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HOW STATES CAN AFFECT FEDERAL DEEPWATER PORT LNG LICENSING DECISIONS: A CASE STUDY INVOLVING THE DEEPWATER PORT ACT AND THE COASTAL ZONE MANAGEMENT ACT

*LINDA KROP**

I. INTRODUCTION

The last decade brought an influx of proposals to import liquefied natural gas (LNG) to the United States from other countries. LNG is natural gas that has been “supercooled” to approximately -260°F , to be condensed into its liquid form for trans-oceanic shipping.¹ After transport, LNG must be re-warmed and vaporized, or “regasified,” before it can be distributed via pipeline for use by consumers. Transporting natural gas in a liquefied state represents the only economic way to transport large quantities of gas because liquefying the gas condenses it

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¹ KEN KUSANO, U.S. COAST GUARD HEADQUARTERS, THE DEEPWATER PORT ACT: UNDERSTANDING THE LICENSING PROCESS 2, www.slc.ca.gov/division_pages/mfd/Prevention_First/Documents/2004/LNG%20ON%20THE%20WEST%20COAST/Kusano%20paper.pdf (last visited June 12, 2011).

to 1/600 of its volume.²

Proponents of importing LNG pointed out that natural gas demand in the United States was on the rise and expected to continue to increase, while domestic supplies were projected to decrease. Importation of natural gas was therefore predicted to play an increasingly significant role in our domestic energy policy, and it was expected to meet 17% of the nation's energy demand by 2025.³ While the East Coast already hosted a few LNG import terminals, which could be expanded, the federal government identified a need for the construction of new facilities as well.⁴

At the time (in the early 2000's), all of the existing terminals were located onshore.⁵ Safety concerns and local opposition, however, had stymied the development of additional onshore terminals. Accordingly, industry and the federal government turned their focus offshore.⁶ If LNG import terminals could be located farther from highly populated areas, the theory went, there would be less opposition. New legislation, however, was necessary to allow construction of offshore LNG facilities.

In 2002 Congress amended the Deepwater Port Act (DWPA)⁷ to allow the construction of offshore facilities to import natural gas.⁸ The DWPA, enacted in 1974, was originally proposed to provide for the safe transportation of oil to the United States.⁹ The 2002 amendment expanded the focus of the Act to support marine transport of natural gas. The obvious purpose of the amendment was to expand the global energy market, so that gas produced in one country could be transported to and imported by the United States. With oil supplies thought to be peaking,

² *Id.* Natural gas is cooled to -260°F to reach a liquefied state. The LNG is then regasified (normally, by a heating process) for use by the importing nation.

³ *Id.*

⁴ *Id.* This projected need was based, in part, on The Energy Information Administration's *Annual Energy Outlook – 2004*.

⁵ Samuel Brown, Chicago-Kent College of Law, *Imported Liquefied [sic] Natural Gas and Its Role in Energy Independence*, www.kentlaw.edu/faculty/fbosselman/classes/EnergyLawSp07/PowerPoints/BrownDeepwaterportactpresentation.ppt (last visited June 12, 2011). The onshore terminals are located in Everett, Massachusetts; Cove Point, Maryland; Elba Island, Georgia; and Lake Charles, Louisiana. Onshore facilities are licensed by the Federal Energy Regulatory Commission under the Natural Gas Act. 15 U.S.C.A. § 717 et seq. (Westlaw 2011).

⁶ See Brown, *supra* note 5.

⁷ 33 U.S.C.A. § 1501 et seq. (Westlaw 2011).

⁸ Maritime Transportation Security Act of 2002 (MTSA), Pub. L. No. 107-295, 116 Stat. 2064. Section 106 of the MTSA amended the DWPA to provide a means for the natural gas industry to construct offshore terminals for storing, transporting and handling natural gas.

⁹ MARITIME ADMINISTRATION, *Frequently Asked Questions*, www.marad.dot.gov/ports_landing_page/deepwater_port_licensing/dwp_faq/dwp_faq.htm (last visited June 12, 2011).

the energy industry turned its eyes toward the next prize – natural gas. Boasts were made about how natural gas was cleaner than oil and coal, and would provide a bridge to a future that relies more on renewable energy sources.¹⁰ Therefore, most of the reaction to the amendment was focused on the expansion of federal oversight to include natural gas importation. A much less noted aspect of the DWPA, however, is the role that coastal states play in the review and licensing of offshore deepwater ports.

This role came about due to concerns of coastal states that, even though the DWPA applies to facilities constructed three miles or more offshore,¹¹ certain impacts would still occur. These impacts could occur either on the offshore terminals, or at the onshore processing, transportation and support facilities. Concerned coastal states insisted on, and achieved, a uniquely powerful role in the review and siting of deepwater oil and gas ports.

This Article explores the general role of coastal states in permitting offshore LNG terminals, and the specific role that California played in the licensing process for the proposed Cabrillo Port LNG project. There are many facets of state authority, including the approvals required for the portions of LNG projects located within a coastal state's jurisdiction (primarily within the first three miles offshore), the application of state laws to proposals to construct offshore LNG facilities under the DWPA, the authority of the governor of the adjacent coastal state to approve or "disapprove" deepwater port projects, and the right of a coastal state to review federal LNG applications for consistency with the state's coastal management program. The last right is granted under the federal CZMA,¹² which is a primary focus of this discussion.

Part I explores the history and authority of the DWPA, as well as its relationship to other federal and state laws. Part II discusses the role of the Coastal Zone Management Act. Part III examines a case study of the Cabrillo Port LNG proposal in Southern California. Part IV analyzes important lessons learned from the Cabrillo Port case study, including the importance of public input and participation. Part V concludes with a summary of the importance of state involvement in LNG licensing decisions.

The California case study is interesting from both a legal and

¹⁰ See, e.g., BHP BILLITON, *Cabrillo Port: A New Source for Clean Reliable Energy* (2003), available at www.bhpbilliton.com/bbContentRepository/News/RelatedContent/BrochCabllPrtFD.pdf.

¹¹ See 33 U.S.C.A. § 1502(9)(A) (Westlaw 2011).

¹² 16 U.S.C.A. § 1451 et seq. (Westlaw 2011).

political perspective. In the early 2000's, the California Energy Commission (CEC) strongly supported importing LNG due to the perceived need to meet the state's future energy needs.¹³ The CEC presented dire predictions of the state's energy portfolio, even in the face of a new California Energy Action Plan that emphasized and prioritized energy conservation, efficiency and an ambitious Renewable Portfolio Standard.¹⁴ Despite these "clean" energy strategies and supplies, the CEC found that importing LNG was an integral feature of any plan to meet the state's future energy demand.¹⁵

Following the 2002 amendment of the DWPA, several energy companies developed proposals to import LNG to the United States.¹⁶ Six of those proposals proposed the construction of new LNG facilities in or offshore California.¹⁷ Of those proposals, five proposed constructing facilities offshore, and one would have required onshore facilities.¹⁸ Although the CEC endorsed the need to construct LNG facilities in California, there was no comprehensive analysis regarding the best locations to site such facilities, or the preferred design or technology.¹⁹

The lack of a comprehensive siting analysis resulted in a "race to the finish line" by the competing project proponents. Although each proposal was required to consider alternatives, including alternative locations, the environmental analyses for the respective proposals were inconsistent and often presented conflicting conclusions.²⁰ The stage was

¹³ See CAL. ENERGY COMM'N, 2003 INTEGRATED ENERGY POLICY REPORT (2003), available at www.energy.ca.gov/reports/100-03-019F.PDF.

¹⁴ *Id.*; see also CAL. STATE LANDS COMM'N, BHP BILLITON CABRILLO PORT LIQUEFIED NATURAL GAS DEEPWATER PORT, FINAL ENVIRONMENTAL IMPACT REPORT (2007), available at www.slc.ca.gov/Division_Pages/DEPM/DEPM_Programs_and_Reports/BHP_Deep_Water_Port/BHP_Final_EIR.html [hereinafter CABRILLO PORT EIS/EIR].

¹⁵ See CAL. ENERGY COMM'N, 2003 INTEGRATED ENERGY POLICY REPORT, *supra* note 13.

¹⁶ See Brown, *supra* note 5. There were more than forty projects and sites proposed for new LNG facilities around the United States.

¹⁷ The Cabrillo Port, Clearwater Port, Port of Long Beach, Chevron/Texaco, Ocean Way, and Port Esperanza projects. Proposals to import LNG to Oregon and Baja California presented additional options for providing natural gas supplies to California from other countries.

¹⁸ The Port of Long Beach proposal was the only onshore proposal. See CABRILLO PORT EIS/EIR, *supra* note 14, at 3-21.

¹⁹ California LNG Terminal Siting Act of 1977, CAL. PUB. UTIL. CODE § 5550 et seq. (Westlaw) (repealed 1987). This omission contrasted with the situation in the 1970's, when the State required a siting analysis to be performed before any LNG projects could be permitted. The purpose of the siting study was to ensure that the best locations would be selected, and that adverse impacts would be avoided or minimized to the extent practicable.

²⁰ See *Liquefied Natural Gas Projects*, CAL. ENERGY COMM'N, www.energy.ca.gov/lng/projects.html (last visited June 12, 2011). For example, the CABRILLO PORT EIS/EIR, found

set, then, for reliance on individual analysis and review by the relevant federal, state and local permitting agencies. This Article will discuss the State's role in that process.

II. THE DEEPWATER PORT ACT

A. PURPOSES AND REQUIREMENTS OF ACT

As noted above, the DWPA was initially passed in 1974 to support the marine transport of oil, and the Act was amended in 2002 to include natural gas.²¹ The 2002 amended version of the DWPA notes that an important policy of the Act is to “promote the construction and operation of deepwater ports as a safe and effective means of importing oil or natural gas into the United States.”²² Although the primary impetus for the original DWPA was to *promote* oil importation, another important policy was to “protect the rights and responsibilities of states and communities to regulate growth, determine land use, and otherwise protect the environment.”²³

A deepwater port is any fixed or floating man-made structure that is used as a port or terminal for the transportation, storage or further handling of oil or natural gas for transportation to any state.²⁴ The DWPA grants jurisdiction to the Secretary of Transportation to issue licenses for deepwater ports;²⁵ however, the Secretary has delegated that authority to the U.S. Coast Guard (USCG) and Maritime Administration (MARAD).²⁶ MARAD has the authority to issue a license for the construction and operation of a deepwater port.²⁷ The USCG and MARAD are the lead federal agencies responsible for conducting environmental review under the National Environmental Policy Act (NEPA).²⁸

alternative locations and technologies to be infeasible, whereas the environmental analysis for competing proposals found those same alternative locations and technologies to be feasible. CABRILLO PORT EIS/EIR, *supra* note 14.

²¹ Deepwater Port Act of 1974, 33 U.S.C.A. § 1501 et seq. (Westlaw 2011) (amended by the Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (codified at 46 U.S.C. § 2101 et seq.)).

²² 33 U.S.C.A. § 1501(a)(5) (Westlaw 2011).

²³ 33 U.S.C.A. § 1501(a)(4) (Westlaw 2011).

²⁴ 33 U.S.C.A. § 1502(9)(A) (Westlaw 2011).

²⁵ 33 U.S.C.A. § 1503 (Westlaw 2011).

²⁶ 33 C.F.R. § 148.3 (Westlaw 2011).

²⁷ *Id.*

²⁸ CABRILLO PORT EIS/EIR, *supra* note 14, at 1-19.

Despite the intended purpose of promoting deepwater ports, the DWPA itself provides a fair balancing of interests and acknowledges the role and application of other federal laws, especially federal environmental laws, in the review of an application for an LNG port.

First, an application for a deepwater port is subject to environmental review under NEPA (42 U.S.C. § 4321 et seq.).²⁹ In addition, the DWPA directs the Secretary to establish specific environmental review criteria, consistent with NEPA and “in accordance with the recommendations of the Administrator of the Environmental Protection Agency and the Administrator of the National Oceanic and Atmospheric Administration,” for use by federal agencies in evaluating the potential environmental effects of a proposed project.³⁰ Such criteria must include the following:

- (1) The effect on the marine environment;
- (2) The effect on oceanographic currents and wave patterns;
- (3) The effect on alternate uses of the oceans and navigable waters, such as scientific study, fishing, and exploitation of other living and nonliving resources;
- (4) The potential dangers to a deepwater port from waves, winds, weather, and geological conditions, and the steps which can be taken to protect against or minimize such dangers;
- (5) Effects of land-based developments related to deepwater port development;
- (6) The effect on human health and welfare; and
- (7) Such other considerations as the Secretary deems necessary and appropriate.³¹

The DWPA also includes specific requirements for ensuring marine environmental protection and navigational safety.³² These provisions allow for pollution prevention measures, establishment of safety zones, and other appropriate regulations and license requirements.

Finally, the DWPA makes it clear that projects authorized under this law are still subject to all other applicable federal laws and regulations.³³ Thus, LNG proposals must comply with such federal laws as the Clean Water Act, Clean Air Act, Oil Pollution Act, Endangered Species Act,

²⁹ 33 U.S.C.A. § 1504(f) (Westlaw 2011).

³⁰ 33 U.S.C.A. § 1505(a) (Westlaw 2011).

³¹ *Id.*

³² *See* 33 U.S.C.A. § 1509 (Westlaw 2011).

³³ *See* 33 U.S.C.A. §§ 1503(c), 1518(a) (Westlaw 2011); 33 C.F.R. § 148.737 (Westlaw 2011).

Marine Mammal Protection Act, Marine Protection, Research and Sanctuaries Act, and – as discussed in further detail in this Article – the CZMA.

Despite the many statutory and regulatory requirements, the DWPA also facilitates the consideration of applications for deepwater ports by providing an expedited schedule for review. Under the DWPA, the licensing decision must be rendered within 356 days from when the application is filed. This deadline is based upon the following timeline: (1) the Secretary (MARAD) must determine whether an application is complete within 21 days of its receipt; (2) if the application is complete, a notice must be published in the Federal Register within 5 days; (3) the federal agencies are given 240 days from the date of the notice to complete environmental review and hold a public hearing; and (3) MARAD must issue a final decision within 90 days following the public hearing.³⁴ As part of that 90-day period, other federal agencies and the governor of the adjacent coastal state must provide their input within the first 45 days; MARAD then has an additional 45 days to render a final decision.³⁵

B. STATE ROLE IN DEEPWATER PORT ACT IMPLEMENTATION

Imbedded in the congressional declaration of policy for the DWPA is the desire to “protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law.”³⁶ States are given traditional roles, such as permitting authority for project components within their jurisdictions, as well as expanded purview via application of state laws and the right of the governor of an adjacent coastal state to approve or disapprove a project.³⁷ Finally, states have the ability under the CZMA to review the federal permits for consistency with their state coastal management programs.³⁸

California’s interest in deepwater port regulations may have

³⁴ See 33 U.S.C.A. § 1504 (Westlaw 2011).

³⁵ See 33 U.S.C.A. §§ 1504(e)(2), 1508(b)(1) (Westlaw 2011).

³⁶ 33 U.S.C.A. § 1501(a)(4) (Westlaw 2011).

³⁷ See 33 U.S.C.A. § 1508(b)(1) (Westlaw 2011).

³⁸ See 16 U.S.C.A. § 1451 et seq. (Westlaw 2011); 33 U.S.C.A. § 1508(c) (Westlaw 2011).

As explained *infra*, under the CZMA, once a coastal state has adopted a coastal management program that is certified by the Secretary of Commerce, the state is granted the authority to review activities under federal jurisdiction that may affect the state’s coastal resources, and to determine whether such activities will be conducted in a manner that is consistent with the state’s program. 16 U.S.C.A. § 1456 (Westlaw 2011).

stemmed, at least in part, from the effect of the 1969 Santa Barbara oil spill and the lessons learned from that disaster. For although the 1969 spill occurred from an oil platform located more than three miles offshore in federal waters, the spill quickly reached the beaches and affected the state's and community's tourism, fishing, and recreational industries.³⁹

Some state and local approvals are necessary to allow the transportation of the gas from the deepwater port to onshore support and distribution facilities. For offshore ports, LNG is usually proposed to be re-processed from a liquid to gaseous state offshore, to minimize potential safety impacts. The gas is then piped to shore and delivered to onshore gas storage or distribution systems.

In order to make this journey, the applicant must develop infrastructure that crosses through state waters, which extend from the beach to three miles offshore.⁴⁰ Thus, state approval is required for any necessary leases, pipeline permits, and ancillary infrastructure. In addition, depending upon the type of project, onshore processing or transmission facilities may be required. State laws and regulations will apply to the project application, as will any necessary or applicable local policies, plans, ordinances and regulations.

One of the unique aspects of the DWPA is the provision that:

The law of the nearest adjacent coastal State . . . is declared to be the law of the United States, and shall apply to any deepwater port licensed pursuant to this chapter, to the extent applicable and not inconsistent with any provision or regulation under this chapter or other federal laws and regulations.⁴¹

The "nearest adjacent coastal State" is defined, for purposes of the Act, as "that State whose seaward boundaries, if extended beyond 3 miles, would encompass the site of the deepwater port."⁴²

In response to concerns raised by coastal states, the DWPA includes the unique requirement that even though a deepwater port would be sited

³⁹ *E.g.*, ROBERT OLNEY EASTON, BLACK TIDE: THE SANTA BARBARA OIL SPILL AND ITS CONSEQUENCES (1972); ROBERT SOLLEN, AN OCEAN OF OIL: A CENTURY OF POLITICAL STRUGGLE OVER PETROLEUM OFF THE CALIFORNIA COAST (1998).

⁴⁰ *See* Submerged Lands Act of 1953, 43 U.S.C.A. § 1301 et seq. (Westlaw 2011).

⁴¹ 33 U.S.C.A. § 1518(b) (Westlaw 2011).

⁴² *Id.* In general, the Act defines "adjacent coastal State" as any coastal state that (a) would be directly connected by pipeline to a deepwater port, as proposed in an application; (b) would be located within fifteen miles of any such proposed deepwater port; or (c) is designated by the Secretary. 33 U.S.C.A. § 1502(1) (Westlaw 2011).

offshore in federal jurisdiction, the Secretary may not issue a license unless the governor of the adjacent coastal state approves issuance of the license.⁴³

The governor has up to 45 days following the last public hearing on the project application to render a decision.⁴⁴ In doing so, the governor has four options: (1) approve the project; (2) disapprove the project; (3) notify the Secretary that the application is inconsistent with state programs relating to environmental protection, land and water use, and coastal zone management, in which case the Secretary “shall condition the license granted so as to make it consistent with such State programs”; or (4) take no action, in which case approval will be conclusively presumed.⁴⁵

III. COASTAL ZONE MANAGEMENT ACT

The roles of federal and state governments regarding projects in federal waters were not always straightforward. With the discovery of valuable mineral resources offshore, federal and state agencies often fought over the authority to regulate such resources.⁴⁶

Motivated by its own interest in offshore oil and gas resources, the federal government initially asserted authority over all offshore lands in 1937.⁴⁷ Coastal states had a different perspective. In their opinion, the resources off their coasts belonged to them.⁴⁸ After years of litigation and legislative battles, the Submerged Lands Act was passed in 1953, setting the boundary between state and federal jurisdiction at three miles offshore.⁴⁹ Thus, the federal government was assured jurisdiction over

⁴³ 33 U.S.C.A. § 1503(c)(8) (Westlaw 2011).

⁴⁴ 33 U.S.C.A. § 1508(b) (Westlaw 2011).

⁴⁵ *Id.*

⁴⁶ OCS POLICY COMMITTEE, MOVING BEYOND CONFLICT TO CONSENSUS, REPORT OF THE OCS POLICY COMMITTEE’S SUBCOMMITTEE ON OCS LEGISLATION (1993), available at www.boemre.gov/mmab/PolicyCommittee/SubcommitteeReports/MovingBeyondConflictToConsensus10-1993.pdf [hereinafter MOVING BEYOND CONFLICT TO CONSENSUS]; see also SOLLEN, *supra* note 39.

⁴⁷ See OCS POLICY COMMITTEE, *supra* note 46 at 4.

⁴⁸ *Id.* Specifically, California, Texas and Louisiana asserted jurisdiction to the lands off their coasts. In 1947, the Supreme Court ruled in favor of the federal government against California. *United States v. California*, 332 U.S. 19 (1947). The Supreme Court subsequently ruled against Texas and Louisiana as well. *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950). In 1952, Congress passed legislation granting states jurisdiction over the first three miles offshore; President Truman vetoed the bill, however, in light of the Supreme Court decisions. In his campaign for President, Eisenhower supported the states. See MOVING BEYOND CONFLICT TO CONSENSUS, *supra* note 46.

⁴⁹ See 43 U.S.C.A. § 1301 et seq. (Westlaw 2011).

activities that take place more than three miles offshore, whereas states were granted jurisdiction over activities up to three miles offshore.⁵⁰

This delineation did not fully assuage the coastal states, which continued to seek a greater role in offshore governance. The 1969 Santa Barbara oil spill and other events confirmed the states' concerns that activities in federal waters could have a significant impact on their coastal communities and resources.

The Coastal Zone Management Act (CZMA) was passed in 1972, in an attempt to address such lingering disputes.⁵¹ The CZMA retained the three-mile extent of state jurisdiction, but it gave states a voice, and indeed limited authority, over activities proposed in federal jurisdiction that may affect the states' coastal resources.⁵² Hence, for activities either proposed or approved by the federal government that would affect "any land or water use or natural resource of the [state's] coastal zone," the states were given an opportunity to review such activities, evaluate them for potential effects to the state's coastal zone, and even prevent harmful private activities.⁵³

The CZMA thus requires an applicant for a federal deepwater port license to submit a certification to the state in which the port would be built, demonstrating consistency with that state's coastal management program (CMP).⁵⁴ The state reviewing authority must concur with the certification before MARAD can issue the license under the DWPA.⁵⁵

A. COASTAL MANAGEMENT PROGRAMS

A coastal state is granted the right to review and take action regarding certain activities in federal waters if it develops a CMP in

⁵⁰ See 43 U.S.C.A. §§ 1301(a)(2), (b) (Westlaw 2011).

⁵¹ See 16 U.S.C.A. § 1451 et seq. (Westlaw 2011).

⁵² The congressional findings for the CZMA explicitly acknowledge that "[b]ecause of their proximity to and reliance upon the ocean and its resources, the coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal programs affecting such resources and, wherever appropriate, by the development of state ocean resource plans as part of their federally approved coastal zone management programs." 16 U.S.C.A. § 1451(m) (Westlaw 2001).

⁵³ 16 U.S.C.A. § 1456 (Westlaw 2011).

⁵⁴ See 16 U.S.C.A. § 1456(c)(3)(A) (Westlaw 2011).

⁵⁵ See *id.* The state must review the applicant's consistency certification and either concur with or object to the certification. The Secretary of Commerce can override a state's objection if the Secretary finds that the activity is consistent with the objectives of the CZMA or is "otherwise necessary in the interest of national security."

accordance with the requirements set forth in the CZMA.⁵⁶ The purpose of the CMP is to encourage coastal states to manage their coastal resources in accordance with specific national priorities, e.g., protection of natural resources, water quality, shoreline stability, and public access.⁵⁷

A state's CMP must be certified by the Secretary of Commerce.⁵⁸ Only states that have certified CMPs can review proposals for consistency with their coastal policies. Fortunately, all of the eligible coastal states and territories have approved CMPs.⁵⁹ Some states, including California, have "direct" CMPs, which authorize the state or local governments to manage the majority of land and water uses in the coastal zone with a single coastal permit. Other states have "networked" CMPs, in which the state or local governments manage the majority of land and water uses in the coastal zone with numerous coastal permits or authorizations (e.g., Florida).⁶⁰

A direct program can be implemented by a state agency or by an appointed commission or council. Commission or council members may be appointed by the governor, lieutenant governor, state legislature, or some combination thereof, or may serve in their capacity as a representative of a state commission or board. Some states require representation of local government or communities on their commissions or councils; other states require representation of certain interest sectors.⁶¹ Some states require geographical representation.⁶²

Just as the appointment structure may vary from state to state, so may the respective responsibilities of state commissions and councils. Responsibilities may include issuing permits, hearing appeals or disputes, issuing rules and regulations, and conducting state consistency review under the CZMA.⁶³ In some states, such as California, the appointed commission covers all roles.⁶⁴ In other states, the commission

⁵⁶ See 16 U.S.C.A. § 1456 (Westlaw 2011).

⁵⁷ See 16 U.S.C.A. § 1452(2) (Westlaw 2011).

⁵⁸ See 16 U.S.C.A. §§ 1452, 1454, 1455 (Westlaw 2011).

⁵⁹ Email from Chris McCay, Program Analyst, Nat'l Oceanic & Atmospheric Admin. (Dec. 3, 2010).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* California, for example, requires that Coastal Commissioners be appointed from specific regions along the state's coastal zone. CAL. PUB. RES. CODE § 30301(e) (Westlaw 2011).

⁶³ Email from Chris McCay, *supra* note 59.

⁶⁴ CAL. PUB. RES. CODE § 30601 (Westlaw 2011). The California Coastal Commission issues coastal development permits within state tidelands and submerged lands, which are those offshore lands up to three miles. The Commission also issues permits within the onshore portions of the state if the local city or county does not have a certified local coastal program. CAL. PUB. RES. CODE §§

may have responsibility for some roles but may delegate other responsibilities to staff. Several states, for example, allow staff to perform consistency review.⁶⁵

Thus, in the context of offshore LNG proposals, some states may have a single reviewing authority that will consider coastal permits as well as appeals and consistency review. In other states, different entities (e.g., staff vs. commission) may handle different aspects of the project.

B. CONSISTENCY REVIEW

The CZMA differentiates between activities that are proposed by the federal government (“federal agency activities”) and those proposed by private applicants that require federal approval (“private activities”).⁶⁶ For federal agency activities, the proposing federal agency must submit a consistency determination to the state in which the project is located, demonstrating consistency with that state’s CMP “to the maximum extent practicable.”⁶⁷ If the state objects to the consistency determination, the state notifies the federal agency of its objections.⁶⁸ If the federal agency proceeds over the state’s objection, the state’s only recourse is to seek judicial review.⁶⁹

For activities proposed by a non-federal applicant that require a federal approval such as a license or permit, the project proponent must submit a consistency certification to the state, showing “that the proposed activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner consistent with the program.”⁷⁰ If the state objects to the certification, the federal permitting agency is prohibited from issuing the necessary

30600, 30601, 30604 (Westlaw 2011). The Commission also considers appeals of permits issued by local governments. CAL. PUB. RES. CODE §§ 30600.5(d), 30602, 30603 (Westlaw 2011). In addition, the Commission certifies local coastal programs and administers consistency review under the CZMA. CAL. PUB. RES. CODE §§ 30330, 30500 et seq. For information regarding the Commission, see www.coastal.ca.gov.

⁶⁵ Email from Chris McCay, *supra* note 59.

⁶⁶ 16 U.S.C.A. §§ 1456(c)(1)-(2) (Westlaw 2011); a third category of activities includes plans for the exploration development or production of oil or gas from any area that has been leased under the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1331 et seq. *See* 16 U.S.C.A. § 1456(c)(3)(B) (Westlaw 2011).

⁶⁷ 16 U.S.C.A. §§ 1456(c)(1)-(2) (Westlaw 2011).

⁶⁸ 16 U.S.C.A. § 1456(c)(3)(A) (Westlaw 2011).

⁶⁹ 16 U.S.C.A. § 1456(c)(1)(B) (Westlaw 2011). Even if the state prevails in its legal challenge, the Secretary of Commerce may mediate the dispute or the President may exempt the activity if the President determines that the activity is in the paramount interest of the United States.

⁷⁰ 16 U.S.C.A. § 1456(c)(3)(A) (Westlaw 2011).

approval.⁷¹ The Secretary of the Commerce Department may, however, overrule the state's objection by determining (on his or her own initiative, or on appeal) "that the activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security."⁷²

An LNG project proposed pursuant to the DWPA requires a federal license; thus it must be fully consistent with the state's CMP, and objection by the state blocks issuance of the deepwater port license unless the Secretary of the Commerce Department overturns the state's objection.

IV. CALIFORNIA CASE STUDY: CABRILLO PORT

BHP Billiton LNG International Inc. (BHP) submitted an application to the USCG and MARAD in 2003 to construct and operate the Cabrillo Port LNG Deepwater Port.⁷³ The Cabrillo Port LNG proposal was one of several that focused on something that had not been done in the United States – constructing and operating an LNG import terminal in offshore waters. BHP proposed to import LNG from the Pacific Basin⁷⁴ to a terminal that would have been located approximately fourteen miles offshore Ventura and Los Angeles Counties near Oxnard, California.⁷⁵ Until then, all LNG terminals were located onshore or in ports or harbors. Accordingly, different proponents of offshore terminals proposed vastly different types of technologies, most of which were innovative and untested.⁷⁶

BHP proposed construction of a new offshore LNG floating storage and regasification unit (FSRU) that not only would receive shipments of LNG from specially built supertankers, but would also "regasify" the LNG on the terminal using a controlled heating process, so that it could be reformulated as natural gas.⁷⁷ The gas would then be transported by pipe to shore. The FSRU would be approximately 971 feet long, 213 feet wide, and 161 feet high.⁷⁸ One or two shipments would be delivered each

⁷¹ *Id.*

⁷² *Id.*

⁷³ CABRILLO PORT EIS/EIR, *supra* note 14, at 1-1.

⁷⁴ Although the specific source of the gas was undetermined at the time of the application, BHP's "preferred source" was Australia's Scarborough Field. The source gas could have also come from Malaysia or Indonesia. *Id.* at 1-1, 1-17.

⁷⁵ *Id.* at 2-5.

⁷⁶ *See id.* at 3-31, 3-42, for description of various types of facilities and technologies..

⁷⁷ *Id.* at 1-1.

⁷⁸ CABRILLO PORT EIS/EIR, *supra* note 14, at 2-15 to 2-16.

week, with a maximum of 130 carriers per year.⁷⁹ The FSRU would be located near the north-south shipping lanes that are used by large cargo ships entering and exiting the Los Angeles/Long Beach ports, the busiest ports in the United States.⁸⁰ BHP would also construct natural gas pipelines between the FSRU and a new onshore metering station. The project was expected to deliver an annual average of 800 million cubic feet per day of natural gas.⁸¹

A. ENVIRONMENTAL REVIEW

Due to the many potential impacts posed by the project, a joint Environmental Impact Statement/Environmental Impact Report (EIS/EIR) was prepared pursuant to NEPA and the California Environmental Quality Act (CEQA).⁸² The Draft EIS/EIR found that the project would result in potentially significant and unavoidable impacts relating to public safety, aesthetics, air quality, marine biological resources, noise, recreation, water quality, and agriculture and soil resources.⁸³ The report further found that some impacts could be reduced or avoided through the adoption of mitigation measures.⁸⁴

Hundreds of comments were submitted by public agencies, organizations and individuals. Many of these interested stakeholders questioned the conclusions in the Draft EIS/EIR and provided evidence and expert opinion that many impacts, including those related to safety, views, marine mammals, geology, climate change, and air and water quality, would be greater than disclosed in the report.⁸⁵ Additionally, public groups and energy experts expressed concern that the project would negatively impact California's ability to meet its renewable energy goals if natural gas was allowed to glut the market.

The Final EIS/EIR was released on March 16, 2007, and reflected

⁷⁹ *Id.* at 1-1.

⁸⁰ THE PORT OF LOS ANGELES, www.portoflosangeles.org/idx_about.asp (last visited Apr. 19, 2011); THE PORT OF LONG BEACH, www.polb.com/about/faqs.asp (last visited Apr. 19, 2011).

⁸¹ CABRILLO PORT EIS/EIR, *supra* note 14, at 1-1, 1-2.

⁸² *See generally* CAL. PUB. RES. CODE § 21000 et seq. (Westlaw 2011).

⁸³ CAL. STATE LANDS COMM'N, BHP BILLITON CABRILLO PORT LIQUEFIED NATURAL GAS DEEPWATER PORT, REVISED DRAFT ENVIRONMENTAL IMPACT REPORT (2006), *available at* www.slc.ca.gov/Division_Pages/DEPM/DEPM_Programs_and_Reports/BHP_Deep_Water_Port/BHP_DEIS-R.html.

⁸⁴ *Id.*

⁸⁵ *Id.* The main commenter representing the environmental community was the California Coastal Protection Network, represented by the Environmental Defense Center (EDC). The EDC submitted numerous comments, including comments by experts, which can be viewed on the EDC website: www.EnvironmentalDefenseCenter.org.

changes to the project intended to reduce project impacts. These changes included a reduction in the number of tanker deliveries from 130 per year to 99 per year, as well as a change in the cooling system and vessel operations.⁸⁶ Nevertheless, the Final EIS/EIR identified nineteen significant and unmitigated impacts.⁸⁷

B. CALIFORNIA STATE LANDS COMMISSION REVIEW AND ACTION ON STATE LEASE

As the lead agency under CEQA, the California State Lands Commission (CSLC) was required to review and certify the EIR for the project.⁸⁸ In addition, CSLC approval was necessary to issue a lease for the pipeline in state waters.⁸⁹ The EIR and the project were considered at a public hearing before the Commission on April 9, 2007.

The primary issues considered by the CSLC included air quality, public safety, marine biology, water quality, noise, aesthetics, recreation and agriculture.⁹⁰ Despite these impacts, the CSLC staff recommended approval of the project, on the grounds that the benefits of the project (a new energy supply) outweighed the potential harms.⁹¹ The Commissioners, however, responded to the overwhelming public opposition and voted 2-1 to deny certification of the EIR and the lease.⁹²

C. CALIFORNIA COASTAL COMMISSION CONSISTENCY REVIEW AND ACTION

California has a direct CMP.⁹³ The State's program is overseen by the California Coastal Commission, which comprises twelve voting commissioners who are appointed by the Governor, State Senate and State Assembly.⁹⁴ Half of the Commissioners are local elected officials

⁸⁶ CABRILLO PORT EIS/EIR, *supra* note 14, at 2-1 – 2-2.

⁸⁷ *Id.*

⁸⁸ CAL. STATE LANDS COMM'N, CONSIDER CERTIFICATION OF A FINAL ENVIRONMENTAL IMPACT REPORT (FINAL EIR) AND THE ISSUANCE OF A GENERAL LEASE – RIGHT OF WAY USE 4 (2007).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² STATE OF CALIFORNIA, CALIFORNIA STATE LANDS COMMISSION, SPECIAL HEARING ON LNG, OPEN SESSION MINUTES, APRIL 9, 2007 at 2, *available at* archives.slc.ca.gov/Meeting_Summaries/2007_Documents/04-09-07/Minutes.pdf [hereinafter STATE LANDS COMMISSION MINUTES].

⁹³ Email from Chris McCay, *supra* note 59.

⁹⁴ CAL. PUB. RES. CODE § 30301 (Westlaw 2011).

and half are public representatives.⁹⁵ The officials and public representatives must come from specific geographic regions along the state's coast.⁹⁶ There are also three non-voting members that represent specific state agencies.⁹⁷

The Coastal Commission has responsibility for all three aspects of LNG coastal entitlements: (1) issuing permits for development within the Coastal Commission's original permit jurisdiction (from the mean high tide line seaward three miles), (2) hearing appeals of local onshore permits located within the Coastal Commission's appellate jurisdiction, and (3) conducting consistency review of the federal deepwater port licenses.⁹⁸

California's CMP was certified in 1978 and includes the coastal resource protection policies of the California Coastal Act,⁹⁹ as well as any state or local regulations established to meet the requirements of the Federal Clean Air Act and Clean Water Act.¹⁰⁰

The Coastal Commission hearing took place on April 12, 2007. The staff report that was prepared for the hearing pointed out the many impacts that would result from the proposed project.¹⁰¹ At the hearing, the Commission endorsed the staff's analysis and found that the Cabrillo Port project would result in the following significant adverse impacts to coastal resources:

- Impacts to air quality, including both air pollutant emissions in excess of federal and local thresholds established to protect public health and welfare, as well as greenhouse gases at levels that would result in adverse effects to coastal resources in the form of sea level rise, ocean warming, increased erosion, habitat displacement, and others.
- Impacts to marine mammals due to underwater noise, entanglement and vessel strikes.
- Impacts to seabirds from lighting.
- Impacts to sealife due to entrainment of fish eggs, larvae, and other planktonic organisms, and disturbance of benthic habitat caused by placing pipelines and anchors on the

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See supra* note 64.

⁹⁹ *See* CAL. PUB. RES. CODE § 30000 et seq. (Westlaw 2011).

¹⁰⁰ *See* 16 U.S.C.A. § 1456(f) (Westlaw 2011).

¹⁰¹ CAL. COASTAL COMM'N, STAFF REPORT AND RECOMMENDATION CONSISTENCY CERTIFICATION (2007), available at documents.coastal.ca.gov/reports/2007/4/Th7a-4-2007.pdf.

seafloor.

- Impacts to water quality from the discharge of wastes into the ocean.
- Impacts to public health and safety resulting from the storage, processing and transportation of natural gas, with the concomitant risk of spills or releases of natural gas, fuel, petroleum products and hazardous substances.
- Impacts to commercial fisheries, due to loss of historic fishing grounds, entanglement of fishing gear, and interference with commercial fishing activities at port.
- Impacts associated with the location of the proposed FSRU in areas such as seismic hazards, including ground shaking, fault rupture, liquefaction, failure of subsea slopes, and tsunamis.
- Impacts to views due to the facility's location and lighting affecting views along several miles of the California coast.¹⁰²

Based upon these impacts, the Coastal Commission found that the project was inconsistent with Coastal Act and CMP policies related to marine resources, water quality, spill prevention and response, geology, visual resources, hazardous development siting, terrestrial biology, commercial fishing, public access and recreation, and cultural resources.¹⁰³ The Coastal Commission also found that the project would be inconsistent with the Federal Clean Air Act and thus inconsistent with CMP policies related to air quality.¹⁰⁴

Although BHP proposed mitigation measures to address some of the project's impacts, the Coastal Commission found that such measures were not sufficient to avoid impacts to coastal resources, especially with respect to air quality and greenhouse gas (GHG) emissions, marine resources, spill prevention and response, terrestrial biology, geology, and visual resources.¹⁰⁵

Despite these inconsistencies, the Coastal Commission could have approved the project based on the industrial "override" provision in the Coastal Act.¹⁰⁶ This provision allows the Coastal Commission to approve an industrial project despite inconsistencies with the resource protection

¹⁰² CAL. COASTAL COMM'N, ADDENDUM TO PROPOSED REVISED FINDINGS FOR CC-079-06-BHP BILLITON LNG INTERNATIONAL, INC. (2007), available at documents.coastal.ca.gov/reports/2007/7/W6a-7-2007.pdf [hereinafter COASTAL COMMISSION FINDINGS].

¹⁰³ See *id.*

¹⁰⁴ See *id.* at 79-102.

¹⁰⁵ COASTAL COMMISSION FINDINGS, *supra* note 102.

¹⁰⁶ CAL. PUB. RES. CODE § 30260 (Westlaw 2011).

policies of the Coastal Act, provided that there are no feasible alternatives, impacts are mitigated to the maximum extent feasible, and to do otherwise would negatively affect the public welfare.¹⁰⁷ The Coastal Commission found that the Cabrillo project did not meet these criteria because the impacts to air quality, terrestrial biology and marine resources were not mitigated to the maximum extent feasible, and because objection to the proposal would not adversely affect the public welfare.¹⁰⁸ This last finding was based upon the project's nonconformity with Clean Air Act requirements, harm to marine and terrestrial biological resources, and the fact that the project's GHG emissions would contribute to global warming "and the resulting adverse effects to a wide range of coastal resources."¹⁰⁹

D. GOVERNOR REVIEW AND ACTION

Prior to the hearings on the project, California Governor Schwarzenegger had made public statements supporting the importation of LNG to the state.¹¹⁰ Like many others in government, he preferred an offshore location, on the basis that impacts to the state would be reduced.¹¹¹ Of the pending offshore proposals, the Cabrillo Port application was the furthest along in the permitting process and therefore appeared most likely to receive the Governor's support.

Following the actions of the CSLC and Coastal Commission, Governor Schwarzenegger issued his decision on May 18, 2007.¹¹² Although he maintained his general support for LNG, he concluded that based on the review conducted by the two state agencies, this particular project should be "disapproved" because it would result in significant and unmitigated impacts to air quality and marine life.¹¹³ In issuing his statement, the Governor made it clear that he continued to see a role for LNG in California's future, but that this or any other project would have to address these concerns before it could be approved.¹¹⁴

¹⁰⁷ *Id.*

¹⁰⁸ COASTAL COMMISSION FINDINGS, *supra* note 102, at 179-97.

¹⁰⁹ *Id.* at 7.

¹¹⁰ Letter from Arnold Schwarzenegger, Governor of Cal., to Sean Connaughton, Mar. Adm'r, U.S. Dep't of Transp. (May 18, 2007), available at www.energy.ca.gov/lng/documents/cabrillo_deepwater_port/2007-05-18_GOVENOR_LNG_LETTER.PDF.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ At the time, there were other LNG projects proposed offshore California. As of the date of this article, there are no pending proposals.

E. USCG/MARAD ACTION

Based upon the Coastal Commission's objection and the Governor's disapproval, the federal government had no choice but to deny BHP's application. MARAD issued its denial decision on June 5, 2007, based upon the Governor's disapproval submitted pursuant to section 1508(b)(1) of the DWPA.¹¹⁵

V. LESSONS LEARNED FROM CALIFORNIA

Despite the federal government's strong support for LNG, as evidenced by the 2002 amendments to the DWPA, the DWPA and CZMA both recognize and grant substantial weight and authority to coastal states that would be affected by such projects. The DWPA itself applies the laws of the adjacent coastal state and gives that state's governor the ability to disapprove a project. In addition, the CZMA gives the coastal state the authority to prevent a federal agency from approving an application for a private license or permit if the application is found inconsistent with the state's CMP.

A. IMPORTANCE OF STRONG UP-TO-DATE COASTAL MANAGEMENT PLANS

A state's role in reviewing and permitting offshore LNG terminals depends in large part on the strength and adequacy of its CMP. California's CMP is largely made up of the coastal protection policies embodied in the California Coastal Act. The Coastal Act was enacted in 1976,¹¹⁶ as a result of a citizens' initiative (Proposition 20) that was passed by the voters in 1972 and is perhaps the strongest environmental law in the nation.

The goals of the Coastal Act are to protect and restore the coastal environment; assure orderly balanced use and conservation of coastal zone resources, taking into account social and economic needs; require comprehensive and long-term planning for the coast; maximize public access to and recreation opportunities near the coast, consistent with the constitutionally protected rights of property owners; assure priority for coastal dependent and coastal related uses; and encourage state and local

¹¹⁵ See U.S. DEP'T OF TRANSP., THE SECRETARY'S DECISION ON THE DEEPWATER PORT LICENSE APPLICATION OF BHP BILLITON LNG INTERNATIONAL, INC. (2007), *available at* <http://www.epa.gov/region9/liq-natl-gas/cabrillo/bhp-billiton-rod-6-5-07.pdf>.

¹¹⁶ CAL. PUB. RES. CODE § 30000 et seq. (Westlaw 2011).

initiatives and coordinated planning and development.¹¹⁷

The substance of the Coastal Act is contained in its “Chapter 3” policies, which protect public access and recreation, marine and terrestrial resources, visual resources, agricultural lands, water quality, archaeological resources, and commercial fisheries.¹¹⁸ The policies also address specific uses that may occur in the state’s coastal zone, including residential, commercial, and industrial. The Act provides guidance regarding siting of development, transportation, and public facilities such as power plants and public works.

The strength and enforceability of these policies sets the stage for California to protect its coastal interests in response to proposed offshore LNG facilities. These facilities may result in significant impacts to coastal air and water quality, marine and coastal resources, and scenery, and they may interfere with other protected coastal uses and industries.¹¹⁹ California was fortunate to have the Coastal Act in place when it submitted its CMP for certification to the Secretary of Commerce. Not only did the Coastal Act address the issues and concerns set forth in the CZMA, but it went beyond the bare minimum required by the Act. Because all of the Chapter 3 policies are part of California’s certified CMP, they all apply to any federal activity or application that would affect the state’s coastal zone. Drawing on California as an example, it would behoove any coastal state to include strong policies in its own CMP.

Another important aspect of the CZMA is the requirement that a state’s program incorporate the requirements of the federal Clean Air Act and Clean Water Act.¹²⁰ In the case of Cabrillo Port, these requirements proved to be critical, as the project would have had an impact on both water quality and air quality. The Coastal Commission was most concerned about the air quality impacts and the project’s lack of compliance with Clean Air Act requirements for new sources of NO_x and ROC emissions.¹²¹ The Commission found that the Cabrillo Port project failed to incorporate “Best Available Control Technology” and failed to secure emissions offsets.¹²² For these (and other) reasons, the

¹¹⁷ CAL. PUB. RES. CODE § 30001.5 (Westlaw 2011).

¹¹⁸ CAL. PUB. RES. CODE § 30200 et seq. (Westlaw 2011).

¹¹⁹ See CABRILLO PORT EIS/EIR, *supra* note 14; COASTAL COMMISSION FINDINGS, *supra* note 102.

¹²⁰ See 16 U.S.C.A. § 1456(f) (Westlaw 2011).

¹²¹ See COASTAL COMMISSION FINDINGS, *supra* note 102, at 79-101. NO_x (nitric oxide and nitrogen dioxides) and ROCs (reactive organic compounds) are precursors to smog.

¹²² *Id.* at 79-102.

Coastal Commission objected to BHP's consistency certification.

B. IMPORTANCE OF PUBLIC INVOLVEMENT AND EXPERT COMMENT

The role of the public is also important. The DWPA states that a license may be issued “only after public notice and public hearings” and ensures that “[a]t least one public hearing shall be held in each adjacent coastal State.”¹²³ Based upon the materials and testimony submitted at the public hearings, the Secretary may decide to convene a formal evidentiary, or adjudicatory, hearing to resolve disputed material factual issues.¹²⁴

The CSLC hearing on Cabrillo Port was held in Oxnard, the city most affected by the proposed project. Approximately 2,000 people attended the hearing, most of whom were strongly opposed to the project.¹²⁵ The public's influence on the CSLC's decision was obvious. The agency staff had recommended certification of the EIR and approval of the project.¹²⁶ The staff found that the impacts from the project were outweighed by the benefits, which included a new energy supply that would fill an unmet need and would help diversify the state's portfolio.¹²⁷

The public input convinced the CSLC otherwise. First, the public had submitted numerous expert reports and testimony demonstrating that the EIS/EIR understated impacts to safety, marine resources, air and water quality, and climate change.¹²⁸ The experts also refuted the applicant's and State's analysis of the need for the project.¹²⁹

Second, other agencies, including local air districts, expressed concern about the impacts of the project. The CSLC received technical comments from experts and agencies that contradicted the findings of its

¹²³ 33 U.S.C.A. § 1504(g) (Westlaw 2011).

¹²⁴ *See id.*

¹²⁵ Matthew Singer, *Cabrillo Port Runs Out of Gas*, VENTURA CNTY. REP., Apr. 12, 2007, www.vcreporter.com/cms/story/detail/?id=4523&IssueNum=119.

¹²⁶ CAL. STATE LANDS COMM'N, CONSIDER CERTIFICATION OF A FINAL ENVIRONMENTAL IMPACT REPORT (FINAL EIR) AND THE ISSUANCE OF A GENERAL LEASE – RIGHT OF WAY USE (2007).

¹²⁷ *Id.*

¹²⁸ *See* Letter from EDC to Ken Kusano, USCG, and Cy Oggins, CSLC (Dec. 20, 2004); Letter from EDC to Dwight Sanders, CSLC (May 11, 2006); Letter from EDC to Chairman Garamendi, State Lands Comm'n (Apr. 4, 2007).

¹²⁹ *See* Letter from EDC to Ken Kusano, *supra* note 128; Letter from EDC to Dwight Sanders, *supra* note 128; Letter from EDC to Garamendi, *supra* note 128; *see also* Letter from Ratepayers for Affordable Clean Energy to Dwight Sander [sic], CSLC (Apr. 6, 2007).

own staff.¹³⁰ At the end of the hearing, the Commissioners were convinced by the public input that the project would in fact pose significant adverse impacts to public safety, air quality, and climate change, and they voted to deny certification of the EIR and approval of the project.¹³¹

The California Coastal Commission was also influenced by public comment. In addition to the public hearing requirements of the DWPA, the Coastal Commission was required to hold its own hearing pursuant to the CZMA and California Coastal Act. The Coastal Act provides for the “widest opportunity for public participation” in decisions affecting the state’s coast.¹³² In order to implement this policy, the Coastal Commission attempts to hold hearings in locations that facilitate participation by the interested public. In the case of the Cabrillo Port project, the hearing was held in Santa Barbara, California, approximately 40 miles from Oxnard, the community closest to, and most affected by, the project.¹³³ The hearing was attended by “a large crowd of project opponents.”¹³⁴

The Coastal Commission staff had received the same public comments and expert reports that had been submitted to the CSLC. In the case of the Coastal Commission, however, the staff agreed with the public that the project violated the State’s CMP and the Coastal Act.¹³⁵ The Commissioners agreed with their staff and voted to object to BHP’s proposed consistency certification.

This case study reinforces the importance of public stakeholders

¹³⁰ *Id.*; see also CAL. GAS AND ELECTRIC UTILITIES, 2006 CALIFORNIA GAS REPORT; testimony by Dr. Chung Liu, Deputy Executive Officer, South Coast Air Quality Management District, meeting of the State Lands Commission, Apr. 9, 2007, hearing item V.02 BHP BILLITON LNG INTERNATIONAL, INC., available at archives.slc.ca.gov/Meeting_Transcripts/2007_Documents/04-09-07/04-09-07_Transcripts_part_2.pdf at 214-231.

¹³¹ See STATE LANDS COMMISSION MINUTES, *supra* note 92; see also Commissioner John Chiang, State Controller, Motion to Deny Cabrillo Port LNG Application (Apr. 9, 2007), available at www.cabrilloportdenial.gov (citing concerns about air quality, safety, and harm to marine life); Commissioner John Garamendi, Lieutenant Governor, Cabrillo Port LNG--Final Decision (Apr. 9, 2007) (on file with author) (citing lack of need for project, inadequate analysis of alternatives to the project).

¹³² CAL. PUB. RES. CODE § 30006 (Westlaw 2011).

¹³³ Melinda Burns, *Historic Coastal Commission Vote May Sink Floating Natural Gas Terminal*, SANTA BARBARA NEWSROOM, Apr. 13, 2007, www.santabarbaranewsroom.com/news/environment/historic-coastal-commission-vote-may-sink-floating-natural-gas-terminal.html.

¹³⁴ *Id.*

¹³⁵ In response to public comment, the California Coastal Commission (CCC) did add some concerns to those already raised by the staff, including concerns regarding impacts to seabirds and other marine and terrestrial biological resources. See COASTAL COMMISSION FINDINGS, *supra* note 102, at 6-7, 33-36, 43-56, 77, 136-38, 144-45, 182-85, 194.

seeking their own expert analysis and participating in each step of the LNG licensing process.

C. IMPORTANCE OF GHG EMISSIONS AND CONSIDERATION OF CLIMATE CHANGE IMPACTS

Perhaps the public's most significant contribution to the debate regarding the Cabrillo Port project was the focus on global climate change as an impact of the project. The EIS/EIR for the project devoted only one paragraph (out of thousands of pages) to the topic.¹³⁶ In its truncated analysis, the EIS/EIR identified only the GHG emissions that would occur at the terminal itself and found such emissions to be insignificant.¹³⁷

The lead opponents of the project, the California Coastal Protection Network, represented by the Environmental Defense Center, hired an independent expert in climate change, who analyzed the emissions from the full "life cycle" of the project.¹³⁸ This analysis included emissions from the production and processing of the gas in the source country or countries, transportation of the LNG to the United States, reprocessing and distribution of the gas, and ultimate end use of the gas.¹³⁹ This study determined that the EIS/EIR analysis addressed only 1.5% of the project's total GHG emissions, and that the total direct and indirect emissions would amount to 25 million tons per year¹⁴⁰ (or the equivalent of 3.5 million cars).

The project opponents used this report to highlight the importance of analyzing GHG emissions under NEPA and CEQA. Under these statutes, environmental review must consider the impacts of connected and cumulative activities, as well as indirect effects of a proposed project.¹⁴¹ In this case, the activities associated with producing, transporting and using the natural gas could be considered "connected"

¹³⁶ CABRILLO PORT EIS/EIR, *supra* note 14, at 4.20-31, 32.

¹³⁷ *Id.*

¹³⁸ See Richard Heede, LNG SUPPLY CHAIN GREENHOUSE GAS EMISSIONS FOR THE CABRILLO DEEPWATER PORT: NATURAL GAS FROM AUSTRALIA TO CALIFORNIA (2006), available at www.edcnet.org/pdf/Heede_06_LNG_GHG_Anlys.pdf.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See 40 C.F.R. § 1508.25 (Westlaw 2011) (connected actions); 40 C.F.R. §§ 1508.7, 1508.25(a)(2), (c)(3), 1508.27(b)(7) (Westlaw 2011); CAL. CODE REGS. tit. 14, § 15064(h) (Westlaw 2011) (cumulative effects); 40 C.F.R. §§ 1508.8(b), 1508.25(c)(3); CAL. CODE REGS. tit. 14, § 15126.2(a) (Westlaw 2011) (indirect effects).

to the operations of the LNG deepwater port.¹⁴² Furthermore, the construction and operation of the LNG port would result in an indirect effect caused by the combustion of the natural gas in homes and businesses.¹⁴³ Finally, the GHG emissions from this project, while not solely responsible for global climate change, should be viewed as part of a cumulative problem that warrants consideration and response.¹⁴⁴

Analysis of GHG emissions is also important in the CZMA context. Similar to NEPA, the CZMA requires state reviewing agencies to consider the indirect, as well as the direct, effects of a proposed action. This approach was codified in 1990, when Congress amended the CZMA to delete language limiting state review to activities that “directly affect” a state’s coastal resources and replaced it with language allowing states to review activities that merely “affect” their coastal resources.¹⁴⁵

The analysis of GHG emissions proved to be extremely important to the CSLC’s and Coastal Commission’s consideration of the project. The Coastal Commission adopted the Environmental Defense Center’s expert report and devoted a substantial portion of its analysis to the climate change impacts of the project.¹⁴⁶ Both agencies relied heavily on the publicly provided information in reaching their decision.

¹⁴² Under NEPA, connected actions are those that are “closely related and therefore should be discussed in the same impact statement. Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1) (Westlaw 2011).

¹⁴³ See, e.g., *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003). The Surface Transportation Board was required to evaluate emissions of CO₂ and other pollutants from increased coal consumption that would result from approval of new and upgraded rail lines. See also *Border Power Plant Working Grp. v. Dep’t of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003). The Department of Energy was required to evaluate CO₂ emissions from power plants that would result from approval of transmission line project.

¹⁴⁴ See, e.g., *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008). The National Highway Traffic Safety Administration failed to adequately examine climate change implications of a rule establishing corporate average fuel economy standards in an Environmental Assessment. *Id.* The court held that the “impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.” *Id.*

¹⁴⁵ Coastal Zone Management Act, Pub. L. No. 101-508, § 6208(a), 104 Stat. 1388 (amending 16 U.S.C. § 1456(c)(1)). The Ninth Circuit relied on this amendment in requiring State review of offshore oil leasing activities. See *California v. Norton*, 311 F.3d 1162, 1173 (9th Cir. 2002). State consistency review extended to oil leasing activities, including lease suspensions, because they “represent a significant decision to extend the life of oil exploration and production off of California’s coast, with all of the far reaching effects and perils that go along with offshore oil production.” *Id.* The court noted that consistency review of lease suspensions would allow the State to consider the “very broad and long term effects” of the leases. *Id.* at 1174.

¹⁴⁶ See COASTAL COMMISSION FINDINGS, *supra* note 102, at 185-194.

VI. CONCLUSION

Although the primary purpose of the DWPA is to facilitate the construction and operation of deepwater oil and gas ports, including those used to import LNG from overseas,¹⁴⁷ the Act also recognizes the importance of giving affected coastal states a significant role in the deepwater port licensing process.¹⁴⁸ The respective roles of federal and coastal state governments has a long history, leading up to and including the passage of the Submerged Lands Act in 1953,¹⁴⁹ the CZMA in 1972,¹⁵⁰ and the DWPA in 1974.¹⁵¹

Offshore LNG terminals can pose significant risks and impacts to coastal states and communities. It is critical that state governments, local agencies and public stakeholders participate in every step of the LNG deepwater port licensing process. LNG projects must be approved by many federal and state agencies;¹⁵² thus, there are many opportunities for public input. An informed public will foster equally informed decision-making.

¹⁴⁷ 33 U.S.C.A. § 1501(5) (Westlaw 2011).

¹⁴⁸ 33 U.S.C.A. §§ 1501(a)(4), 1503(c)(8), 1508(b)(1), 1518(b) (Westlaw 2011).

¹⁴⁹ 43 U.S.C.A. § 1301 et seq. (Westlaw 2011).

¹⁵⁰ 16 U.S.C.A. § 1451 et seq. (Westlaw 2011).

¹⁵¹ 33 U.S.C.A. § 1501 et seq. (Westlaw 2011).

¹⁵² CABRILLO PORT EIS/EIR, *supra* note 14, at 1-31 to 1-33.