOT, which delegates the power to MARAD. 49 C.F.R. § 146(s).

¹²²⁴ 33 C.F.R. § 148.105(z) and (bb), and 33 U.S.C. 6 1518(a)(1).

¹²²⁵ The Coast Guard is responsible for matters related to navigation safety, vessel engineering and safety standards, and all matters pertaining to equipment and facility safety in or adjacent to navigable waters up to the last valve immediately before the receiving LNG tanks. It also is tasked with informing FERC of safety issues. 33 U.S.C. § 1221 *et seq.* It also issues a Letter of Recommendation as to the suitability of the waterway for LNG-related marine traffic. Guidance for issuance of such letters is contained in the Coast Guard Navigation and Vessel Inspection Circular 01-2011. Also see 33 U.S.C. § 1504(f) regarding the need to comply with NEPA regarding deepwater port applications.

¹²²⁶ The DPA authorizes the Secretary of DOT to license deepwater ports. The Secretary delegated to the Coast Guard authority to process licenses under the DPA, which delegation was confirmed by the Homeland Security Act of 2002. See 49 C.F.R. § 1.46(s) and the Homeland Security Act of 2002, §§ 888 and 1512(d).

¹²²⁷ See “Memorandum of Understanding on Deepwater Port Licensing” White House Task Force on Energy Project Streamlining. (May 20, 2004) https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/5ps/Operating%20and%20Environmental%20Standards/OES-2/DWP/dwp_white_house_task_force_energy_streamlining.pdf?ver=2017-07-26-102702-223. This MOU was issued pursuant to Presidential Executive Order 13212: Actions to Expedite Energy Related Projects. 66 Fed. Reg. 28357 (May 18, 2001).

was signed by 10 agencies outlining how these agencies coordinate in the licensing of deepwater ports.¹²²⁸)

The DPA gives MARAD 330 days from receipt of a complete license application to make a final determination, although it can suspend the “clock” if outstanding information needs exist.¹²²⁹ MARAD makes its determination with consultation or comments from the EPA and the nearest coastal state (which it identifies). The U.S. Coast Guard’s regulations require that deepwater LNG projects submit the information required for a Rivers and Harbors Act Section 10 permit and a Clean Water Act section 404 permit with their application for a deepwater port license.¹²³⁰

EPA must provide a recommendation—and must make and provide notification of its own permit decisions—to the Secretary of Transportation within 45 days after the last public hearing on the license application.¹²³¹ (For more on EPA’s role, see Section 10.E.2.)

The Secretary of Transportation cannot issue the DPA permit if EPA informs the Secretary that the port will not conform with applicable provisions of the Clean Air Act, Clean Water Act, or MPRSA.¹²³² EPA can request that the license for the deepwater port be “conditioned” upon the applicant receiving the required Clean Air Act permits from EPA before any construction or operational activity that requires a permit can occur.¹²³³ While applicants for deepwater port licenses purportedly must demonstrate that the requirements of Clean Water Act section 401(a)(1) for maintenance of state water quality standards will be satisfied,¹²³⁴ they do not have to submit this information to the state.

The Department of Transportation has jurisdiction to regulate oil spill prevention requirements for deepwater ports and their associated vessels as well as transportation-related onshore facilities.¹²³⁵

Additionally, for Clean Air Act purposes, deepwater ports will typically be permitted by EPA rather than states, as discussed in Section 8.D. Other statutes that may come into play include the Endangered Species Act,¹²³⁶ Coastal Zone Management Act, Magnuson Stevens Fishery Conservation and Management Act,¹²³⁷ Marine Mammal Protection Act,¹²³⁸ and National Historic Preservation Act.

¹²²⁸ “Memorandum of Understanding on Deepwater Port Licensing” White House Task Force on Energy Project Streamlining. (May 20, 2004)

https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/5ps/Operating%20and%20Environmental%20Standards/OES-2/DWP/dwp_white_house_task_force_energy_streamlining.pdf?ver=2017-07-26-102702-223.

¹²²⁹ 33 U.S.C. § 1504.

¹²³⁰ 33 C.F.R. § 148.105(aa).

¹²³¹ 33 U.S.C. § 1504(e)(2). MARAD may issue the license without EPA’s approval if EPA does not meet that 45-day deadline. 33 U.S.C. § 1503(c)(6).

¹²³² 33 U.S.C. § 1503(c)(6).

¹²³³ EPA. “EPA’s Liquefied Natural Gas Regulatory Roadmap.” EPA-230-B-06-001. Nov. 2006, p. 6.

https://www.epa.gov/sites/default/files/2015-08/documents/lng_regulatory_roadmap.pdf.

¹²³⁴ 33 C.F.R. § 148.105(i)(1)-(2).

¹²³⁵ Clean Water Act, § 311(j)(1)(c) and Executive Order 127777.

¹²³⁶ 16 U.S.C. § 1856, et seq. The National Oceanic and Atmospheric Administration (NOAA), which has a National Marine Fisheries Service, advises on Endangered Species Act compliance for deepwater port applications. See “Memorandum of Understanding Related to the Licensing of Deepwater Ports.” White House Task Force on Energy Project Streamlining. (May 20, 2004) at 5

https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/5ps/Operating%20and%20Environmental%20Standards/OES-2/DWP/dwp_white_house_task_force_energy_streamlining.pdf?ver=2017-07-26-102702-223.

¹²³⁷ 50 C.F.R. § 600.

¹²³⁸ 16 U.S.C. § 1382, implemented by the National Marine Fisheries Service (NMFS) within NOAA.

Also, if a deepwater or onshore/near-shore LNG facility has a structure that could affect navigable airspace, Federal Aviation Administration (FAA) rules would require marking and lighting.¹²³⁹

2. EPA's responsibilities

EPA has the power to decide whether to grant an air pollution permit for a deepwater LNG port under the Clean Air Act.¹²⁴⁰ Included in the scope of the air permit are emissions from the deepwater port itself and from “activities connected, associated, or potentially interfering with the use or operation of any such port,”¹²⁴¹ such as any carrier that is moored to the LNG port (the air pollutant emissions resulting from the transfer of gas to the port.¹²⁴² Its decision is based not only on federal law, but also on the air pollution regulations that would otherwise apply within the “nearest adjacent coastal State” consistent with federal law—*i.e.*, the state whose seaward boundaries, if extended beyond 3 miles, would encompass the site of the deepwater port.¹²⁴³

EPA also has the authority to decide whether to grant or deny a water pollution discharge permit under the Clean Water Act, pursuant to the National Pollution Discharge Elimination System (NPDES). Also, for discharges into the territorial sea or beyond, the NPDES permit must comply with EPA’s Ocean Discharge Criteria.¹²⁴⁴ The Clean Water Act provides that EPA issuance of a section 402 NPDES permit to a “new source” is subject to review under NEPA.¹²⁴⁵ Generally, the facility must fall within an industrial category for which new source performance standards have been developed,¹²⁴⁶ and EPA has not promulgated new source performance standards for deepwater ports or LNG terminals, whether based on land or water. But the DPA specifies that deepwater ports shall be considered “new sources” under the Clean Water Act,¹²⁴⁷ and that the Secretary of Transportation “shall comply” with NEPA for all Deepwater Port Act license applications.¹²⁴⁸ As a result, by operation of the DPA, NEPA applies to EPA’s proposal to issue an NPDES permit to a deepwater LNG terminal. EPA reviews the deepwater port EIS as a cooperating agency and must use that EIS in connection with its own permit decisions.¹²⁴⁹

As noted above, EPA has 45 days after the end of the last hearing to make its decision on any applications under the Clean Air Act, Clean Water Act, or MPRSA. If complete information for the project’s NPDES permit is not available in time to meet this deadline, however, then MARAD may condition the license upon the applicant receiving the EPA water discharge permit before the discharge activity an occur.¹²⁵⁰

¹²³⁹ For example, if the facility is more than 200 feet above ground level, such approval must be obtained. Stack flares, for example, may exceed the height threshold. Other standards apply depending on proximity to an airport runway or heliport. 14 C.F.R. § 77.

¹²⁴⁰ A deepwater port is a “new source” under both the Clean Air Act and the Clean Water Act. 33 U.S.C. § 1502(9).

¹²⁴¹ 33 U.S.C. § 1518(a)(1).

¹²⁴² A useful discussion of EPA air permitting requirements for deepwater LNG ports is included in a letter from EPA Region 1 regarding a proposed Northeast Gateway Deepwater LNG import facility off the coast of Massachusetts. EPA Region 1. Ltr. to Mr. Buck Booth, Excelerate Energy, L.P. and Christopher Williams, Tetra Tech, Incl. (Aug. 13, 2020) https://www.epa.gov/sites/production/files/2021-02/documents/neg_lng_tranfers2020.pdf.

¹²⁴³ The DPA effectively federalizes the law of the nearest adjacent state. 33 U.S.C. § 1518(b).

¹²⁴⁴ 40 C.F.R. Part 125, Subpart M.

¹²⁴⁵ 33 U.S.C. § 1371(c)(1). See 33 U.S.C. § 1316 and 40 C.F.R. § 6, Subparts A, B, D, and F.

¹²⁴⁶ 33 U.S.C. § 1316(a)(2) and 40 C.F.R. §§ 122.2 and 122.29(b)(2).

¹²⁴⁷ 33 U.S.C. § 1502(9)(D).

¹²⁴⁸ 33 U.S.C. § 1504(f).

¹²⁴⁹ 33 U.S.C. § 1504(f).

¹²⁵⁰ 33 C.F.R. § 148.105(z).

Whether deepwater or onshore/near shore, operators of LNG projects must determine if any wastes the facility generates will be hazardous as defined under the Resource Conservation and Recovery Act (RCRA) regulations,¹²⁵¹ and determine whether such wastes such as used oil or antifreeze should be categorized as hazardous waste or used oil.¹²⁵² LNG facility operators may accumulate hazardous waste on site without a permit for 90 days if deemed a large quantity generator or 180 days if deemed a small quantity generator.

3. The involvement of adjacent coastal states' governors

The governors of each “adjacent coastal state” as identified by the Secretary of Transportation, have the power to review and approve the license.¹²⁵³ Each adjacent coastal state governor must approve, or be presumed to have approved, the license—otherwise, the Secretary of Transportation cannot issue the DPA license.¹²⁵⁴ If a governor fails to transmit approval or disapproval within 45 days after the last day of public hearing on the license application, then that governor’s approval is presumed.¹²⁵⁵

Louisiana’s governor Kathleen Babineaux Blanco, for example, vetoed a proposed Main Pass Energy Hub offshore LNG import project in May 2006, expressing concerns about its open rack vaporizer system.¹²⁵⁶ In another example, Governor Bob Riley of Alabama rejected offshore LNG import projects that used an ocean-water-based “open-loop” technology for warming LNG,¹²⁵⁷ eventually giving his approval to an import facility proposing to use a “closed-loop” system of warming the gas.¹²⁵⁸

This one-stop veto could be a powerful tool to stop a deepwater terminal, if the governor is sympathetic. Just recall that this gubernatorial veto power of deepwater LNG ports does not exist for onshore/near-shore LNG facilities.¹²⁵⁹

4. The involvement of the nearest adjacent coastal state governor

The air and water pollution laws of the nearest adjacent coastal state, to the extent that they are consistent with federal law, would apply to the deepwater port project if the state’s seaward boundaries—if extended beyond three miles—would encompass the port site.¹²⁶⁰ (Recall that ports closer to shore than three miles will likely be under FERC’s jurisdiction.) In this situation, the state’s

¹²⁵¹ 40 C.F.R. § 262.10. They also must determine if the wastes are ignitable, corrosive, reactive or toxic pursuant to 40 C.F.R. § 261, Subpart C.

¹²⁵² Used oil is defined at 40 C.F.R. § 279.

¹²⁵³ 33 U.S.C. § 1502(1) defines an adjacent coastal state as one that would be directly connected to the deepwater port by pipeline or located within 15 miles of the port, or that is “so designated by the Secretary.” A state can request designation.

¹²⁵⁴ 33 U.S.C. § 1508(c)(8).

¹²⁵⁵ 33 U.S.C. § 1508(b)(1).

¹²⁵⁶ Dismukes, *supra* note 1, 76.

¹²⁵⁷ Rivera Newsletters. “Two LNG months in a nutshell 27” (Feb. 9, 2009) <https://www.rivieramm.com/news-content-hub/news-content-hub/two-lng-months-in-a-nutshell-27-53749>.

¹²⁵⁸ Altman, George. “Liquefied natural gas terminal south of Dauphin Island approved.” AL.com. (Sept. 16, 2010) https://www.al.com/live/2010/09/liquefied_natural_gas_terminal.html.

¹²⁵⁹ This fact was noted by the Congressional Research Service in its 2009 report on LNG import terminals. Congressional Research Service. “Liquefied Natural Gas (LNG) Import Terminals: Siting, Safety, and Regulation.” (Dec. 14, 2009) p. 17.

<https://crsreports.congress.gov/product/pdf/RL/RL32205>.

¹²⁶⁰ 33 U.S.C. § 1518(b). “Under the Deepwater Port Act, Deepwater Port projects locating beyond 9 nautical miles from the Louisiana shoreline or 3 nautical miles from the Texas shoreline will likely need an EPA Region 6 issued preconstruction and operating permit” for its air emissions. “Air Permitting for Deepwater Port Act Projects in the South Central Region.” EPA. <https://www.epa.gov/caa-permitting/air-permitting-deepwater-port-act-projects-south-central-region>.

law is said to be “federalized” and would apply to the actions of MARAD, the U.S. Coast Guard, and the EPA.

5. FERC’s authority over pipelines for deepwater ports

FERC has authority over permitting of any pipeline portion of a deepwater port that is located landward of the high-water mark. It also has authority over interconnecting facilities that are not part of the deepwater port itself.¹²⁶¹ Such pipelines are subject to Section 7 of the Natural Gas Act, which authorizes FERC to issue certificates of “Public Convenience and Necessity” for “the construction or extension of any facilities...for the transportation in interstate commerce of natural gas.”¹²⁶² For these projects, the Energy Policy Act of 2005 designates FERC as the lead agency for coordinating all federal permits and authorizations, as well as complying with NEPA. It establishes the schedule of the decision-making procedures, sets deadlines, and maintains a complete consolidated record of all federal administrative decisions regarding the project.¹²⁶³

Underwater pipelines have an unsettling safety record: the U.S. Government Accountability Office issued a report in 2021 finding that the Department of the Interior’s Bureau of Safety and Environmental Enforcement has a weak program for ensuring underwater pipeline safety. It also notes that the BSEE has allowed over 97% of all decommissioned pipeline mileage on the Gulf of Mexico seafloor, since the 1960s, to remain in place.¹²⁶⁴ The GAO found that the Bureau doesn’t sure the standards for cleaning and burying this decommissioned pipeline is met, increasing the risk of environmental and safety hazards now and in the future.¹²⁶⁵

¹²⁶¹ See 33 U.S.C. § 150(b)(9)(C).

¹²⁶² 15 U.S.C. § 717f.

¹²⁶³ Energy Policy Act of 2005, Pub. L. No. 109-58, Sect. 313, amending 15 U.S.C. § 717n.

¹²⁶⁴ “Offshore Oil and Gas: Update Regulations Needed to Improve Pipeline Oversight and Decommissioning.” U.S. GAO. GAO-21-293. (Mar. 29, 2021) <https://www.gao.gov/products/gao-21-293>.

¹²⁶⁵ *Id.*