

Widener University Delaware Law School

From the Selected Works of Kenneth T Kristl

Winter 2009

Renewable Energy and Preemption: Lessons from Siting LNG Terminals

Kenneth T Kristl



Available at: https://works.bepress.com/kenneth_kristl/7/

Renewable Energy and Preemption: Lessons from Siting LNG Terminals

Kenneth T. Kristl

In the Energy Policy Act of 2005, Congress gave exclusive “authority to approve or deny an application for the siting, construction, expansion, or operation” of liquefied natural gas (LNG) terminals to the Federal Energy Regulatory Commission (FERC). 15 U.S.C. § 717b(e)(1). How this federal power to preempt local control operates for LNG terminal siting can provide important lessons for the coming push to expand renewable energy sources such as wind and solar power.

FERC’s preemption power over siting LNG terminals is not absolute. The Act specifically reserves state rights under the Coastal Zone Management Act (CZMA) and the Clean Air and Water Acts. See 15 U.S.C. § 717b(d). However, permitting under the Clean Air and Water Acts operates *after* siting; only the CZMA theoretically allows a state to block LNG facility siting under a prohibition in the state’s Coastal Management Plan. For example, Delaware relies on the CZMA to prohibit the Crown Landing LNG facility (located in New Jersey but with a pier extending into Delaware waters) at the center of the U.S. Supreme Court’s recent ruling in *New Jersey v. Delaware*, 128 S. Ct. 1410 (2008). Because Delaware’s Coastal Zone Act (CZA) prohibits “bulk product transfer facilities” like LNG terminals, and the CZA is part of Delaware’s approved Coastal Management Plan under the CZMA, Delaware’s regulatory power survives despite FERC approval of the project.

A recent Fourth Circuit case, however, shows the limits of this CZMA exception. In *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120 (4th Cir. 2008), Baltimore County, Maryland, did not want a proposed LNG terminal built on the Chesapeake Bay. To prevent construction, the County amended its zoning regulations to require LNG terminals to obtain a “special exception” and not be located within specified distances of residential zones or businesses. The terminal operator challenged the amendment, claiming preemption under Section 717b(e)(1) and won. See *AES Sparrows Point LNG, LLC v. Smith*, 470 F. Supp. 2d 586 (D. Md. 2007). Undaunted, the County changed its zoning regulations to make LNG terminals a prohibited use in the Chesapeake Bay Critical Area. It then persuaded the Maryland Critical Area Commission for the Chesapeake and Atlantic Coastal Bays to amend the Critical Area Protection Plan (CAPP) for Baltimore County to include the new prohibition. Because CAPPs exist pursuant to a statute identified in Maryland’s Coastal Management Plan under the CZMA, the County argued the new regulation survived preemption. 527 F.3d at 124–25. The trial court agreed with the County, but the Fourth Circuit reversed,

INSIGHTS

Edited by David S. May

- Renewable Energy and Preemption: Lessons from Siting LNG Terminals
- Natural Resources Management and Public Participation
- FERC Guidance Order Shows Inter-Agency Tension
- REACH: The New European Union Chemicals Regulations
- Incentives for New Owners under EPA’s Audit Policy

finding preemption because the changes to the CAPP had not been approved by the National Oceanic and Atmospheric Administration (NOAA) as required by the CZMA. *Id.* at 126. While Judge Williams' concurrence expressed concern that the County's regulation, "although 'preempted' today, might be 'saved' from preemption tomorrow" by a NOAA approval, *id.* at 127, the majority squelched that possibility, pointing out that "there is some indication that NOAA would not approve an LNG terminal ban" based on language in NOAA's regulations. *See id.* note 9. In effect, Section 717b's preemption precluded Baltimore County as local authority from having a significant decisional role in siting the LNG terminal.

Such a result was predicted when Congress created FERC preemption in 2005. Rep. Michael Castle (R-DE) unsuccessfully sought to remove FERC preemption, arguing that preemption will "trample[] on the rights of the States and the individual communities . . . to be able to influence these decisions that are made." 115 Cong. Rec. H2431, 2433-34 (Apr. 21, 2005). As *AES Sparrows Point* suggests, Rep. Castle was prescient on the LNG front. More interestingly, Rep. Castle predicted more far-reaching consequences from FERC preemption:

[L]et me tell my colleagues something. This may be more than just the terminals for LNG. This could end up being other things, not in this legislation necessarily, but this commission could reach out and start to deal with energy lines, could start to deal with pipelines and a variety of other things, taking away the local jurisdiction over land.

115 Cong. Rec. H2433 (Apr. 21, 2005). In proving Castle right on LNG, *AES Sparrows Point* thus raises broader questions concerning the use of federal preemption in siting any energy facility, including renewable energy sources. The push for renewable energy will require a fundamental policy decision about whether local control and concerns will play a significant role in siting these facilities.

The push for more renewable energy is here. Both 2008 presidential campaigns emphasized that wind, solar, and other renewable energy sources must play increasing roles in powering our country; Barack Obama wants 10 percent of all electricity to come from renewables by 2012. T. Boone Pickens advocates wind turbines from Texas to North Dakota. Renewable Portfolio Standards requirements exist in numerous states. It seems inevitable that wind, solar, and other renewables will contribute a significant amount of more energy to the grid in the coming years.

Simply announcing (or mandating) renewables does not, however, get the wind turbines or solar panels sited and built. Contrary to the clever television ads for Wecansolveit.org, there is no oversized switch in a field or city street that, once thrown, will suddenly bring renewables on-line. The reality is that numerous government approvals—from local land use approvals to state and federal reviews and/or permits—must first be obtained before renewable energy facilities can be built. A fact sheet on permitting community-scale wind power in Mas-

sachusetts from the Renewable Energy Research Laboratory at the University of Massachusetts identifies twenty-seven different required reviews (six local, fifteen state, and six federal). *See* www.ceere.org/rerl/about_wind/RERL_Fact_Sheet_7_Permitting.pdf. Such reviews take time. The Cape Wind project off Cape Cod, for example, took seven years to get a favorable U.S. Minerals Management Service draft environmental impact statement in January 2008, and it still needed nine more state and local permits; it "could be operating" by 2011. *See* Beth Daley, *Cape Wind Proposal Clears Big Obstacle*, *THE BOSTON GLOBE* (Jan. 15, 2008). While the actively opposed Cape Wind project might be atypical, four-to seven-year lead times are considered average. For an aggressive plan to expand renewables, that can seem like an eternity. The inevitable question will, therefore, arise: can we speed up the process of siting renewable energy facilities?

Developing a strategy to streamline renewable siting is not easy due to competing interests. National and international interests likely favor building renewable sources as quickly as possible because of benefits such as energy independence, greenhouse gas reductions, and profits. On the other hand, local interests, where turbines or solar farms are to be built, have different concerns, including the economic benefits (from leases for turbines) as well as the visual and aural burdens and wildlife impacts. As a result, some localities have encouraged the presence of wind facilities via permissive zoning, tax credits, and incentives, while other localities regulate or restrict renewables via zoning, land use ordinances, and moratoria. *See, e.g., Ecogen LLC v. Town of Italy*, 438 F. Supp. 2d 149, 152-53 (W.D.N.Y. 2006) (one town "welcomed" a wind farm while the neighboring town imposed a one-year moratorium affecting the other half of the project). Whether in support or opposition, localities value being able to weight the benefits against the burdens—a process that, by necessity, will generally be slower. The current system of permitting renewable energy sources is largely such a local-based approach. Thus, any coordinated strategy to maximize renewable energy sources will have to address how to resolve these competing "siting speed" interests to be able to implement its goals. Because the desire to increase renewables in the economy is great and growing greater, there will likely be enormous pressure to "speed up" the process.

The fastest method for siting approval is the LNG terminal approach: place siting authority exclusively in a federal agency, thereby preempting local authorities' ability to slow down or block the approval process. Such a system puts federal decision makers—far removed from local concerns (and petty politics) about a particular project—in position to put national interests at the forefront of siting approval and act quickly.

Yet the very reason a national-based siting approach is faster is also its greatest shortcoming: the reduced consideration or importance of local concerns. *AES Sparrows Point* illustrates this point. Baltimore County clearly did not want the LNG terminal yet was powerless to stop it with its own regulatory authority. It is questionable whether a national-based preemption approach

can ever adequately consider local concerns because it lacks the political mechanism at the heart of local-based approaches—the political risk of ignoring the concerns of voters and thus losing the next election. A federal bureaucrat in Washington, D.C., likely will not worry about angering voters in, say, North Dakota. Thus, LNG siting offers a valuable lesson to the architects of a comprehensive national policy on renewable energy: federal preemptive siting authority may offer a quicker way to get facilities approved and online, but it risks losing the adequate attention to local concerns that has traditionally been expressed through local decision making.

Is there a middle ground that can be faster while respecting local concerns? Perhaps the federal agency with preemptive siting authority could be required to consider local concerns. FERC is supposed to do that in siting LNG terminals via consultation with officials on “[s]tate and local safety considerations,” see 15 U.S.C. § 717b-1(b). Both the questions raised in 2005 and the history in subsequent sitings of FERC approvals despite local opposition suggest that such a “consultation” requirement may not be very effective. When the national issues driving federal interest in a particular project (e.g., electrical generation, reduction of dependence on foreign oil, or reduction of greenhouse gases) differ from the concerns of local interests, federal decision makers will be tempted to emphasize the federal and ignore the local. A federal preemption model may never fully respect local concerns.

Perhaps there are ways to speed up local siting approval processes so that local concerns play a role without inordinate delay. Federal or state legislation could impose time limits on local approval processes so that both developers and planners can expect predictable time frames for project approval. Or time limits could be one of the conditions to federal grants or assistance provided to localities to encourage renewable resource development. Market forces might even be creating such incentives already; as localities increasingly embrace renewable energy projects for their economic benefits, the localities acting most quickly may enjoy an advantage in attracting projects. The key, however, is that localities still get to decide whether they want to have the renewable energy facility built in the community.

As we move towards increasing use of renewable energy, policymakers must carefully and consciously consider the complicated issues in siting these facilities. The temptation for federal policymakers to choose siting speed via a federal preemption model will be great. FERC’s track record for siting LNG terminals should serve as a cautionary tale for how federal preemption models will work. Serious consideration should, therefore, be given to whether local-based systems can be tweaked to increase siting speed while maintaining local approval authority to insure that local issues continue to receive the attention they need and deserve.

Mr. Kristl is an associate professor of law and the director of the Environmental and Natural Resources Law Clinic at Widener University School of Law’s Wilmington, Delaware, campus. He may be reached at ktkristl@widener.edu.