Legal Alert:

Energy Policy Act of 2005:
Title III as it relates to LNG

August 18, 2005

On August 8, 2005, President Bush signed into law the Domenici-Barton Energy Policy Act of 2005 (“EPACT 2005” or “the Act”). Title III of the Act addresses oil and gas issues and contains significant provisions related to the importation of liquefied natural gas (“LNG”). Some of these provisions are to be incorporated into the Natural Gas Act (“NGA”), while others are stand-alone provisions. This Legal Alert summarizes the LNG provisions included in the Act.

**Exclusive Siting Authority**

EPACT 2005 amends the NGA to grant the Federal Energy Regulatory Commission (“FERC”) express exclusive authority to approve or deny the siting, construction, expansion or operation of an LNG import terminal located onshore or in State waters. Moreover, FERC may approve an application “with such modifications and upon such terms and conditions as the Commission finds necessary or appropriate.” (Recent press reports indicate that FERC may ask that the pending challenge to FERC’s jurisdiction over such siting matters, currently pending in the 9th Circuit, be dismissed in light of this provision in the Act.)

The NGA is also amended to include a provision that states that, except as provided, nothing in the NGA affects the rights of States under the Coastal Zone Management Act (“CZMA”), the Clean Air Act (“CAA”), or the Clean Water Act (“CWA”).

**Hackberry Codification**

One of the primary elements of the Act is its codification of the Hackberry policy adopted by FERC in the December 2002 Hackberry LNG decision. In Hackberry, FERC eliminated open access requirements for LNG terminals by allowing for proprietary ownership as a way to encourage terminal siting. Now, under the amended NGA, FERC is prohibited from:

- Denying an application based on the fact that the terminal developer intends to use the facility, either exclusively or partially, for its own gas, and
Conditioning an order approving a terminal on a requirement that the terminal offer service to any party other than the applicant, on any regulation of rates, terms of conditions of service, or on a requirement to file schedules or contracts related to the rates, terms and conditions of service with FERC.

The new law also establishes a sunset provision with regard to the *Hackberry* codification. Specifically, effective January 1, 2015, FERC has discretion whether or not it will apply *Hackberry* to new terminal and expansion applications. In addition, the Act provides protection from degradation of service and undue discrimination to existing shippers at a terminal already providing open access service in the event the terminal seeks FERC approval to expand.

**Process and Procedural Matters**

EPACT 2005 confirms FERC’s role as the lead agency in the review and authorization of LNG terminals. It also mandates that FERC promulgate regulations on the National Environmental Protection Act (“NEPA”) pre-filing process within 60 days after enactment of EPACT 2005. Therefore, FERC must issue a Notice of Proposed Rulemaking (“NOPR”) by October 6, 2005. The new law also requires that LNG terminal applicants comply with the NEPA pre-filing process prior to filing an application. Prior to enactment of this law, applicants had the discretion whether to utilize the NEPA pre-filing process. Moreover, the new law directs applicants to commence the pre-filing process at least six months prior to filing the actual application for authorization to construct an LNG terminal.

Upon receipt of an application for a new terminal or an expansion, FERC is required to set the matter for hearing and give reasonable notice to all interested parties, including state utility commissions.

FERC is empowered under the new law to establish a schedule for all Federal authorizations required for an LNG terminal. This likely includes the establishment of a schedule for a federal coastal zone consistency determination since the States act pursuant to federally delegated authority in certifying or denying federal consistency for a facility. However, the law also requires FERC to comply with existing applicable schedules established in by Federal law. This means that FERC must respect the timelines established in the Coastal Zone Management Act implementing regulations (15 CFR § 930.62), and cannot impose a schedule that would shorten those established schedules.

Once established, however, the new law requires Federal, State and local agencies to cooperate and comply with the FERC-established deadlines. If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authority in
accord with the FERC-established schedule, the LNG terminal applicant may pursue remedies under the newly created Section 19(d) of the NGA (see below).

EPACT 2005 also mandates that FERC keep a consolidated record of all decisions made and actions taken by FERC or by a Federal administrative agency, or by a State administrative agency acting under delegated Federal authority, with respect to any Federal authorization required for the terminal. The FERC consolidated record shall be the record for:

- Appeals under the CZMA, provided that the record may be supplemented as provided by Section 319 of the CZMA; and

- Judicial review under Section 19(d) of decisions made or actions taken of Federal and State administrative agencies, with the exception that the court can remand the matter to FERC if it determines that there is insufficient information in the record.

**Judicial Review – New NGA § 19(d)**

The Act confers original and exclusive jurisdiction on the U.S. Court of Appeals for the Circuit in which the LNG facility is located over any review of an order of a Federal (other than FERC) or State administrative agency acting pursuant to Federally delegated authority to issue, condition, or deny any permit, license concurrence or approval required under Federal law. The provision expressly exempts the CZMA, however, leaving intact the CZMA appeal process to the Secretary of Commerce. (See CZMA Appeals Process Modifications below).

In circumstances where an LNG facility applicant alleges a failure to act on the part of the Federal agency or State agency acting pursuant to Federally delegated authority to issue, condition or deny any permit required under Federal law, the U.S. Court of Appeals for the D.C. Circuit shall have original and exclusive jurisdiction over any civil action for review of such failure to act. This provision similarly excludes the CZMA from this appellate process.

In both of the above appellate processes, the court is required to set all actions brought before it for expedited consideration.

**CZMA Appeals Process Modifications**

EPACT 2005 also modifies the deadlines and processes for CZMA appeals. First, the Secretary of Commerce must publish notice of the appeal no later than 30 days after the appeal is filed. The Secretary then shall close the decision record and receive no more filings no later than the end of the 160-day period beginning on the date that the initial notice is published. However, the Secretary may stay the closing of the decision record if 1) mutually agreed to by the appellant
and the State agency, or 2) the Secretary determines it is necessary in order to receive either any supplemental information requested by Secretary or any clarifying information submitted by a party to the proceeding related to the information in the consolidated record compiled by FERC. The Secretary may stay the closing of the decision record only for 60 days, and should issue a decision within 60 days after the record is closed. If he is unable to do so, he must issue a statement explaining why not, and then must issue the final decisions within the next 15 days. These newly enacted timelines generally compress the CZMA appeals process into a shorter time frame than what was applicable prior to this enactment. For example, in contrast to the 75 total days that the Secretary now has to issue a decision under the new law, previously the Secretary had a maximum of 135 days in which to issue his decision.

**Coordination with Department of Defense**

The Act also requires that FERC enter into a Memorandum of Understanding ("MOU") with the Department of Defense ("DOD") in order to ensure coordination and consultation between the two agencies when a proposed LNG terminal or expansion "may affect an active military installation." EPACT 2005 does not provide any scope to this provision, however. Therefore, it is likely that the MOU will attempt to provide some definition to the DOD’s role in the LNG terminal review process. In addition, the Secretary of Defense must concur with a terminal site that affects the training or activities of an active military installation before FERC can authorize the siting, construction, expansion, or operation of an LNG facility.

**Safety and Security Issues**

In the Act, States are given a level of involvement with regard to the safety and security of LNG facilities that they previously did not have. Governors of states in which LNG terminals are proposed are required to designate the appropriate state agency for coordination with FERC on safety and security considerations associated with proposed LNG terminals. According to EPACT 2005, State and Local safety considerations include: 1) the kind and use of the facility; 2) the existing and projected population and demographics; 3) the existing and proposed land use; 4) natural and physical aspects of the proposed location; 5) emergency response capabilities near the proposed facility location; and 6) the need to encourage remote siting.

The amended NGA now provides that the designated State agency may furnish an advisory report to FERC on State and local safety considerations no later than 30 days after the application is filed with FERC. Prior to authorizing the facility, FERC must respond specifically to the issues raised by the report. For applications pending with FERC when EPACT 2005 is enacted, August 8, 2005, the State agency has 30 days after such enactment to file such advisory report.
Additionally, once an LNG terminal is operational, the state public utility commission of the state in which the facility is located may conduct safety inspections of the LNG facility in conformance with Federal regulations and guidelines after providing FERC with written notice of such intended inspection.

In any order authorizing an LNG terminal, FERC shall require the terminal operator to develop an Emergency Response Plan (“ERP”), which shall be prepared in consultation with the U.S. Coast Guard and State and local agencies and be approved by FERC prior to construction. While not previously codified, in practice FERC has included this requirement in the last several orders authorizing LNG facilities. Attendant to the development of the ERP, LNG facility applicants must include a “cost-sharing plan” in the ERP. The cost-sharing plan must include a description of any direct reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety at the LNG terminal and in proximity to LNG vessels.

**LNG Forums**

Within one year of enactment of EPACT 2005, the Secretaries of Energy, Transportation, and Homeland Security, FERC and the governors of coastal States shall convene at least three forums on LNG. These forums shall be held in areas where terminals are under consideration, and shall be intended to identify and develop best practices for addressing LNG issues by fostering education and dialogue. The Act specifically authorizes “such sums as are necessary” to be appropriated.

For more information about the information on these details, please contact any of the following attorneys:

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