STRIKING A DELICATE BALANCE: DEVELOPING A NEW RATIONALE FOR PREEMPTION WHILE PROTECTING THE PUBLIC'S ROLE IN SITING LIQUIFIED NATURAL GAS TERMINALS

INTRODUCTION

Chairman Joseph T. Kelliher of the Federal Energy Regulatory Commission (FERC) has stated that the Energy Policy Act of 2005 (the "Act") is "one of the most important changes in the laws [FERC] administer[s] in [the past seventy] years."[1] Previous versions of the Act had been introduced in Congress since 2003.[2] The final version was signed by President Bush on August 8, 2005, after having passed the House of Representatives by a vote of 275 to 156[3] and the Senate by a vote of 74 to 26.[4]

Section 311 of the Act grants FERC the "exclusive authority to approve or deny an application for the siting, construction, expansion or operation of [a Liquefied Natural Gas] terminal."[5] Section 313 of the Act designates FERC as the "lead agency for the purposes of coordinating all applicable Federal authorizations [necessary to site Liquified Natural Gas Terminals] and for the purposes of complying with the National Environmental Policy Act of 1969,"[6] and further grants judicial review of all federal authorizations to the U.S. Courts of Appeals.[7] Although Chairman Kelliher has maintained that these portions of the Act merely "clarify" FERC's jurisdiction to site Liquified Natural Gas (LNG) Terminals,[8] opponents of sections 311 and 313 of the Act

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1 Press Release, Fed. Energy Regulatory Comm'n, Chairman Joseph T. Kelliher's Statement on EPAct 2005 (Sept. 21, 2005), http://www.ferc.gov/press-room/statements-speeches/kelliher/2005/09-21-05-kelliher-epact.pdf.

2 S. REP. NO. 109-78, at 11 (2005).

3 151 CONG. REC. H6972–73 (July 28, 2005). Supporters of the Act included 200 out of 231 Republicans, but only 75 of 199 Democrats. *Id.*

4 151 CONG. REC. S9374 (July 29, 2005). Twenty out of forty-four Democrats voted for the Act, as did forty-nine out of fifty-five Republicans. *Id.*

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

6 EPAct § 313(a)(3), 15 U.S.C.A. § 717n(b)(1).

7 EPAct § 313(b), 15 U.S.C.A. § 717r(d).

8 Press Release, Fed. Energy Regulatory Comm'n, *supra* note 1.

have argued that they "signal[] a departure from current law whereby states and localities play[ed] a significant role in siting" these facilities.[9]

Natural gas consists primarily of methane.[10] This gas can be "supercooled" to -260 degrees, which decreases its volume to 1/600th of its volume as a gas, making it easier to transport and store.[11] After conversion into liquid form, the natural gas can be transported in tankers from countries that export natural gas[12] and then converted back into gaseous form for use in the U.S. energy market. However, "specially designed terminals" must receive and process the LNG, which involves converting it back into gas.[13] These LNG terminals are then linked to pipelines that transport the gas across the United States. Four of these terminals have already been built in U.S. cities: Everett, Massachusetts; Cove Point, Maryland; Elba Island, Georgia; and Lake Charles, Louisiana.[14]

Congress's grant of exclusive jurisdiction to FERC preempts the authority of state agencies—principally public utility commissions, which previously were viewed as the primary authorities responsible for siting LNG terminals.[15] Congress's regulation in this area impinges on states' traditional authority under the police power to regulate in areas of public health, safety and welfare, land use planning, and utility planning.[16] Although Congress has the right to regulate in these areas, courts have developed a presumption against

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[9] 151 CONG. REC. E765 (extension of remarks Apr. 26, 2005) (statement of Rep. Tierney).

[10] Federal Energy Regulatory Commission, For Citizens—LNG Overview, http://www.ferc.gov/for-citizens/citizen-guides/lng.asp (last visited Oct. 20, 2006).

[11] FED. ENERGY REGULATORY COMM'N, OFFICE OF ENERGY PROJECTS, A GUIDE TO LNG: WHAT ALL CITIZENS SHOULD KNOW 2 (2005), http://www.ferc.gov/for-citizens/citizen-guides/citz-guide-lng.pdf.

[12] The leading exporters of LNG are currently Indonesia, Algeria, Malaysia, Trinidad, and Qatar. *Id.* However, Nigeria, Russia, Iran, and Australia are potential exporters of LNG as well. *Id.*

[13] *Id.* Section 311 of the Act defines "LNG Terminal" to

> include[] all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel . . . .

EPAct § 311(b), 15 U.S.C.A. § 717a(11).

[14] U.S. Department of Energy, Office of Fossil Energy, Liquified Natural Gas, http://www.fossil.energy.gov/programs/oilgas/storage/index.html (last visited Dec. 1, 2006). These terminals were built in the 1970s. U.S. DEP'T OF ENERGY, LIQUIFIED NATURAL GAS: UNDERSTANDING THE BASIC FACTS 6 (2005), http://www.fossil.energy.gov/programs/oilgas/publications/lng/LNG_primerupd.pdf. For a general discussion of the history of the use of and demand for LNG in the United States, see Kathryn E. Kransdorf, Note, *Not on My Coastline: The Jurisdictional Battle over the Siting of LNG Import Terminals*, 17 FORDHAM ENVTL. L. REV. 37, 40–43 (2005).

[15] *See generally* Opening Brief of Petitioner, Californians for Renewable Energy v. FERC, No. 04-73650 (9th Cir. Nov. 1, 2004).

[16] *See infra* notes 134–36 and accompanying text.

Congress's preemption of state or local law in areas of traditional state concern.[17] Furthermore, when Congress regulates in an area of traditional state concern, it most often does so because states have not regulated sufficiently or there is a need for uniform regulation.[18]

These rationales only partially support Congress's preemption of states' authority to site LNG terminals. Therefore, this Comment argues that the grant of exclusive jurisdiction over the siting of LNG terminals to FERC represents a departure from the traditional rationales that support the reallocation of power to the state governments and away from the federal government in areas of traditional state concern. However, this Comment suggests that an alternate rationale exists for the passage of section 311: the effective ban on siting LNG terminals that has developed through regulatory fragmentation and state and local opposition to these projects. Although Congress's grant of exclusive jurisdiction to FERC was justified by this functional ban, this Comment notes that the transfer of power that Congress has effected has the potential to decrease the effectiveness of public participation in the LNG terminal siting process.

This Comment generally discusses the new role granted FERC under the Energy Policy Act of 2005 in siting LNG terminals and analyzes Congress's rationale for granting that role. Part I reviews the regulatory framework that applied to siting LNG terminals prior to the Act's passage. Part II presents the relevant provisions of the Act, including the reasons for and goals of sections 311 and 313's passage, the arguments presented by the opposition as to why FERC should not have been granted exclusive jurisdiction in this realm, and a description of the Act's resultant provisions. Part III discusses the rationales that have guided Congress's judgments on how to allocate power between the federal government and state and local governments in the past, including a discussion of the preemption doctrine, which traditionally has been Congress's main tool for overriding state law. Part IV compares Congress's decision to act here with the traditional preemption rationales, and it concludes that none of these rationales fully support Congress's actions with respect to LNG siting.

Finally, Part V analyzes the risks of and rationales for Congress's passage of sections 311 and 313. Specifically, the numerous and diverse regulating bodies that have traditionally been involved in siting LNG terminals have bogged down the process to such an extent that projects that are necessary for

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[17] *See infra* notes 125–26 and accompanying text.
[18] *See infra* notes 142–48 and accompanying text.

the security of the U.S. energy supply are not being constructed. However, although Congress, with the passage of sections 311 and 313, created a solution to the effective ban imposed on LNG terminals, it also created a risk of less effective public participation in the siting process. This Comment concludes that FERC should take great care to maintain a high level of public interaction prior to making any siting decisions.

I. REGULATORY FRAMEWORK PRIOR TO THE ACT

To better understand the current regulatory framework that applies to siting LNG terminals under the Act, it is instructive to review the regulatory framework that the Act displaced. Prior to the Act's passage, FERC did not have the exclusive authority to site LNG terminals. Rather, a complicated, fragmented regulatory scheme applied to LNG terminals. The Natural Gas Act's (NGA) policy provision, which was not altered by the Act, states that

> the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and . . . Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.[19]

However, the NGA as originally passed went on to reserve the regulation of "transportation or sale of natural gas or . . . the local distribution of natural gas or [of] . . . *the facilities used for such distribution*" to states.[20] Thus, Congress envisioned "a system of dual state and federal regulation."[21] Under the NGA, prior to the Act's passage, FERC had exclusive jurisdiction to transport and sell natural gas across state lines and to regulate natural gas companies that transport or sell natural gas.[22] FERC also had the jurisdiction to authorize exportation and importation of LNG to the United States.[23]

[19] 15 U.S.C. § 717(a) (2000).

[20] § 717(b) (emphasis added).

[21] Opening Brief of Petitioner, *supra* note 15, at 17.

[22] § 717(b) ("The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural-gas companies engaged in such transportation or sale . . . .").

[23] § 717b(a) ("[N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so.").

Pursuant to section 717(b) of the NGA, states retained all other authority regarding the regulation of LNG terminals, specifically including the authority to site the terminals.[24] For example, in California, the California Public Utilities Commission (CPUC) was "charged by statute with the responsibility for regulating natural gas corporations," which included "the authority 'to require every public utility to construct, maintain, and operate its . . . premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers and the public.'"[25] Prior to the Act's passage, each Californian public utility (which included LNG terminals) was required to obtain a Certificate of Public Convenience and Necessity from the CPUC as part of the siting process.[26]

In addition to the federal and state public utility permits, an applicant desiring to site an LNG terminal was also subject to approval by several other federal and state regulatory agencies, each of which applied its own timetable and requirements.[27] These included approvals from the relevant state agency under the Coastal Zone Management Act (CZMA),[28] the Clean Water Act (CWA),[29] the Clean Air Act (CAA),[30] and section 404 of the CWA for dredge-

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[24] § 717(b).

[25] Opening Brief of Petitioner, *supra* note 15, at 20–21 (quoting CAL. PUB. UTIL. CODE § 768 (West 2004)).

[26] *Id.* at 21.

[27] Although these approvals are still required under the Act, the timetables have been altered by section 313, which grants FERC lead status over all federal authorizations. EPAct of 2005 § 313(a)(3), 15 U.S.C.A. § 717n(b)(1); *see also infra* notes 96–98 and accompanying text.

[28] Under the CZMA, an applicant who desires to build an LNG terminal before obtaining the certification from FERC must certify to the relevant state agency "that the proposed activity complies with the enforceable policies of the state's approved [Coastal Zone Management] program and that such activity [would] be conducted in a manner *consistent* with the program." 16 U.S.C. § 1456(c)(3)(A) (2000) (emphasis added). "[E]nforceable polic[ies]" is then defined as "State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone." § 1453(6a). One author has noted that the breadth of this definition codifies the ability of local governmental agencies and actors to affect federal governmental activities, as long as the state's coastal management program requires the consideration of local zoning and land use regulations. Bruce Kuhse, *The Federal Consistency Requirements of the Coastal Zone Management Act of 1972: It's Time to Repeal This Fundamentally Flawed Legislation*, 6 OCEAN & COASTAL L.J. 77, 92 (2001).

[29] An LNG terminal permit applicant also has to obtain a certification from the state in which the "discharge . . . will originate . . . that any such discharge will comply with" the effluent limitations and water quality standards that the state had adopted in accordance with the CWA. 33 U.S.C. § 1341(a)(1) (2000). The certification had to include effluent limitations and "monitoring requirements" that the state determined were necessary for the applicant to comply with the CWA, which then became a condition of the section 404 permit issued by the U.S. Army Corps of Engineers (USACE). *Id.* Once the state provides the certification, the permitting agency (here, the USACE) must then notify the Administrator of the EPA of the application and certification. If the Administrator determines that the "discharge may affect . . . the quality of the waters of

and-fill activities.[31] The splintered process that applied to siting LNG terminals created lengthy delays and often resulted in several layers of bureaucracy reviewing the same information in a string of regulatory approvals.

For example, FERC's power to certify the importation of LNG to the United States and the transportation of natural gas across state lines was conditioned on the consistency determination required to be made by the state under the CZMA.[32] Prior to the Act's passage, the state agency responsible for CZMA consistency determinations potentially had six months to make its decision regarding a proposed LNG terminal,[33] thereby delaying FERC's certification for those six months. Furthermore, the U.S. Army Corps of Engineers (USACE), which remains responsible for issuing section 404 CWA dredge-and-fill permits for LNG terminals,[34] also had to wait for the consistency determination under the CZMA, delaying their decision for six

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any other state," then the Administrator must notify that other state. § 1341(a)(2). The other state then has sixty days to object to the permit. If the other state does object and requests a public hearing, the permitting facility then must hold a hearing and add conditions to the permit "to insure compliance with applicable water quality requirements" of the other state. *Id.* In the context of LNG terminals, this becomes significant for states with narrow coastlines, where the effects of an LNG terminal may be broader than the coastline of any individual state, and the other state may further delay the process by objecting.

[30] An LNG terminal permit applicant has to obtain a section 502 CAA permit from the relevant state's air pollution control agency. 42 U.S.C. § 7661a (2000).

[31] 33 U.S.C. § 1344 (2000).

[32] 15 C.F.R. § 930 (2006). An applicant whose proposed project has been found to be inconsistent by a state's designated agency can appeal the state's objection to the Secretary of Commerce. *Id.* However, the Secretary has authority to "override the state's objection only if finding 'that the activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security.'" Kuhse, *supra* note 28, at 84–85 (quoting 16 U.S.C. § 1456(c)(3) (2000)). The Secretary also nominally has the ability to make this determination *sua sponte*. 16 U.S.C. § 1456(c)(3); 15 C.F.R. § 930.131 (2006).

An application is "consistent with the objectives or purposes of" the CZMA if "it satisfies each of the following three requirements:"

> (a) The activity furthers the national interest . . . in a significant or substantial manner,
> (b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively.
> (c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.

15 C.F.R. § 930.121 (2006). Should a permit applicant move forward with its plans in the face of a denial of a permit, however, the CZMA does not create a right of action against the applicant by the state's designated agency. *See* New York v. DeLyser, 759 F. Supp. 982, 987 (W.D.N.Y. 1991).

[33] 16 U.S.C. § 1456(c)(3)(A) (2000).

[34] 33 U.S.C. § 1344 (2000).

months.[35] USACE also had to wait for certification from the relevant state's water quality certification under section 401 of the CWA.[36]

The interaction of these permit requirements resulted in long delays in the approval of the siting of LNG terminals.[37] In some states, different agencies historically have been responsible for the necessary approvals under the CWA, CAA, and CZMA,[38] and, often, several administrative appeals could occur in different jurisdictions. The requirements that some permits not be approved until other agency reviews were complete[39] stalled approvals even longer. This regulatory gridlock contributed to Congress's decision to pass sections 311 and 313 of the Act, but there were other reasons, which will be explored in Part V.

II. SECTIONS 311 AND 313 OF THE ACT

This Part introduces the relevant provisions of the Act. First, it discusses the reasons for and goals of sections 311 and 313's passage. Second, it reviews the arguments opposing exclusive federal jurisdiction over LNG siting. Finally, this Part describes the provisions and their implications.

A. *Motivations Leading to Passage of the Act*

In addition to the delays in the siting process that existed due to the diffusion of decision-making authority to site LNG terminals,[40] Congress felt significant pressure to ease the siting process from reports of the risk of future energy shortages, delays caused by opposition to the projects by states and localities, and lobbying efforts of industry groups and from FERC itself.

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[35] *See supra* note 28 and accompanying text.

[36] 33 U.S.C. § 1341(a)(1) (2000).

[37] *See* Shannon Davis, *Senate GOP Eyes Deregulating Natural Gas Pipeline Service Rates*, ENERGY WASH. WK., Dec. 7, 2004.

[38] For example, in California, the California Coastal Commission (CCC) is responsible for carrying out the CZMA, the Environmental Protection Agency (EPA) carries out the CWA, and the Air Resources Board is responsible for the state's duties under the CAA. FED. ENERGY REGULATORY COMM'N, COASTAL STATE AGENCIES ENFORCING CLEAN WATER ACT, CLEAN AIR ACT, AND COASTAL ZONE MANAGEMENT ACT (2005), http://www.ferc.gov/industries/lng/gen-info/laws-regs/state-agencies.pdf.

[39] *See supra* notes 27–30 and accompanying text.

[40] *See supra* Part I.

1. Future Energy Shortages

Congress has felt growing pressure to find new sources of energy to fuel the country's ever-increasing demand. Currently, U.S. production of oil has reached a fifty-year low and shows no signs of rebounding.[41] Although growth is projected in the domestic production of natural gas and coal, this growth cannot make up for our country's dependence on foreign oil.[42] Furthermore, domestic demand for natural gas is projected to increase at a faster rate than the domestic supply of natural gas[43] over the next twenty years.[44] Congress has responded to this potential energy crisis by focusing, in part, on the importation of LNG. The four terminals that have already been built to convert LNG back into gaseous form[45] are not sufficient for the increased amount of LNG that the Energy Information Administration (EIA) projects the United States will need in the upcoming years.[46] In fact, EIA projects that at least ten more LNG terminals will be needed to meet future demand for natural gas.[47] In April 2005, when Congress was debating the Act, five of these terminals had received "some level of approval at FERC" but were being challenged at the "State and local" level,[48] subjecting the construction of the proposed LNG terminals to delays. Delaying these projects for even two years will cost American consumers as much as $200 billion due to "price volatility"[49] that will occur as a result of anticipated shortages of natural gas.

2. State Opposition

In light of the importance Congress has begun to attach to LNG as a means of satisfying the United States' energy needs, difficulties that LNG terminals

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[41] S. REP. NO. 109-78, at 6 (2005).

[42] *The Energy Policy Act of 2005: Hearings Before the Subcomm. on Energy and Air Quality of the Comm. on Energy and Commerce*, 109th Cong. 70 (2005) (statement of Guy F. Caruso, Adm'r, Energy Info. Admin. (EIA)) [hereinafter *2005 House Hearings*]. *But see* Angela Neese, *The Battle Between the Colorado Oil and Gas Conservation Commission and Local Governments: A Call for a New and Comprehensive Approach*, 76 U. COLO. L. REV. 561, 561 (2005). Neese argues that rather than looking abroad for our supplies of natural gas, the United States should be making domestic reserves more accessible. *Id.*

[43] *2005 House Hearings*, *supra* note 42, at 70 (statement of Guy F. Caruso, Adm'r, EIA). According to the EIA, demand for natural gas will increase more than thirty-eight percent by 2025. FEDERAL ENERGY REGULATORY COMMISSION, *supra* note 11, at 1; *see also* Neese, *supra* note 42, at 561.

[44] *See* FEDERAL ENERGY REGULATORY COMMISSION, *supra* note 11, at 1.

[45] *See supra* note 14 and accompanying text.

[46] *See 2005 House Hearings*, *supra* note 42, at 120 (statement of Guy F. Caruso, Adm'r, EIA).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 417 (statement of Donald F. Santa, Jr., President, Interstate Natural Gas Ass'n of Am. (INGAA)).

have encountered in the process of being sited at the state and local levels have come into sharp focus.[50] One of the terminals being challenged at the state and local levels has been proposed by Broadwater Energy and would be located in the Long Island Sound.[51] The Broadwater terminal, if built, would satisfy one quarter to one third of the demand for gas in southern Connecticut and downstate New York.[52] Because the terminal would be placed directly next to the market in need of the gas, gas prices would probably be lower than if the gas had to be pipelined from a terminal along the Gulf Coast.[53] However, the project has been criticized on many fronts, primarily due to environmental and safety concerns, and this criticism has led to inordinate delays in the siting process.[54]

Sound Energy Solutions, Inc. (SES) has proposed to build an LNG terminal in Long Beach, California.[55] Unlike the Broadwater terminal, the SES terminal would be constructed in the Port of Long Beach rather than far offshore.[56] Also, unlike the Broadwater terminal, which would service two states, all the natural gas that would be imported into the SES terminal would be solely for California citizens, satisfying approximately ten percent of California's natural gas needs.[57] Possibly due to the potential for state and local opposition to its proposed terminal, in January 2004, SES applied directly to FERC for approval of its terminal rather than applying to the California Public Utilities Commission (CPUC).[58] This circumvention of CPUC's

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50 Richard J. Pierce, Jr., *Environmental Regulation, Energy, and Market Entry*, 15 DUKE ENVTL. L. & POL'Y F. 167, 175–76 (2005). *See generally* Jeff Gosmano, *Local Foes Biggest LNG Hurdle,* NAT. GAS WK., June 4, 2004, at 5; Barbara Shook, *Maine Rejects TransCanada LNG Terminal Plans a Second Time*, NAT. GAS WK., May 14, 2004, at 1; John Sullivan, *Politics, Not Safety Main Risk to Future of LNG Industry*, NAT. GAS WK., May 21, 2004, at 20.

51 John Rather, *Beset by Opposition, Broadwater Bets on Washington and Time*, N.Y. TIMES, July 3, 2005, at 14LI1.

52 *Id.*

53 *Id.* Broadwater claims that regional consumers would save approximately $6 billion in energy costs between 2010 and 2020, but has given no evidence of how that number was calculated. *Id.*

54 Environmental and civic groups have claimed that

> [t]he terminal, close to both a busy shipping lane and heavily used fishing and recreational waters, would be vulnerable to catastrophic accidents and present an all too tempting target for terrorists. It would spoil the view and require a security zone . . . [a]nd it would undermine efforts to develop renewable energy sources and reduce reliance on fossil fuels.

Id.

55 Opening Brief of Petitioner, *supra* note 15, at 15. SES is a subsidiary of Mitsubishi Corporation. *Id.* For an in-depth discussion of the issues surrounding the SES Terminal, see Kransdorf, *supra* note 14, at 48–53.

56 Opening Brief of Petitioner, *supra* note 15, at 15.

57 *Id.*

58 *Id.* at 10.

authority led CPUC to challenge SES's actions. Initially, CPUC filed a protest with FERC and a motion to intervene in FERC's proceeding regarding the SES terminal.[59] In response to CPUC's challenge, FERC issued a "[d]eclaratory [o]rder, finding it had exclusive jurisdiction over the SES project."[60] CPUC then appealed FERC's declaratory order to the Ninth Circuit Court of Appeals.[61] The controversy between CPUC and FERC has delayed indefinitely the construction of the SES terminal.

Due to the local and state opposition to the Broadwater terminal and the litigation that has surrounded the SES terminal, Congress became concerned that many of the terminals it felt were necessary for the United States' future energy supply would never be built or at least would be so delayed in their construction as to not provide the required energy relief.[62] Although some LNG terminals along the Gulf Coast have been sited without opposition,[63] terminals are "need[ed] where the gas can enter into certain pipeline systems," namely New England and California.[64] Therefore, the fact that some Gulf Coast communities are not opposed to having LNG terminals off their coast does not resolve the issue.

3. *Agency and Industry Advocacy*

Congress also felt pressure from FERC and industry actors to alter the framework applicable to siting LNG terminals. Early in 2005, Cynthia Marlette, General Counsel for FERC, testified before Congress about these issues.[65] During her testimony, she advocated for a "clarif[ication of FERC's] jurisdiction to site LNG facilities onshore or in state waters, and provide for a single federal record and for direct appeal of LNG-related decisions to a United States court of appeals."[66] In her testimony, Ms. Marlette referenced the litigation between FERC and CPUC in the Ninth Circuit as justification for

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59 *Id.* at 12.

60 *Id.* at 13.

61 *Id.* at 4; *see also infra* note 74 and accompanying text.

62 *See supra* notes 25–35 and accompanying text.

63 An LNG terminal has been "welcomed by many residents" near Cameron, Louisiana due to the possibility of jobs for local residents. Simon Romero, *Demand for Natural Gas Brings Big Import Plans, and Objections*, N.Y. TIMES, June 15, 2005, at C8.

64 Craig Cordes, *FERC Eminent Domain Request for LNG May Prove Hard Sell in Congress*, ENERGY WASH. WK., Feb. 9, 2005.

65 *2005 House Hearings*, *supra* note 42, at 25–32 (statement of Cynthia A. Marlette, Gen. Counsel, Fed. Energy Regulatory Comm'n).

66 *Id.* at 31.

her position.[67] Ms. Marlette emphasized that no federal or state agency should lose its current authority to be involved in the permitting process but that a "single agency should be responsible for the final public interest determination and be held accountable for that determination."[68] All federal and state agencies would provide their findings to the lead agency, and those findings would be submitted in a timeframe dictated by the lead agency.[69] Finally, Ms. Marlette advocated for "direct appeal" to a U.S. court of appeals, which "would avoid the long delays as individual permit appeal processes wend their way through state and federal administrative appeals."[70]

Laurence M. Downes, Chairman of the American Gas Association, also testified before Congress, and similarly encouraged Congress to "reaffirm that FERC has exclusive jurisdiction" to approve LNG terminals.[71] Mr. Downes emphasized the "difficulty with infrastructure permitting [caused by] the multiple layers of review required as part of the permitting process."[72] Discussing directly the problems with local control over the siting of LNG terminals, Donald F. Santa, Jr., President of Interstate Natural Gas Association of America (INGAA), stated that "[t]he nation as a whole would suffer if the ability to enhance the capacity to import this critical source of supplemental natural gas supply were frustrated. FERC jurisdiction is important to ensuring that the larger, national public interest is served, *rather than just local, parochial interests.*"[73]

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[67] *Id.*

[68] *Id.* When questioned, Ms. Marlette reiterated that the authority she was advocating for on behalf of FERC was "very separate from State authority under the [CZMA], section 401 Water Quality Act certifications, or other Federal laws which States are tasked with implementing." *Id.* at 54.

[69] *Id.* at 31. Once again, Ms. Marlette, when questioned, emphasized that she did not intend "to interfere with timelines that are set forth in other Federal statutes," but rather wanted "agencies to work at the same time, rather than in sequential process." *Id.* at 54.

[70] *Id.* at 31.

[71] *Id.* at 399 (statement of Laurence M. Downes, Chairman, Am. Gas Ass'n). The views of Mr. Downes and Ms. Marlette were echoed by Donald F. Santa, Jr., President of INGAA. *Id.* at 417–18 ("INGA [sic] also supports affirming . . . FERC's clear preemptive authority to cite [LNG] facilities.").

[72] *Id.* at 399 (statement of Laurence M. Downes, Chairman, Am. Gas Ass'n). Mr. Downes was speaking specifically about the permitting process for interstate natural gas pipelines, but his testimony applies more broadly to all natural gas infrastructure.

[73] *Id.* at 423 (statement of Donald F. Santa, Jr., President of INGAA) (emphasis added). He went on to state that "States currently have significant permitting authority delegated to them under federal statutes such as the CZMA and the CWA. *INGAA does not propose that this authority be removed*." *Id.* Instead, similarly to Ms. Marlette, he advocated a "coordinated review process" in which all the federal and state agencies can participate, but which leaves the "final say" to FERC regarding approval of the terminal. *Id.*

B. Opposition to the Grant of Exclusive Jurisdiction to FERC

Prior to Congress's addition of sections 311 and 313 to the Act, heated debate already existed regarding the prudence of granting FERC exclusive jurisdiction to site LNG terminals due to safety issues. However, once Congress added the preemptive provisions to the Act, a separate, but related, issue of the impropriety of preempting states' and localities' roles in LNG terminal siting arose. These strains of opposition are reviewed below.

1. Safety Concerns

In the Ninth Circuit litigation between FERC and CPUC, both CPUC and an intervenor in the case, Californians for Renewable Energy (CARE), were highly concerned about the safety and environmental issues that surrounded the proposed project.[74] They cited "grave environmental hazards to residential neighborhoods and businesses located within two miles of the project site in the cities of Los Angeles and Long Beach, in an area of notably high seismic and liquefaction risks."[75] Environmental and civic groups voiced similar concerns with regard to the proposed Broadwater terminal in Long Island Sound.[76]

Safety concerns regarding LNG terminals most likely were spurred, in part, by a report issued by Sandia National Laboratories.[77] The Sandia report concluded that within 500 meters (0.3 miles) of either an accidental or intentional spill of LNG, "[p]eople, major commercial/industrial areas or other critical infrastructure elements, such as chemical plants, refineries, bridges or tunnels, or national icons located within portions of this zone could be seriously affected."[78] Although the Sandia report noted that "minor injuries and minor property damage" could occur further than 1600 meters (1 mile) from a large LNG spill,[79] it went on to warn that "[i]ncreased injuries [in addition to those projected within 1600 meters of the origin of the spill] would be possible if vapor dispersion occurred and a vapor cloud was not ignited until

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74 *See* Opening Brief of Petitioner, *supra* note 15.

75 *Id.* at 1. The site where SES has proposed to build the LNG terminal is a landfill. *Id.* at 49.

76 *See supra* note 51 and accompanying text.

77 MIKE HIGHTOWER ET AL., SANDIA NAT'L LABS., GUIDANCE ON RISK ANALYSIS AND SAFETY IMPLICATIONS OF A LARGE LIQUIFIED NATURAL GAS (LNG) SPILL OVER WATER (2004), http://www.fossil.energy.gov/programs/oilgas/storage/lng/sandia_lng_1204.pdf. For additional information on the safety concerns surrounding LNG, see Kransdorf, *supra* note 14, at 44–47.

78 HIGHTOWER ET AL., *supra* note 77, at 19.

79 *Id.*

after reaching this distance."[80] The Sandia report's findings have been quoted ad nauseum by the media, thereby inciting citizen groups against the construction of these facilities.[81]

2. *Preemption of State and Local Regulation*

During consideration of the Act in both the Senate and the House, there was significant opposition to the inclusion of sections 311 and 313. Specifically, Representative John F. Tierney (D–Massachusetts) stated that "[a]lthough th[ese] provision[s] allow[] FERC to consult with state governments, this signals a departure from current law whereby states and localities play a significant role in siting decisions."[82] Rosa L. DeLauro (D–Connecticut) went further by stating that the provisions "declare[d] war on States' rights," and that they would "eviscerate the role of the States in the siting of LNG facilities."[83]

These concerns were also vocalized by CPUC and California Earth Corps (CEC), an amicus curiae, in their briefs to the Ninth Circuit.[84] Although some of CPUC and CEC's concerns were geared directly toward the SES terminal proposed in the Port of Long Beach,[85] those arguments may apply to siting of LNG terminals more broadly. CPUC and CEC also raised general concerns about granting exclusive jurisdiction to FERC.[86] First, they were concerned

[80] *Id.* However, the Broadwater terminal, if built, would be nine miles from New York's coastline, potentially alleviating some of the safety concerns listed in the Sandia report. Rather, *supra* note 51. Furthermore, according to FERC, "No serious accidents involving an LNG terminal facility in the U.S. have happened in over 25 years." FEDERAL ENERGY REGULATORY COMMISSION, *supra* note 11, at 4. Furthermore, "only eight significant incidents" have occurred regarding LNG tankers, none of which resulted in an LNG spill. *Id.*

[81] *See, e.g.*, Press Release, U.S. Congressmen Barney Frank and James P. McGovern, Frank and McGovern Set Record Straight on Their Opposition to Fall River LNG Plant (Jan. 27, 2006), *available at* http://www.house.gov/frank/lngstatement2006.html ("A recent Department of Energy study conducted by Sandia National Laboratories reported that a terrorist attack on an LNG tanker could cause second-degree burns to people more than a mile away.").

[82] 151 CONG. REC. E765 (extension of remarks April 21, 2005) (statement of Rep. Tierney).

[83] 151 CONG. REC. E1759 (extension of remarks July 28, 2005) (statement of Rep. DeLauro); *see also* 151 CONG. REC. E1740 (extension of remarks July 28, 2005) (statement of Rep. Anna G. Eshoo). Representative Eshoo (D–California) stated that the Act "undermines the ability of states to ensure that [LNG terminals] are properly sited and operate safely." *Id.*

[84] Opening Brief of Petitioner, *supra* note 15; Brief of California Earth Corps. as Amicus Curiae Supporting Petitioners, Californians for Renewable Energy v. FERC, Nos. 04-73650, 04-75240 (9th Cir. Jan. 12, 2005).

[85] CPUC was especially concerned about the proximity of the SES Terminal to residential neighborhoods and that it would be built on a landfill. Opening Brief of Petitioner, *supra* note 15, at 48–49.

[86] *Id.*; Brief of California Earth Corps. as Amicus Curiae Supporting Petitioners, *supra* note 84.

that application of national, uniform standards applied by a "distant federal agency"[87] would be "inappropriate for siting of hazardous industrial facilities"[88] when these facilities were being proposed in a "variety of sites and settings."[89] Second, they expressed concern that an exercise of federal jurisdiction over these terminals would "needlessly trigger opposition from local communities who want their voices to be heard in the decision-making process."[90] Without "state regulatory involvement," CPUC suggested that "local opposition [would actually] be exacerbated."[91] Finally, CPUC argued that granting exclusive jurisdiction to FERC was not necessary: "[A] majority of CPUC Commissioners and many state agencies recognize the need for LNG," and that therefore, retaining state jurisdiction over siting these terminals would "not be an obstacle to proposed LNG facilities."[92]

C. The Current Framework

Contrary to the concerns vocalized within Congress and during the litigation in the Ninth Circuit,[93] Congress did effect a change in the law with its grant of exclusive jurisdiction over the siting of LNG terminals to FERC in section 311 of the Act.[94] Section 3 of the NGA has been amended, and now explicitly states that FERC "shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."[95] This provision takes siting authority away from state agencies, which means that neither states nor localities can directly impose any requirements on an LNG terminal in their jurisdictions or even affect the choice of where one would be located.

However, Congress did include a small concession to deal with the resistance to sections 311 and 313.[96] Congress inserted section 3A into the NGA, which requires that FERC "consult with [the appointed] State agency regarding State and local safety considerations prior to issuing an order" to

[87] Brief of California Earth Corps. as Amicus Curiae Supporting Petitioners, *supra* note 84, at 29.
[88] *Id.* at 3.
[89] *Id.* at 26.
[90] Opening Brief of Petitioner, *supra* note 15, at 47.
[91] *Id.* at 56.
[92] *Id.* at 40.
[93] *See supra* notes 82–92 and accompanying text.
[94] *See* EPAct of 2005 § 311(c)(2), 15 U.S.C.A § 717b(e)(1) (2006). For a history of natural gas regulation in the United States, see Kransdorf, *supra* note 14, at 53–59.
[95] 15 U.S.C.A. § 717b(e)(1).
[96] *See supra* Part II.B.

approve the siting of an LNG terminal.[97] Furthermore, the state agency is given the option to submit an "advisory report" regarding state and local safety concerns to FERC, and FERC must "review and respond specifically to the issues raised" before approving the LNG terminal.[98] However, FERC has the ultimate authority to choose the location of the LNG terminal regardless of any state or local reservations.

Furthermore, although section 311 states that "[e]xcept as specifically provided in this Act, nothing . . . affects the rights of States under" the CZMA, the CAA, or the CWA,[99] section 313 declares that FERC "shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations" and that "[e]ach Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with [FERC] and comply with the deadlines established by [FERC]."[100] FERC is given the authority to create a schedule with which all state and federal agencies must comply regarding necessary federal authorizations.[101] If a federal or state agency does not comply with the schedule set by FERC, the LNG terminal applicant can pursue remedies against the agency in the U.S. Court of Appeals for the District of Columbia.[102]

Finally, Congress responded to Ms. Marlette's request for "direct appeal[s]" to U.S. courts of appeals:[103] Under section 313, the U.S. court of appeals in the circuit where an LNG terminal is proposed has "original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency . . . or State administrative agency acting pursuant to Federal law."[104]

Congress's actions under sections 311 and 313 indicate an overwhelming intention to preempt state law regarding regulation of the siting and construction of LNG terminals. It is arguable that, with the passage of sections 311 and 313, Congress has acted in an unprecedented preemptive manner, with

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[97] § 717b-1(b).

[98] § 717b-1(c).

[99] EPAct § 311(c)(2), 15 U.S.C.A. § 717b(d).

[100] EPAct § 313(a)(3), 15 U.S.C.A. § 717n(b). A "federal authorization" is then defined to include "any permits, special use authorizations, certifications, opinions, or other approvals," and would therefore include states' roles under the CAA, CWA, and CZMA. 15 U.S.C.A. § 717n(a).

[101] 15 U.S.C.A. § 717n(c)(1).

[102] §§ 717n(c)(2), 717r(d)(2).

[103] *2005 House Hearings*, *supra* note 42, at 31 (statement of Cynthia A. Marlette, Gen. Counsel, Fed. Energy Regulatory Comm'n).

[104] EPAct § 313(b), 15 U.S.C.A. § 717r(d)(1).

no traditional justification to support its actions. The traditional justifications for Congress's decision to preempt state law are discussed below.

III. TRADITIONAL RATIONALES: ALLOCATION OF POWER AND PREEMPTION

This Part investigates Congress's past efforts to reallocate power and the rationales upon which those transfers of power have been founded. First, this Part explores the constitutional and common law basis for federal preemption, which is Congress's main tool for transferring power to the federal government. Then, this Part analyzes previous situations in which Congress has preempted state and local law, focusing on the purposes of Congress's decisions to transfer power away from the states.

A. Constitutional and Common Law Basis for Preemption

The Supremacy Clause of the U.S. Constitution[105] is the source of preemption doctrine.[106] In *McCulloch v. Maryland*, Chief Justice Marshall affirmed the supremacy of federal law when he stated "that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and the laws of the respective States, and cannot be controlled by them."[107] Therefore, when Congress regulates in an area previously regulated only by states, the resultant federal law must prevail.

The passage of sections 311 and 313 of the Act is supported by Congress's authority under the Commerce Clause of the U.S. Constitution.[108] The Supreme Court held in *Garcia v. San Antonio Metropolitan Transit Authority* that there is no categorical limitation on Congress's authority under the Commerce Clause to regulate in areas otherwise traditionally in the scope of state and local governments' control.[109] Therefore, even in areas traditionally regulated by states, if Congress passes a law, state regulation on the same matter will be preempted under the Supremacy Clause.[110] To interpret the

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[105] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2. The phrase "Laws of the United States" includes both federal statutes and federal regulations. City of New York v. FCC, 486 U.S. 57, 63 (1988).

[106] *See, e.g.*, La. Public Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986).

[107] 17 U.S. (4 Wheat.) 316, 426 (1819).

[108] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

[109] 469 U.S. 528, 548 (1985).

[110] *Id.*

preemptive nature of Congressional statutes, courts have created a "tripartite typology,"[111] or three categories of preemption: express preemption, field preemption, and conflict preemption.[112]

In determining if a federal statute preempts state law, a court inquires whether "Congress, in enacting the Federal Statute, intend[ed] to exercise its constitutionally delegated authority to set aside the laws of a State."[113] If a court finds that Congress's intent was to supplant state law, then the Supremacy Clause requires that the state law is preempted.[114] The first category, express preemption, occurs when Congress "makes explicit its intention to preempt state law through statutory language."[115] Express preemption usually occurs when Congress includes a specific provision in its statute preempting state regulation on the matter.[116]

Field preemption and conflict preemption are the two types of implied preemption.[117] If a court determines that the "statutory language and/or legislative history of a law provide indications of a preemptive intent," the court will strike down the state or local law as implicitly preempted.[118] Field preemption has been found by courts in two situations: First, if Congress expresses an intent to occupy a field of regulation in the statute's language, courts will rule that state and local regulation in the same field is preempted.[119] Second, even if there is no express statement in the federal law regarding state laws that relate to the same subject, a court may still find the state law preempted if "the overall comprehensiveness of the federal regulatory scheme, the existence and scope of jurisdiction of a federal regulatory agency, and the historically national nature of the matter being regulated" point to congressional intent to preempt.[120]

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[111] Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 252 (2000).

[112] *Id.*

[113] Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 30 (1996).

[114] *Id.*

[115] Weiland, *supra* note 111, at 253; *see also* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983) ("It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms.").

[116] *See, e.g.*, *infra* note 141 and accompanying text.

[117] Weiland, *supra* note 111 at 253.

[118] *Id.*

[119] Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 11 (2001).

[120] *Id.* at 12.

Conflict preemption occurs in two situations: First, when "compliance with both federal and state regulations is physically impossible,"[121] "actual conflict preemption" exists.[122] Second, when a state or local regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, conflict preemption will be found";[123] this is sometimes referred to as "goals conflict preemption."[124]

However, underlying the preemption analysis, courts have relied on a "presumption against pre-emption in areas of traditional state regulation."[125] To find state law preempted in these traditional areas of state regulation, courts usually require express preemption: The federal statute's preemptive purpose must be "clear and manifest."[126] Where Congress has included an express preemptive clause in a statute, a court will easily conclude that state law is preempted.[127] An express preemptive clause exists when "a national statute expressly . . . requires that national regulation [of the subject in question] be exclusive."[128]

Section 311 of the Act explicitly grants exclusive jurisdiction to FERC to site LNG terminals,[129] thereby expressly preempting states and localities' ability to site LNG terminals.[130] However, the issues surrounding siting LNG

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121 Weiland, *supra* note 111, at 253 (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

122 *Id.* at 254.

123 *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

124 *Id.* Weiland notes that conflict preemption should not be found by courts "because of the mere existence of a federal regulatory scheme that covers the same ground as a state's laws." *Id.* Rather, he maintains that a court should "consider the degree to which state or local law may interfere with the ends Congress intended to achieve by enacting a law and the means Congress designed to achieve those ends." *Id.*

125 Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 151 (2001). *But see* David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1187 (1999). Spence and Murray, after researching actual federal decisions determined that "the majority of judges on the federal bench appear [actually] to be predisposed to preempt state and local regulation of environmental, health, and safety regulation." *Id.*

126 Rice v. Santa Fe Elevator Corp., 331 US. 218, 230 (1947); *see also* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000); Weiland, *supra* note 111, at 252. Weiland notes that this presumption is also called the "plain statement rule." *Id.*

127 English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990); *see also* Nelson, *supra* note 126, at 227; Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363, 364 (1978).

128 *A Framework for Preemption Analysis*, *supra* note 127, at 363. However, in *Cipollone v. Liggett Group*, the U.S. Supreme Court went even further by stating that an express preemption clause should be narrowly read when areas of traditional state concern are at issue. 505 U.S. 504, 518 (1992). Nelson has criticized the Court's narrow view of express preemption clauses as contrary to congressional intent. Nelson, *supra* note 126 at 292.

129 *See supra* note 95 and accompanying text.

130 *See supra* note 95 and accompanying text.

terminals have traditionally been issues regulated by states and localities, including land use planning, safety regulation, and regulation of utilities.[131] Although section 311 satisfies Congress's "clear and manifest statement" burden to overcome the presumption against preemption in areas of traditional state concern,[132] the question remains whether Congress has conformed to rationales that have traditionally supported this type of preemption. This section reviews Congress's prior reallocations of power to the federal government in the realm of traditional state and local control to determine what those rationales historically have been. In the next Part, this Comment compares Congress's actions under section 311 of the Act with Congress's previous reallocations of power, focusing on the rationales for previous transfers of power and the passage of sections 311 and 313.[133]

States have traditionally regulated in the areas of public health and safety,[134] land use,[135] and public utility planning.[136] In the 1970s, with the surge of health and safety regulations passed by Congress, the federal government began to overtake many areas that states felt were in their province.[137] Congress historically has justified these encroachments on state and local authority by citing concerns regarding "the efficacy of existing state-

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[131] *See infra* notes 134–36 and accompanying text.

[132] *See supra* notes 126–27 and accompanying text.

[133] *See infra* Part IV.

[134] Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996).

> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily, and historically . . . matter[s] of local concern," . . . the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" . . . .

Id. (citations omitted) (quoting Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 719 (1985); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985)).

[135] St. Charles Gaming Co., Inc. v. Riverboat Gaming Comm'n, 648 So. 2d 1310, 1316 (La. 1995) ("Zoning is a legislative function, the authority for which flows from the police powers of governmental bodies.").

[136] Allen R. Ferguson, Jr., *Federal Supremacy Versus Legitimate State Interests in Nuclear Regulation:* Pacific Gas & Electric *and* Silkwood, 33 CATH. U. L. REV. 899, 900 n.3 (1984) ("States . . . have well-established authority over economic aspects of electric power generation, such as utility rate-setting and planning for future energy consumption.").

[137] Spence & Murray, *supra* note 125, at 1135 ("The primary reason for the recent growth in the number and importance of preemption cases is the explosive growth in the number of federal environmental, health, and safety laws and regulations during the last three decades."). A study performed by David O'Brien indicated over half the federal statutes with a preemptive effect were passed after 1970, and of those, nearly one third would be considered "[h]ealth, [s]afety, & [n]atural [r]esources" legislation. David M. O'Brien, *The Supreme Court and Intergovernmental Relations: What Happened to "Our Federalism"?*, 9 J.L. & POL. 609, 619 (1993).

based programs, the related concern that states lacked the capacity to regulate effectively, and industry's preference for uniform standards over a multiplicity of state standards."[138]

However, when Congress has regulated in areas traditionally left to the states, Congress has, more often than not, allowed states to regulate more stringently than the national standards set in the federal statute.[139] In unusual cases, however, due to the purposes of the relevant statute, Congress has forbidden states from regulating more stringently, even in areas of traditional state concern.[140] Congress has done this with the passage of section 311 of the Act by transferring sole authority to FERC to regulate the siting of LNG terminals and away from states and localities, representing the most preemptive action Congress can take. A review of several statutes representative of Congress's past preemptive actions, especially during the last thirty years, provides a window into the traditional rationales that have supported congressional preemption in areas normally governed by the states' police power.

B. *Historical Preemptive Statutes: The Creation of Norms Underlying Allocation of Power*

This section begins with a general discussion of the rationales utilized by Congress and the courts as a means of allocating power between the several states and the federal government. This discussion will begin with an analysis of particular statutes Congress has previously passed. Next, this section explores the Hazardous Materials Transportation Act of 1974 (HMTA), the strongest preemptive statute Congress had passed prior to the passage of the Act, emphasizing the justification proffered for the passage of that statute.[141] An analysis of the HMTA will demonstrate the outer limits of Congress's past preemptive activities.

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[138] Spence & Murray, *supra* note 125, at 1136. Although Spence and Murray were referring specifically to Congress's reasons to impinge on the ability of states and localities to regulate in the realm of environmental law, these reasons are applicable to many of Congress's preemptive actions, regardless of the area of law.

[139] *See infra* note 158 and accompanying text.

[140] *See infra* notes 161–64 and accompanying text.

[141] Hazardous Materials Transportation Act of 1974, Pub. L. No. 93-633, 88 Stat. 2156.

1. *Statutory Analysis of Congress's Historical Behavior*

Congress has regulated in areas traditionally reserved for the states when state regulation would hinder a commercial market.[142] When Congress passed the Medical Device Amendments of 1976 (MDA), it included a preemption provision that prohibited states from regulating medical devices.[143] Justice Stevens noted in his *Medtronic* opinion that Congress had passed the MDA due to "concern[s] that competing state requirements may unduly interfere with the market for medical devices."[144] The Court reasoned that medical device manufacturers should be protected from divergent state requirements, thereby promoting interstate commerce.[145] Similar concerns are applicable in the context of the regulation of the automotive industry. Independent state regulation would require automotive companies to produce fifty different types of each vehicle model rather than a single model that could be sold nationally, resulting in an undue burden on the industry.

In addition, Congress's desire to regulate at a national level has often stemmed from concern over "conflicting regulations" or "fragmented supervision" provided by a "multiplicity of State and local regulations."[146] For example, Congress developed the Consumer Product Safety Commission because a report from the National Commission on Product Safety found that "state and local regulation of consumer products is vitiated by narrow scope, diffuse jurisdiction, miniscule budgets, absence of enforcement, mild sanctions, and casual administration."[147] In fact, Congress has intervened in a number of areas where states were seen to have regulated inadequately, including federal standards for "air quality, medical devices, and occupational health and safety."[148]

Although insufficient regulation by states and conflicting regulation by states are the most common reasons for congressional intervention in areas

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[142] Medtronic, Inc. v. Lohr, 518 U.S. 470, 490 n.12 (1996); *see also* Susan Bartlett Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429, 1434 (1984) ("[U]niform federal requirements ease the flow of interstate commerce.").

[143] Pub. L. No. 94-295, § 521, 90 Stat. 539, 574 (codified at 21 U.S.C. § 360k(a) (2000)) ("[N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement . . . (1) which is different from, or in addition to, any requirement applicable under this chapter to the device . . . .").

[144] *Medtronic*, 518 U.S. at 490 n.12.

[145] *See id.*

[146] Nat'l Tank Truck Carriers, Inc. v. Burke, 535 F. Supp. 509, 516 (D.R.I. 1982).

[147] Foote, *supra* note 142, at 1434 (quoting NAT'L COMM'N ON PROD. SAFETY, FINAL REPORT 81 (1970)).

[148] *Id.*

traditionally reserved to the states,[149] there are several other reasons, some of which are particularly significant to this Comment's analysis. Specifically, Congress passed the Atomic Energy Act of 1954 (AEA),[150] which gave the Atomic Energy Commission (AEC)[151] the exclusive authority to regulate the nuclear power industry, including the ability to site nuclear power plants.[152] The development of nuclear power had ramifications for national security and for private energy consumption.[153] As a private energy source, nuclear energy was in its infant stages; Allen R. Ferguson, Jr. has noted that Congress's desire to "foster the development of a nonexistent industry" gave Congress the incentive to regulate in this area,[154] athough there were concerns about traditional areas of state authority, such as public health and safety.[155] Furthermore, Congress had an interest in "encouraging development of a *variety* of energy sources . . . to promote the general welfare and common defense of the nation," beyond Congress's desire to encourage nuclear energy.[156]

However, Congress's interest in and justification for regulating nuclear energy exclusively was due in part to the special relationship between nuclear energy and the federal government.[157] Perhaps without that close relationship, the reasons for Congress's intervention in the regulation of public utilities, specifically the encouragement of an infant industry and the desire to promote a variety of energy sources, should not be applied to other areas of the law, even in the realm of energy regulation.

Even when Congress has justified regulating in the realm of states' police powers, it usually has preserved the right of states to regulate more stringently

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[149] *See supra* notes 142–49 and accompanying text.

[150] Pub. L. No. 83-703, 68 Stat. 919 (codified as amended in scattered sections of 42 U.S.C.).

[151] The regulatory branch of the AEC is now known as the Nuclear Regulatory Commission. Ferguson, *supra* note 136, at 901–02.

[152] *Id*. at 902. However, in *Pacific Gas & Electric Co. v. State Energy Resource Consideration & Development Commission*, the U.S. Supreme Court permitted California to ban the construction of any nuclear power plants until a means for disposal of nuclear waste was developed, albeit for a narrow, economic rationale. 461 U.S. 190, 212, 218–20 (1983).

[153] *See* Ferguson, *supra* note 136, at 902–03.

[154] *Id.* at 936 (arguing that federal control is necessary if there is a "danger that state controls on nuclear energy will prevent fulfillment of" Congress's desire to develop a market for nuclear energy).

[155] *Id.* at 900–03.

[156] *Id.* at 900 n.7 (emphasis added) (describing the policy and purposes provisions of the Energy Reorganization Act of 1974, 42 U.S.C. § 5801(a)–(b) (1982)).

[157] *A Framework for Preemption Analysis*, *supra* note 127, at 380 ("Because it was initially developed by the federal government, and because it is so closely linked to national security, the use of atomic energy is arguably much more a matter of federal concern than are other activities of public utilities.").

than the federal standard.[158] For example, even though Congress granted the AEA exclusive authority over nuclear energy facilities,[159] Congress included a provision in the 1977 CAA amendments authorizing states to promulgate higher standards for radioactive emissions from nuclear plants than had been set by the federal government.[160]

However, due to the purposes of the federal legislation, Congress at times has not reserved states' rights to legislate more stringently, and courts have interpreted this omission to create preemption of more stringent state laws.[161] For example, where international interests are in play, Congress has determined that states cannot interfere by regulating more stringently.[162] The Ports and Waterways Act of 1972 (PWA) grants the Secretary of Transportation the authority to create "uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements."[163] Tanker design implicates international concerns because eighty-five percent of the tankers entering U.S. ports arrive from foreign countries.[164] In light of this, Congress needed to take international perspectives regarding tanker design into consideration. Therefore, interpreting the preemption clause of the PWA, the Supreme Court ruled that "[t]he Supremacy clause dictate[d] that [a] federal judgment that a vessel is safe to navigate United States waters prevail[ed] over the contrary state judgment."[165] This means that coastal states are not permitted to regulate tankers entering their own ports more stringently than the federal government.

Notably, when Congress has allowed states to regulate more stringently in the face of an otherwise preemptive statute, courts and agencies have often interpreted these grants not to extend to situations where states attempt to ban the relevant conduct.[166] For example, under the Toxic Substances Control Act

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[158] Foote, *supra* note 142, at 1429 (Where Congress preempts state law in areas of traditional state concern, it generally "include[s] provisions to preserve states' role in health and safety legislation, generally permitting states in certain circumstances to enact legislation more protective than federal regulations.").

[159] *See supra* note 152 and accompanying text.

[160] Ferguson, *supra* note 136, at 915–16. The legislative history for the amendments made it clear that Congress intended to overrule the Eighth Circuit Court of Appeals decision in *Northern States Power Co. v. Minnesota*, 447 F.2d 143 (8th Cir. 1971). Ferguson, *supra* note 136, at 916.

[161] *See* Ray v. Atl. Richfield Co., 435 U.S. 151, 163 (1978).

[162] *See id.* at 163–68 (holding that the federal judgment prevailed over state matters when international concerns were implicated).

[163] *Id.*

[164] *Id.* at 167 n.17.

[165] *Id.* at 165.

[166] *See, e.g.*, *infra* notes 167–69.

(TSCA), Congress limited EPA's authority to regulate by stating that any prohibition or regulation promulgated by EPA "may not require any person to take any action which would be in violation of any law or requirement of . . . a State or political subdivision."[167] EPA interpreted this limitation to allow states to "set pollutions control standards more restrictive than the Federal standards," but stated that "if this principle were to become the basis for refusal by States to share in the national responsibility for finding safe means for the proper disposal of hazardous substances," then it would be inconsistent with the TSCA.[168] Following EPA's interpretation, a federal district court found a North Carolina ordinance completely banning the disposal of polychlorinated biphenyls within a certain county preempted by the TSCA.[169] On the other hand, the court noted that "regulations which impose requirements reasonably dictated by local geographical or other physical conditions" would not have been preempted.[170]

In conclusion, during the latter half of the twentieth century, Congress has increasingly regulated in areas traditionally reserved to states and localities.[171] Most often, the justifications for Congress's preemptive actions included the need for uniformity and insufficient state regulation in a given area.[172] However, in particular circumstances, Congress justified its encroachment for alternate reasons, including the encouragement of infant industries and the diversification of the nation's energy supply.[173] In the following section, this Comment delves into one of Congress's broadest preemptive statutes of the last thirty years: the Hazardous Materials Transportation Act.

2. *Hazardous Materials Transportation Act*

The Hazardous Materials Transportation Act (HMTA) became law in 1975[174] and was substantially amended in 1990.[175] The HMTA, according to

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[167] 15 U.S.C. § 2605(a)(6)(B) (2000).

[168] Warren County v. North Carolina, 528 F. Supp. 276, 289 (E.D.N.C. 1981) (quoting Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions, 44 Fed. Reg. 31,514, 31,528 (May 31, 1979)).

[169] *Id.* at 290.

[170] *See id.* at 289.

[171] *See supra* note 142 and accompanying text.

[172] *See supra* notes 142–48 and accompanying text.

[173] *See supra* notes 155–60 and accompanying text.

[174] Hazardous Materials Transportation Act (HMTA) of 1974, Pub. L. No. 93-633, 88 Stat. 2156.

[175] Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, 104 Stat. 3244; Frank P. Grad, *Hazardous Material Transportation Uniform Safety Act of 1990*, C981 ALI-ABA 593, 595–96 (1995).

an outline prepared by the American Law Institute regarding the 1990 Amendments, "constitutes a nationwide code governing transportation of hazardous materials within the entire United States." The ALI outline summarized the findings of Congress that led to the passage of the 1990 amendments, including that

> approximately four billion tons of regulated hazardous materials are transported each year and that a half a million movements of such materials occur each year; that accidents involving the release of hazardous materials are a serious threat to health and safety; *that many states and localities have enacted laws and regulations which differ from the federal requirements, creating a potential for unreasonable hazards in other jurisdictions and "confounding" shippers and carriers who try to comply with multiple and conflicting regulatory requirements*; because of the potential risks to life, property and environment posed by unintentional releases of hazardous materials, "consistency in law and regulations govern[ing] the transportation of hazardous materials is necessary and desirable" *in order to achieve greater uniformity and promote public health, welfare and safety at all its levels*.[176]

Section 112(a) of the HMTA states that "any requirement, of a State or political subdivision thereof, which is *inconsistent* with any requirement set forth in this title, or in a regulation issued under this title, is preempted."[177] Either courts[178] or the Office of Hazardous Materials Transportation (OHMT) can determine whether a state or local regulation is inconsistent.[179] OHMT uses the principles of conflict preemption to determine if a state or local regulation should be preempted, asking whether "compliance with both federal and state or local regulations is a physical impossibility"[180] or whether "the state or local law stands as an obstacle to the accomplishment and execution of

[176] Grad, *supra* note 175, at 595–96 (emphasis added) (quoting Hazardous Material Transportation Uniform Safety Act of 1990 § 2).

[177] HMTA § 112(a) (codified as amended at 49 U.S.C. § 5125(a) (Supp. II 2002)) (emphasis added).

[178] If a court makes the determination, it can also determine that regardless of statutory preemption, the state or local regulation interferes with interstate commerce, and is therefore preempted under the dormant Commerce Clause. Tucson City Code Governing Transportation of Radioactive Materials, 50 Fed. Reg. 20,872, 20,872–73 (Dep't of Transp. May 20, 1985) (inconsistency ruling).

[179] Edward A. Nolfi, Annotation, *State or Local Regulation of Transportation of Hazardous Materials as Pre-Empted by Hazardous Materials Transportation Act*, 78 A.L.R. FED. 289, § 1(a) (2005). The OHMT is part of the Department of Transportation (DOT). *Id.*

[180] *Id.* § 2(a). This is known as the "dual compliance test." Tucson City Code Governing Transportation of Radioactive Materials, 50 Fed. Reg. at 20,873 ("[C]ompliance with the state or local requirement causes the Federal requirement to be violated, or *vice versa*.").

the full purposes and objectives"[181] Congress intended to fulfill with the passage of the HMTA.[182]

Congress passed the HMTA due to "concern about the fragmented supervision . . . in the area of hazardous materials transportation and the lack of comprehensive regulation over such transportation."[183] Because the transportation of hazardous materials by nature includes "risks to life and property" and "conflicting regulations in the area of hazardous materials" would lead to "irreconcilable conflicts," Congress felt it was warranted in regulating in this area on a nationwide basis.[184] Therefore, the HMTA has been interpreted so that "there is not any requirement that safety in such transportation be maximized and that even state action which increases such safety is precluded."[185]

In light of this interpretation, as a general rule, state and local governments have not prevailed when arguing that their regulations should not be preempted (by way of being ruled inconsistent) due to "unique local conditions."[186] In a DOT Inconsistency Ruling ("IR-16"), the city of Tucson argued that "when a locality considers Federal safety regulations inadequate to meet local needs, it may, on its own determination, regulate to overcome the perceived Federal inadequacy."[187] However, the Materials Transportation Board (MTB) (the predecessor of the OHMT) rejected this argument, stating that Tucson's behavior "completely undermine[d] the regulatory system mandated by the HMTA. Congress recognized that rules of national applicability would not always meet unique local conditions."[188] However, the MTB went on to state:

> [I]t was for this reason that the HMTA did not preempt all state or local rules, but only those that were inconsistent. Furthermore, Congress recognized that there could be valid safety reasons for permitting certain inconsistent state or local rules to coexist with

[181] Nolfi, *supra* note 179, § 2(a). This is known as the "obstacle" test. Tucson City Code Governing Transportation of Radioactive Materials, 50 Fed. Reg. at 20,873.

[182] Nolfi, *supra* note 179, § 2(a).

[183] Nat'l Tank Truck Carriers, Inc. v. Burke, 535 F. Supp. 509, 516 (D.R.I. 1982).

[184] *Id.*

[185] N.Y. State Energy Research & Dev. Auth. v. Nuclear Fuel Servs., 102 F.R.D. 18, 22 (W.D.N.Y. 1983) (quoting City of New York v. New York, 715 F.2d 732, 740–42 (2d Cir. 1983)).

[186] Nolfi, *supra* note 179, § 2(b). *But see* Am. Trucking Ass'n, Inc. v. City of Boston, No. 81-628-MA, 1981 U.S. Dist. LEXIS 18423 (D. Mass. Apr. 6, 1981).

[187] Tucson City Code Governing Transportation of Radioactive Materials, 50 Fed. Reg. at 20,880.

[188] *Id.*

> their Federal counterparts, and authorized the Department of Transportation to waive preemption in certain circumstances.[189]

As mentioned by the MTB in IR-16 above, in the face of an inconsistency determination, states and localities may be granted an exception by Congress. The Secretary of the DOT is authorized to issue a "non-preemption ruling," thereby allowing the state or local regulation at issue to remain in effect, even though it had been found to be inconsistent.[190] The Secretary is given the authority to issue these "non-preemption rulings" if the state or local regulation "(1) affords an equal or greater level of protection to the public than is afforded by the requirements of this title or of regulations issued under this title and (2) does not unreasonably burden commerce."[191] With the inclusion of section 112, "Congress expressed its intent . . . that the need to provide an adequate level of safety outweigh[ed] the need for nationwide uniformity of regulations."[192] Therefore, although under section 112(a) state and local regulations that are more stringent than the federal standard would be considered "an obstacle to the accomplishment and execution of the full purposes and objectives" of the HMTA,[193] section 112(b) has the potential to relieve more stringent state standards from the strictures of section 112(a). On the other hand, although subsection (1) of section 112(b) seems to grant states and localities the right to regulate more stringently than the federal government, subsection (2) significantly limits this right by emphasizing the need to protect interstate commerce, even in the face of a state's claim that more stringent standards will promote safety.[194]

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[189] *Id.*

[190] Nolfi, *supra* note 179, § 3.

[191] HMTA § 112(b) (codified as amended at 49 U.S.C.A. § 5125(e) (2006)). The DOT had established criteria to determine whether a state or local law unreasonably burdens commerce:

> (1) The extent to which increased costs and impairment of efficiency result from the State or political subdivision requirement.
> (2) Whether the State or political subdivision requirement has a rational basis.
> (3) Whether the State or political subdivision requirement achieves its stated purpose.
> (4) Whether there is a need for uniformity with regard to the subject concerned and if so, whether the State or political subdivision requirement competes or conflicts with those of other States and political subdivisions.

City of New York; Hazardous Materials Transportation, 50 Fed. Reg. 37,308, 37,309–10 (Dep't of Transp. Sept. 12, 1985) (non-preemption determination) (quoting Hazardous Materials Program Procedures, 49 C.F.R. § 107.221(b) (1985)).

[192] City of New York; Hazardous Materials Transportation, 50 Fed. Reg. at 37,309.

[193] Nolfi, *supra* note 179, § 2(a).

[194] The legislative history supports this limitation: "[T]he legislative history of section 112(b) provides explicit testimony to the Congressional intent that non-preemption was meant to be an extraordinary remedy

In line with the MTB's reasoning in IR-16 and with the legislative history of the HMTA,[195] states that have attempted to completely ban the transportation of hazardous materials across their borders have been unsuccessful in obtaining a "non-preemption" ruling.[196] For example, the City of New York petitioned for waiver of the previous inconsistency determination that the MTB issued regarding New York's ban on the transportation of spent nuclear fuel in city limits.[197] New York argued that its high population density caused it to meet the threshold requirement of "exceptional circumstances necessitating immediate action to secure more stringent regulations."[198] In denying New York's request,[199] the MTB relied on case law "holding that a state or local government may not resolve a safety problem by effectively exporting it to another jurisdiction."[200] This ruling illustrates that the nonpreemption exception under section 112(b) is truly narrow.

One final aspect of the HMTA that preserves a role for states is section 22 of the 1990 HMTA amendments, which provides for a "working group of State and local government officials" to collaborate with the DOT in creating "uniform forms and procedures" for all the states.[201] After the regulations are developed by the DOT and the participating states, they are disseminated. The regulations take effect after twenty-six states adopt them.[202] This process provides one way under the HMTA for states to continue to be involved in an area of regulation that Congress has transferred to federal control.

With the passage of the HMTA, Congress planned to develop a uniform set of regulations that would apply on a national basis.[203] These regulations were designed to further the goals of protecting public welfare and safety while promoting interstate commerce.[204] Inherent in developing uniform national

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available only in those 'emergency situations' when 'certain exceptional circumstances . . . necessitate immediate action to secure more stringent regulations.'" City of New York; Hazardous Materials Transportation, 50 Fed. Reg. at 37,310.

[195] *See supra* notes 186–94 and accompanying text.

[196] *See* City of New York; Hazardous Materials Transportation, 50 Fed. Reg. at 37,308.

[197] *Id.*

[198] *Id.* at 37,312.

[199] *Id.* at 37,315.

[200] *Id.* at 37,309.

[201] Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, sec. 22, § 121, 104 Stat. 3244, 3271 (codified as amended at 49 U.S.C.A. § 5119 (2006)); *see* Scott P. Keifer, Case Summary, Massachusetts v. United States Dep't of Transp., *93 F.3d 890 (D.C. Cir. 1996)*, 4 MO. ENVTL. L. & POL'Y REV. 131, 131 (1996).

[202] Keifer, *supra* note 201, at 131.

[203] *See supra* notes 183–84 and accompanying text.

[204] *See supra* notes 191–92 and accompanying text.

standards, Congress was forced to preempt many regulations, including more stringent regulations by states and localities.[205] Even with these prohibitions, however, Congress created a limited preemptive statute, whereby preemption would be governed by a case-by-case process, preserving states and localities' ability to regulate in "exceptional circumstances."[206] Furthermore, Congress maintained a limited state role by permitting collaboration between the states and the DOT to create some of the national standards.[207]

IV. COMPARISON OF THE ACT TO HMTA AND OTHER PREEMPTIVE FEDERAL LEGISLATION

To determine whether and to what extent Congress has departed from the traditional rationales supporting reallocation of power to the federal government with the passage of the Act, this Comment next applies the rationales that have previously underpinned Congress's preemptive actions to sections 311 and 313 of the Act. Applying these rationales leads to the conclusion that the passage of sections 311 and 313 cannot be supported by relying solely on the traditional rationales discussed above in Part III. Therefore, this Part begins by comparing these rationales to sections 311 and 313, and ends with an analysis and comparison of the HMTA to the relevant provisions of the Act.

A. *Traditional Rationales Underlying Allocation of Power: Comparison to the Act*

Congress did not issue any explanatory statements concurrently with the passage of the Act or specifically for sections 311 or 313.[208] Therefore, to determine whether Congress has relied on traditional rationales, it is necessary to refer to the motivations behind Congress's action with the passage of section 311, as discussed in Part II.[209] Upon comparing the pressures Congress felt (leading to the insertion of sections 311 and 313 in the Act) to the purposes that Congress has depended on in the past to justify the transfer of power to the

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[205] *See supra* notes 177–79 and accompanying text.

[206] *See supra* notes 191–92 and accompanying text.

[207] *See supra* notes 202–03 and accompanying text.

[208] Rather, the Conference Report associated with the final bill merely repeated the text of the proposed Act. *See generally* H.R. Rep. No. 109-190 (2005).

[209] *See supra* Part II.A.

federal government, it becomes clear that the traditional rationales lend only partial support to Congress's actions here.[210]

The two major rationales that Congress has depended on in the past, specifically insufficient regulation by states and conflicting regulation by states,[211] are not applicable to LNG terminals. As mentioned in Part I, multiple layers of review occur before a terminal is built,[212] and such regulations should not be viewed as insufficient.[213] Furthermore, because each LNG terminal exists solely in one state at a singular location, there is no need to create national, uniform standards that apply to these structures.[214] Specifically, LNG terminals are not like the tankers regulated under the PWA.[215] There, international interests were in play, leading to the need for uniform standards to be applied.[216] Here, although the LNG tankers will be arriving from foreign countries,[217] the terminals themselves obviously will remain stationed off the relevant state's coast, with no similar need for safety and security standards to be uniform.

However, the industry has argued before Congress that the delays caused by state and local opposition have effected a functional ban on the siting and construction of LNG terminals.[218] Based on this argument, creation of a uniform, federal standard overriding state regulation may seem reasonable, as exhibited by the TSCA.[219] Under the TSCA, Congress permitted states to regulate more stringently than the federal standards.[220] However, North Carolina's ban on disposal of hazardous substances within Warren County led a court to conclude that bans were not similarly exempted from preemption under the TSCA due to the purposes of the statute.[221] Applying the same reasoning to LNG terminals, a partial congressional transfer of authority away

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[210] *See generally supra* Part II for discussion of rationales for the passage of sections 311 and 313 and Part III for discussion of the traditional justifications for preemption.

[211] *See supra* notes 142–48 and accompanying text.

[212] *See supra* notes 24–27 and accompanying text.

[213] *See infra* note 252 and accompanying text.

[214] In fact, as CPUC and CEC argued in the Ninth Circuit Court of Appeals, each LNG terminal should have individualized standards regarding safety and security based on local conditions. *See supra* notes 87–90 and accompanying text.

[215] *See supra* notes 163–65 and accompanying text.

[216] *See supra* notes 163–65 and accompanying text.

[217] Regulation of the tankers themselves has traditionally already been regulated by FERC under the Natural Gas Act. *See* 15 U.S.C. § 717b(a) (2000).

[218] *See supra* notes 72–73 and accompanying text.

[219] *See supra* note 167 and accompanying text.

[220] *See supra* note 168 and accompanying text.

[221] *See supra* note 170 and accompanying text.

from states may have been justified by the need for a uniform standard to protect against statewide bans on building new LNG sites.

Other potentially relevant rationales are Congress's interests in encouraging the development of an infant industry[222] and a variety of energy sources,[223] which provided the justifications for Congress to transfer siting authority of nuclear power plants to AEC. There are only four LNG terminals presently operational in the United States.[224] With so few terminals, it is arguable that the industry remains in its "infant stages" and therefore needs to be protected and regulated by the federal government. Furthermore, in light of steadily rising energy prices, [225] it is likely that Congress has a considerable interest in diversifying the nation's energy supply. However, as Allen Ferguson noted, the energy-price rationale was especially applicable to nuclear energy because of the special relationship between the federal government and nuclear energy, and may not be relevant to other areas of the law, even other types of energy.[226]

Because many states have functionally banned LNG terminals, Congress may have been warranted in taking some authority away from states in this realm of the law. Furthermore, Congress's desire to encourage a diversification of energy sources and its desire to protect the LNG industry may also justify some preemptive action. However, no congressional statute passed prior to the Act has been as broadly preemptive as sections 311 and 313. Therefore, although traditional rationales would have supported limited federal preemption, no rationale supports the extent to which Congress stripped state and local governments of the power to site LNG terminals. A comparison to another broadly preemptive statute, the HMTA, highlights the inability for traditional rationales to support the broadly preemptive nature of sections 311 and 313.

B. Comparison of the Act to the HMTA

With the passage of the HMTA, Congress attempted to develop a uniform set of regulations that would apply on a national basis and further the goals of

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222 *See supra* Part II.A.3 and accompanying text.
223 *See supra* Part II.A.1.
224 *See supra* note 14 and accompanying text.
225 *2005 House Hearings*, *supra* note 42, at 125.
226 *See supra* note 153 and accompanying text.

protecting public welfare and safety while promoting interstate commerce.[227] As a result of its promulgation of these national standards, Congress was forced to preempt many state and local regulations. However, Congress maintained a limited role for states and localities under the HMTA. Under that statute, preemption is not only governed by a case-by-case process, preserving states and localities' ability to regulate in "exceptional circumstances,"[228] but states are made partners with the DOT in formulating certain standards that will be nationally applicable.[229] On the other hand, with the passage of the Act, specifically sections 311 and 313, Congress instead broadly preempted any state or local involvement in siting LNG terminals.[230] Although states and localities are given the ability to consult with FERC regarding "State and Local Safety Considerations," the decision to site an LNG terminal remains exclusively with FERC.[231] The NGA, as amended, contains no exempting provision similar to that of the HMTA, whereby states can attempt to argue that "exceptional circumstances" should allow more stringent, individually tailored standards promulgated by the states themselves.[232]

In contrast to the traditional justifications underpinning the HMTA, there is little traditional justification for Congress's actions under the Act, which, unlike the HMTA, involves an expansive method of transferring power to the federal government. Whereas under the HMTA there was paramount need for uniform, national standards to further the purposes of the statute,[233] there is no correlative need for uniform regulation of LNG terminals.[234] Therefore, the combination of the overly expansive method employed by Congress in sections 311 and 313 and the lack of traditional justifications for its preemptive action leads to the conclusion that there must be some other rationale supporting Congress's passage of these provisions. Namely, the diverse regulatory bodies that have historically been involved in siting LNG terminals created a

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[227] *See supra* notes 175–76 and accompanying text. *But see* Todd Wallace, Comment, *Preemption of Local Laws by the Hazardous Materials Transportation Act*, 53 U. CHI. L. REV. 654, 654 (1987). In his comment, Wallace supports the passage of federal legislation to regulate the transportation of hazardous materials, but criticizes the HMTA for dividing jurisdiction over preemption determinations between the courts and the DOT. *Id.* at 655 ("[T]he addition of a new regulatory layer, far from ending the confusion, has merely intensified it.").

[228] *See supra* note 198 and accompanying text.

[229] *See supra* note 201 and accompanying text.

[230] *See supra* notes 94–95 and accompanying text.

[231] *See supra* notes 94–95 and accompanying text.

[232] *See supra* note 190 and accompanying text.

[233] *See supra* note 204 and accompanying text.

[234] *See supra* notes 87–88 and accompanying text.

fragmented regulatory framework with a multitude of avenues for public input and opposition. Thus, the historical "regulatory fragmentation"[235] associated with LNG terminals may provide a further explanation for Congress's transfer of power away from the states.

V. RISKS OF, AND RATIONALES FOR, THE GRANT OF EXCLUSIVE JURISDICTION TO FERC

This Comment has established that the inclusion of sections 311 and 313 in the Act represents a departure from the traditional purposes for congressional transfer of power from states to the federal government. However, the conclusion that a divergence has occurred should not end the analysis. Rather, a theory has begun to develop in which scholars are presenting another justification for preemptive congressional action. This theory sometimes has been termed the "tragedy of the anticommons"[236] or "regulatory fragmentation."[237] This Part attempts to situate the battle over LNG terminals within this developing theory, concluding that while the process of siting LNG terminals exemplifies the "tragedy of the anticommons" and that Congress was justified in transferring siting power to FERC, the risk of decreased public involvement in the siting process needs to be taken into account.

In 1998, Michael Heller published an article introducing the concept of an "anticommons."[238] In contrast to the traditional concept of the tragedy of the commons,[239] Heller hypothesized that where *too many* parties are given the right to exclude others, a "tragedy of the anticommons" is created.[240] Heller went on to state that the tragedy of the anticommons lies in the "underuse" of the resource at issue.[241] Although Heller's article focused on the "anticommons" rhetoric as it relates to property rights, he provided an example in his article that pertains to the current discussion: "[A]ssume California has a

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[235] William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth*, 21 J.L. & POL. 323, 323 (2005).

[236] Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622 (1998).

[237] Buzbee, *supra* note 235, at 323.

[238] Heller, *supra* note 236 at 622.

[239] "If a natural resource is not subject to any one person's ownership or political institution's control with rights to exclude, but is accessible to many, the resource is likely to be overexploited . . . ." William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 15–16 (2003).

[240] Heller, *supra* note 236, at 622.

[241] *Id.*

property regime such that any community member—environmental group, neighbor, or local government agency—could block development of a coastal plot."[242] Under this assumption, each person in the community is given the right to prevent the development of the plot and could cause inordinate delays and "drag"[243] on the development of that plot, thereby leading to "underuse" of the property.[244] Heller recommended that to avoid the tragedy of the anticommons, property rights should not be granted diffusively, but rather should inhere in a single person.[245] In the regulatory context, Heller's theory would advocate locating authority over a given area of the law within one regulatory agency, which is what Congress has done with the passage of sections 311 and 313 of the Act.[246] Heller's hypothesis focuses on the negative effects of overregulation, a focus that is evident in his terming the phenomenon the "*tragedy* of the anticommons."[247] However, not all scholars have espoused the proposition that centralized regulation, and therefore, more development, is automatically beneficial.[248]

William Buzbee has introduced the term "regulatory fragmentation" as an alternate description for this phenomenon.[249] Although Buzbee recognizes that regulatory "fragmentation can create a drag on, and hence deter, actions that may actually be in the aggregate interest of the region," he goes on to note that the division of authority between different regulatory bodies is not always a bad thing.[250] Rather, "Fragmentation can serve to slow down or even halt projects whose harms might otherwise be overlooked in a more streamlined

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[242] *Id.* at 676.

[243] *Id.* at 685.

[244] *Id.* at 622. James Buchanan, in a response to Heller, has more explicitly applied Heller's theory to regulatory bureaucracy, providing the example of a resort in Sardinia, Italy. There, to obtain approval to site the resort, an investor must acquire "permits from several regional agencies, each one of which holds effective exclusion rights to the project that might, if implemented, be productive of value." James Buchanan, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1, 11 (2000).

[245] Heller, *supra* note 236, at 640 ("[C]reating private property requires moving from too many owners, each exercising a right of exclusion, to a sole decisionmaker, controlling a bundle of rights.").

[246] *See supra* Part II.

[247] Heller, *supra* note 236, at 622 (emphasis added).

[248] A similar debate arose in the securities regulation area in the 1990s. *See* Melanie L. Fein, *Functional Regulation: A Concept for Glass-Steagall Reform?*, 2 STAN. J.L. BUS. & FIN. 89, 107 (1995) ("[SEC Chairman] Levitt argues that one agency issuing one set of rules will achieve cost savings for taxpayers and avoid confusion among the regulated banks as to which rules apply. Levitt also claims that current *regulatory fragmentation* prevents the SEC from comprehensively regulating the securities markets.") (emphasis added).

[249] Buzbee delineates four types of fragmentation: "temporal, horizontal, vertical, and institutional." Buzbee, *supra* note 235, at 323. It is beyond the scope of this Comment to delve specifically into these four types.

[250] *Id.* at 324.

regulatory scheme."[251] Furthermore, Buzbee implies that regulatory fragmentation is especially important at "the intersection of environmental and land use laws," where multiple layers of regulators at the federal, state, and local levels have all played important roles during the past four decades.[252]

Richard Pierce, without explicitly doing so, has relied on the anticommons theory in a critique of the regulatory framework that applied to LNG terminals prior to the passage of the Act.[253] Pierce expressed concern that "local opposition to LNG terminals is so powerful that the [United States] will be unable to construct enough terminals to avoid a catastrophic gas shortage" due to the splintered regulatory process for siting the facilities.[254] Coincident with Heller's proposal to locate exclusive property rights in one individual as a means of solving the "anticommons" problem,[255] Pierce advocated for "enactment of a statute that gives federal agencies or federal courts authority to override the decisions of state or local agencies when those decisions interfere with the nation's ability to obtain enough natural gas to meet our needs."[256] Congress, with the passage of sections 311 and 313, seems to have responded directly to Pierce's call to action.[257]

Congress's decision to preempt state and local involvement in siting LNG terminals is therefore justified—under a newly minted rationale—as a means of preventing the nation from being subject to "a catastrophic gas shortage."[258] However, as Buzbee implied, centralization of siting authority in a single federal agency has repercussions for the ability of the public to become

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[251] *Id.* It is important to note that other scholars have focused on other possible negative effects of regulatory fragmentation. Notably, where "neither citizens nor potential regulators view any person or institution as having regulatory primacy over a particular social ill," the social ill will not be addressed sufficiently, leading instead to a regulatory gap. *Id.* However, because no possibility of a regulatory gap exists in regards to LNG terminals, this aspect will not be addressed.

[252] *See id.* at 340.

[253] Pierce, *supra* note 50, at 168 ("These conflicts result from mismatches between regulatory powers wielded by different institutions.").

[254] *Id.* at 176.

[255] *See supra* note 245 and accompanying text.

[256] Pierce, *supra* note 50, at 176.

[257] Although, of course, other actors were advocating for the same result. *See supra* notes 71–73 and accompanying text.

[258] Pierce, *supra* note 50, at 176.

meaningfully involved in siting LNG terminals.[259] Furthermore, final review by a single federal agency, namely FERC, rather than a multi-layered, multi-tiered review by several state and federal agencies, has the potential to create a situation in which negative aspects of the project "might . . . be overlooked."[260] As discussed in Part II, there are grave security and safety risks inherent in the presence of an LNG terminal off the coast of a community;[261] these risks should be examined in detail prior to a siting decision.

FERC must be careful to maintain an attitude that welcomes the involvement of states and localities, and thereby the public, in the siting process. FERC must encourage state and local input about regional safety and security hazards,[262] as well as support public comment.[263] Otherwise, although the number of LNG terminals will increase at a faster rate due to centralized regulation,[264] the siting of those terminals may be insufficiently analysed, causing the public to be subject to unwarranted safety and security risks.[265]

CONCLUSION

With the passage of sections 311 and 313, which completely preempt state and local regulatory involvement in the decision to site LNG terminals, Congress went beyond the preemptive nature of any statute it had previously passed, and it did so without sufficient traditional justifications. However, Congress's goal in passing these provisions was to alleviate the functional ban caused by the splintered regulatory framework previously applicable to these facilities. Congress's decision to preempt state and local law was therefore justified as a method of defragmenting the regulatory process. However, Congress also created a risk that the voice of the public would be silenced in the siting process. To protect the public interest, FERC, as the newly minted agency with exclusive authority in this area, must encourage public

[259] *See supra* notes 250–52 and accompanying text.

[260] Buzbee, *supra* note 235, at 324.

[261] *See supra* notes 54, 76–79 and accompanying text.

[262] As part of section 311, Congress added section 3A to the NGA to mandate some level of interaction between states, localities, and FERC. EPAct of 2005 § 311(d), 15 U.S.C.A. § 717b-1(b) (2006).

[263] Superficially, FERC seems to have done this to a certain extent. Its website includes a page entitled "LNG-Public Involvement," which lists the various ways in which a citizen may get involved during the LNG siting process. *See* Federal Energy Regulatory Commission, LNG - Public Involvement, http://www.ferc.gov/industries/lng/enviro/pub-involve.asp (last visited Nov. 6, 2006).

[264] *See supra* note 49 and accompanying text.

[265] *See supra* notes 76–79 and accompanying text.

involvement and incorporate the public's comments into any siting decision. Without this incorporation, FERC runs the risk of prematurely permitting facilities that would not, when all factors are considered, be in the nation's best interest.

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