

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 153, 157 and 375

[Docket No. RM05-31-000; Order No. 665]

Regulations Implementing Energy Policy Act of 2005; Pre-Filing Procedures for  
Review of LNG Terminals and Other Natural Gas Facilities

(Issued October 7, 2005)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations in accordance with section 311(d) of the Energy Policy Act of 2005 (EPAct 2005) to establish mandatory procedures requiring prospective applicants to begin the Commission's pre-filing review process at least six months prior to filing an application for authorization to site and construct a liquefied natural gas (LNG) terminal. Section 311(d) of EPAct 2005, enacted on August 8, 2005, directs the Commission to promulgate such regulations within 60 days after enactment of EPAct 2005. The regulations' mandatory procedures are designed to encourage applicants for LNG terminal siting and construction authority to cooperate with state and local officials, as required by EPAct 2005. The regulations also make the pre-filing process mandatory for prospective applicants for authority to construct related jurisdictional pipeline and other natural gas facilities, as defined in the regulations. The regulations also require a prospective applicant to comply with the pre-filing procedures prior to filing an application to make modifications to an existing or authorized LNG terminal

if such modifications involve significant state and local safety considerations that have not been previously addressed. Under this Final Rule, prospective applicants may elect on a voluntary basis to undertake the pre-filing process prior to filing applications for other facilities subject to the Commission's jurisdiction under the Natural Gas Act (NGA).

EFFECTIVE DATE: The rule will become effective **[insert date thirty days after date of publication in the Federal Register]**.

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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Regulations Implementing Energy Policy Act of 2005; )  
Pre-Filing Procedures for Review of ) Docket No. RM05-31-000  
LNG Terminals and Other Natural Gas Facilities )

FINAL RULE

ORDER NO. 665

(Issued October 7, 2005)

**I. Introduction**

1. Pursuant to section 311(d) of the Energy Policy Act of 2005 (EPAAct 2005),<sup>1</sup> enacted on August 8, 2005, the Commission is required, by October 7, 2005, to promulgate regulations requiring prospective applicants for authorization for the siting and construction of liquefied natural gas (LNG) terminals (as defined in EPAAct 2005) to comply with the Commission's pre-filing review process, beginning at least six months prior to filing an application. As further required by EPAAct 2005, the proposed regulations are designed to encourage applicants to cooperate with state and local officials, a goal also contemplated by the National Environmental Policy Act of 1969 (NEPA).<sup>2</sup> This Final Rule fulfills the Commission's responsibilities under section 311(d) of EPAAct 2005.

2. The mandatory procedures established in this Final Rule require that a

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<sup>1</sup> P.L. 109-58, 119 Stat. 594.

<sup>2</sup> 42 U.S.C. § 4321, *et seq.*

prospective applicant for authority to site and construct an LNG terminal submit information necessary for NEPA pre-filing review of the LNG terminal, as defined in EAct 2005. A prospective applicant for authority to construct related jurisdictional pipeline and other natural gas facilities, as defined in the regulations, is also required to undertake the mandatory pre-filing review process. A prospective applicant is also required to comply with the pre-filing procedures prior to filing an application to make modifications to an existing LNG terminal if such modifications involve significant state and local safety considerations that have not been previously addressed. This Final Rule provides that prospective applicants may elect on a voluntary basis to undertake the pre-filing process prior to filing applications for other facilities subject to the Commission's jurisdiction under the Natural Gas Act (NGA).

## **II. Notice Of Proposed Rulemaking**

3. In response to EAct 2005's directive with respect to LNG terminals, the Commission issued a Notice of Proposed Rulemaking (NOPR) on August 26, 2005, in Docket No. RM05-31-000 setting forth proposed regulations to implement a mandatory pre-filing process for prospective applicants for authority under section 3 of the NGA for the siting and construction of new LNG terminals.<sup>3</sup> As explained in the NOPR, it was already the Commission's policy prior to enactment of EAct 2005 to encourage prospective applicants' use of the Commission's optional pre-filing process for LNG terminal projects, as well as interstate gas pipeline projects in appropriate

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<sup>3</sup> 112 FERC ¶ 61,232 (2005); 70 FR 52328 (September 2, 2005).

cases, to encourage early involvement by the public and governmental agencies, as contemplated by NEPA and Council on Environmental Quality (CEQ) regulations. Further, because it is desirable to maximize early public involvement to promote the wide-spread dissemination of information about proposed projects and to reduce the amount of time required to issue an environmental impact statement (EIS) or environmental assessment (EA) once an application is filed, the Commission's Office of Energy Projects (OEP) developed its current guidelines for going beyond informal discussions into a more formal pre-filing process.<sup>4</sup>

4. As explained in the NOPR, the Commission's experience with the current pre-filing process is that it has been used with much success since its introduction several years ago. It is a process with which the natural gas industry, governmental entities and the public are familiar. However, the current pre-filing process is optional, and EPLA 2005 requires that the Commission implement a mandatory, rather than elective, pre-filing process for review of a planned LNG terminal prior to the filing of an application pursuant to section 3 of the NGA for authorization of the siting and construction of the new LNG terminal. Therefore, the Commission's NOPR used the

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<sup>4</sup> Under the Commission's optional pre-filing process, the Commission's staff provides prospective applicants guidelines which are described at length in the NOPR. As explained in the NOPR, the current guidelines were developed because in certain respects the collaborative pre-filing procedures set forth in section 157.22 of the Commission's regulations, 18 C.F.R. § 157.22 (2005), have proven to be impracticable. Therefore, as proposed in the NOPR, the Commission is eliminating the collaborative process procedures of section 157.22 in conjunction with the promulgation of new regulations in this rulemaking proceeding.

existing guidelines as the basis for proposing regulations to establish the mandatory pre-filing process for new LNG terminals.

5. Although EAct 2005 requires a mandatory pre-filing process only for prospective applicants for new LNG terminals, the Commission must consider in one NEPA document the environmental impacts of the LNG terminal and related facilities. Therefore, the Commission also proposed in the NOPR to make the mandatory pre-filing process applicable to prospective applicants for authority to construct related jurisdictional pipeline and other natural gas facilities. Further, in recognition that the safety concerns raised by modifications to existing LNG terminals in some instances can be largely the same as those addressed by EAct 2005's provisions relating to the siting and construction of new LNG terminals, the Commission proposed in the NOPR to make the pre-filing process mandatory in those instances as well.

### **III. COMMENTS**

6. The NOPR stated that comments were to be filed by September 14, 2005, and that the Commission intended to issue final regulations by October 7, 2005, in order to comply with EAct 2005's 60-day deadline. Comments were filed by 24 interested parties.<sup>5</sup>

7. The largest group of commenters consists of current and prospective owners, operators and developers of LNG terminal facilities. Another group is comprised of natural gas pipeline companies. A third definable group includes the Public Utilities

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<sup>5</sup> The commenters are listed in the Appendix to this Final Rule.

Commission of the State of California (California PUC), the California Energy Commission and the Office of the Governor of the State of Maine (Maine Governor's Office), all representing state and local interests. The Interstate Natural Gas Association of America (INGAA), American Gas Association (AGA), Maryland Conservation Council, Center for Liquefied Natural Gas (Center for LNG) and National Association of Regulatory Utility Commissioners (NARUC) also submitted comments in line with their respective interests.

8. The comments filed in response to the NOPR are discussed at length below, broken down by specific issues. Broadly speaking, however, the comments primarily focused on the NOPR's proposal that the pre-filing process also be mandatory for prospective applicants for authorization of other jurisdictional natural gas facilities necessary to transport regasified LNG from an LNG terminal and for prospective applicants for authorization of modifications to existing LNG terminals; the need for flexibility in the substance and timing of many of the pre-filing requirements; and implementation of EPCRA 2005's directive that the mandatory pre-filing process for new LNG terminals encourage prospective applicants' cooperation with state and local officials. Numerous clarifications of the proposed regulations were also requested.

#### **Related Jurisdictional Pipeline Facilities**

9. El Paso Pipeline Corporation Pipeline Group (El Paso),<sup>6</sup> Exxon Mobil

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<sup>6</sup> The El Paso Pipeline Corporation Group includes ANR Pipeline Company, ANR Storage Company, Bear Creek Storage Company, Blue Lake Gas Storage Company, Cheyenne Plains Gas Pipeline Company, Colorado Interstate Gas Company, El Paso

Corporation (ExxonMobil), Dominion Cove Point LNG, LP (Cove Point), Cheniere LNG, Inc. (Cheniere), Duke Energy Gas Transmission (Duke Energy),<sup>7</sup> and INGAA state that the NOPR's proposal that the mandatory pre-filing procedures apply to prospective applicants for authorization for jurisdictional natural gas facilities related to LNG terminals is inconsistent with, if not contrary to, the mandate of Congress as expressed in section 311(d) of EAct 2005. These commenters point out that EAct 2005's definition of an LNG terminal specifically excludes "any pipeline or storage facility subject to the jurisdiction of the Commission under section 7 [of the NGA]."<sup>8</sup>

10. ExxonMobil asserts that requiring prospective applicants for related pipeline facilities to undergo a mandatory "180-day stand-down period" could prevent the timely expansion of the related LNG project. El Paso contends that the establishment of a minimum six-month pre-filing process for such facilities is inconsistent with the notion of flexibility. Similarly, Duke Energy contends that because LNG terminal proposals have longer lead times, a rigid, six-month pre-filing process for some related pipeline projects will be inappropriate and unworkable.

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Natural Gas Company, Mojave Pipeline Company, Southern LNG Inc., Southern Natural Gas Company, Tennessee Gas Pipeline Company and Wyoming Interstate Company, Ltd.

<sup>7</sup> Duke Energy owns Texas Eastern Transmission, L.P., Egan Hub Storage, L.L.C., Algonquin Gas Transmission, L.L.C., East Tennessee Natural Gas, L.L.C. and Saltville gas Storage Company, L.L.C. Duke Energy is a part owner of Maritimes & Northeast Pipeline, L.L.C. and Gulfstream Natural Gas System, L.L.C.

<sup>8</sup> EAct 2005, section 311(b).



11. Duke Energy also argues that extending the mandatory pre-filing process to prospective applicants for construction authorization under section 7 of the NGA is inconsistent with that section, since section 7 does not place any qualifications on when a natural gas company may file a certificate application. Duke Energy and Cove Point take the position that the Commission's authority pursuant to EPAct 2005 to compel a pre-filing process for pipeline facilities is limited to pipeline facilities which are properly viewed as part of the LNG terminal and for which authorization must be obtained under section 3, rather than section 7, of the NGA. Sempra Global argues that the public interest could be harmed by delaying the construction of other gas facilities needed to serve other customers.

12. ExxonMobil and Duke Energy contend that while the Commission may be required to evaluate the impacts of both the LNG terminal and related natural gas facilities in a single NEPA document, it does not follow that both the LNG terminal project and a related pipeline project must initiate their respective environmental review processes at the same time or follow the same procedures for developing and submitting all of the information necessary to prepare the EA or EIS.

13. A number of commenters seek clarification of the types of LNG-related pipeline projects that might be subject to the mandatory pre-filing procedures. At a minimum, Cove Point asks the Commission to clarify that applicability of the mandatory pre-filing process extends only to pipeline construction to be undertaken contemporaneously with construction or expansion of an LNG terminal. North Baja Pipeline, LLC (North Baja) maintains that the Commission should clarify that the

mandatory pre-filing process will apply only to other natural gas facilities that will interconnect directly with a new LNG terminal.

14. BP Energy asks the Commission to clarify that the pre-filing requirement will be satisfied for minor pipeline facilities to interconnect with a new LNG terminal if the interconnecting pipeline facilities are addressed sufficiently in the LNG project developer's resource reports for purposes of the NEPA document. BP Energy does not believe a pipeline company should have to undertake the pre-filing process for minor interconnecting facilities if adequate information regarding the pipeline facilities is provided by the prospective LNG applicant during the pre-filing process.

15. Duke Power requests clarification that the pre-filing process will not be mandatory for prospective applicants for NGA section 7 authority for capacity expansion projects on existing pipeline systems in order to accommodate throughput originating from a new LNG terminal. INGAA maintains the Commission should clarify that applicants seeking to modify existing pipeline facilities related to existing LNG facilities may continue to use the pre-filing process on a voluntary basis.

### **Commission Response**

16. The Commission recognizes that the definition of "LNG terminal" adopted by EPCRA 2005 specifically excludes "[a]ny pipeline or storage facility subject to the jurisdiction of the Commission under section 7 of the Natural Gas Act." However, the Commission does not agree that this is an expression of Congressional intent that the Commission cannot or should not require a mandatory pre-filing process for jurisdictional gas facilities to be constructed in connection with LNG terminal

facilities. Rather, the Commission believes the exclusion of section 7 facilities from EAct 2005's definition of LNG terminal is better explained by other practical considerations. First, take-away pipelines or other related gas facilities do not involve the state and local safety concerns involved with the siting and construction of an LNG terminal. In addition, the exclusion of section 7 facilities from the definition of LNG terminal avoids making section 7 facilities subject to the provisions of new NGA section 3(e)(3)(B), added by section 311(c) of EAct 2005, which provides that the Commission (1) shall not deny an LNG terminal application because the applicant proposes to use the LNG terminal exclusively or partially for its own gas or an affiliate's gas, and (2) shall not condition an order to require that an LNG terminal offer service to other customers or to regulate the rates or terms of service of the LNG terminal or to require the filing of rate schedules or contracts. In view of these considerations, the Commission concludes that, while EAct 2005 mandates the pre-filing process only for prospective applicants for authority to site and construct new LNG terminals, nothing in EAct 2005 limits the Commission's previous discretion under the NGA to require participation in the pre-filing process by prospective applicants for authority under section 7 of the NGA for related jurisdictional natural gas facilities.

17. The Commission has discussed above and in the NOPR that it needs to evaluate in a single NEPA document the environmental impacts of LNG projects and projects to construct related facilities. Further, an LNG project may prove infeasible if a take-away pipeline or other facilities cannot be approved or will not be constructed. Thus,

to ensure the efficient utilization of the Commission's resources as well as to avoid unnecessary burden on other agencies and stakeholders, it has been Commission staff's practice to initiate the pre-filing process for new LNG facilities only when the prospective applicants for other necessary jurisdictional facilities are ready and willing to participate in the pre-filing process. For the same reasons, it is appropriate to make the pre-filing process mandatory for related jurisdictional facilities now that Congress has mandated a pre-filing process for new LNG terminals.<sup>9</sup>

18. To date, in every LNG project that has utilized the formal pre-filing process, the Commission's staff has required that the pre-filing process cover any related jurisdictional natural gas facilities. The Commission also reiterates that in its experience the current practice has been very successful, and there is a sense of familiarity with the process. Indeed, the Commission has seen no evidence that requiring the environmental analysis for an LNG terminal project to cover related pipeline facilities has impeded the timetable for the LNG terminal, regardless of whether the environmental review for the entire project was conducted during a pre-

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<sup>9</sup> On some occasions, it is necessary for the NEPA document to evaluate the environmental impacts of related facilities which will be non-jurisdictional facilities. The Commission applies a four-prong procedure to determine the need to include non-jurisdictional facilities in an environmental review. See, e.g., Southern Natural Gas Company, 119 FERC ¶ 61,052 at P 80 (2005). The necessary analysis of non-jurisdictional facilities may depend on the jurisdictional applicant's ability to provide sufficient information, since the Commission does not have the authority to compel non-jurisdictional companies' participation in the pre-filing process. However, the Commission does have the discretion to adopt and implement a policy to facilitate environmental review of an LNG project by establishing regulations under which an application for related jurisdictional facilities may be deemed deficient if the applicant did not participate in the pre-filing process.

filing process or after the filing of an LNG terminal application.

19. In view of the above considerations, the Commission is not swayed by arguments that is inappropriate or infeasible to require that the mandatory pre-filing procedures require the participation of prospective applicants for related jurisdictional gas facilities. The prospective applicants for authority to construct necessary related facilities generally are known at the time a prospective LNG applicant initiates the pre-filing process. Therefore, the prospective LNG applicant and the prospective applicants for other related facilities should be able to commence the pre-filing process at the same time. Further, in view of the above-discussed reasons for why it is important that prospective applicants for LNG and related projects undertake the pre-filing process at the same time, the Commission expects there to be few instances where the circumstances justify the exercise of the Director's discretion to approve initiation of the pre-filing process for an LNG terminal project before the prospective applicants for related facilities are known and ready to begin the pre-filing process.

20. The Commission agrees with the commenters, however, that it is important to maintain flexibility in both the substantive and procedural requirements embodied in the pre-filing procedures. Therefore, as proposed in the NOPR, the Commission is providing in new section 375.308(z) of the regulations authority for the Director to act, on a case-specific basis, to make decisions and grant approvals, waivers and modifications, as well as issue guidance, as may be necessary in connection with the use of the pre-filing procedures set forth new in section 157.21. Thus, for example, a

prospective applicant engaged in the pre-filing process for either LNG facilities or other facilities may request that the Director adjust the schedule for filing resources report or waive certain requirements if they are not applicable or unnecessary in view of the previously filed information.

21. In response to those commenters seeking clarification of the types of projects for natural gas facilities related to LNG facilities which will be subject to the mandatory pre-filing procedures, the Commission is providing a definition in section 153.2, Definitions, in Part 153, Applications for Authorization to Construct, Operate, or Modify Facilities used for the Export or Import of Natural Gas. The definition provides:

(e) For purposes of this part and section 157.21, related jurisdictional natural gas facilities means any pipeline or other natural gas facilities which are subject to section 7 of the NGA; will directly interconnect with the facilities of an LNG terminal, as defined in paragraph (d) of this section; and which are necessary to transport gas to or regasified LNG from:

- (1) A planned but not yet authorized LNG terminal; or
- (2) An existing or authorized LNG terminal for which prospective modifications are subject pursuant to section 157.21(e) to a mandatory pre-filing process.

22. This definition clarifies that for facilities related to LNG facilities the mandatory pre-filing process will be mandatory only for prospective applicants for

authority under section 7 of the NGA for the construction or expansion of the capacity of gas facilities directly interconnecting with and related to the construction or expansion of an LNG terminal to import or export LNG. Thus, for example, if a take-away pipeline that directly interconnects with an existing LNG import terminal plans to seek authority under section 7 of the NGA to increase the pipeline's capacity, the pre-filing process will be mandatory for the pipeline's expansion project *if* it is related to a project to expand the LNG terminal's capacity. In the event additional capacity is needed on an existing take-away pipeline because the LNG terminal operator determines that it can increase its send-out volumes without making any modifications to its existing LNG facilities, the pre-filing process would not be a mandatory prerequisite to the Commission's approval of an application by the pipeline for expansion authority under section 7 of the NGA. However, the Commission encourages pipelines to consider in all instances whether undertaking the pre-filing process voluntarily might expedite approval of a contemplated project to expand the capacity of the pipeline's facilities that are directly interconnected with an LNG terminal.

23. In response to the request for clarification regarding "minor" interconnecting pipeline facilities, the Commission clarifies that the pre-filing requirement will be mandatory for prospective applicants for construction authority under section 7 of the NGA to construct pipeline facilities that will directly interconnect with a new LNG terminal. However, as discussed above, the Director OEP may find it appropriate to waive certain filing requirements for a prospective applicant for such related pipeline

facilities to the extent the requirements are unnecessary or the information provided by the prospective LNG terminal applicant in its resource reports is adequate to cover the related pipeline facilities in the NEPA document.

24. If a pipeline plans to seek construction authority under section 7 of the NGA to construct a new direct interconnection with an existing LNG terminal,<sup>10</sup> the LNG terminal operator will need to seek authority under section 3 of the NGA to modify its LNG facilities to accommodate the new pipeline interconnection. In such instances, it will be necessary for the LNG terminal operator to obtain a finding by the Director of OEP as to whether the proposed modifications to the LNG facilities involve significant safety considerations warranting invocation of the mandatory pre-filing procedures. If the Director finds that the mandatory process should apply, it will be necessary for the prospective pipeline applicant for the direct interconnection to participate in the pre-filing process. Again, however, the Director may determine, based on the LNG project developer's resource reports and any other information in the record, that certain filing or other requirements can be waived for the prospective pipeline applicant seeking to construct the direct interconnection with the LNG terminal.

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<sup>10</sup> As several commenters point out, pipeline facilities directly interconnecting with an LNG terminal in order to receive regasified LNG are excluded from the definition of "eligible facilities" for purposes of an interstate pipeline's Part 157 blanket certificate authorizing certain construction activities. See 18 C.F.R. § 157.202(b)(2)(ii)(D) (2005).



**Modifications to Existing LNG Terminal Facilities**

25. The NOPR's proposed new section 157.21(a) provided that the mandatory pre-filing procedures shall apply:

when the Director of OEP finds in accordance with paragraph (e)(2) of this section that prospective modifications to an existing LNG terminal are significant modifications that involve state and local safety considerations.

26. Proposed section 157.21(e)(2) provided:

The Director shall issue a notice making a determination whether prospective modifications to an existing LNG terminal shall be subject to this section's pre-filing procedures and review process. If the Director determines that the prospective modifications are significant modifications that involve state and local safety considerations, the Director's notice will state that the pre-filing procedures shall apply, and the pre-filing process shall be deemed to have commenced on the date of the Director's notice in determining whether the date an application is filed is at least 180 days after commencement of the pre-filing process.

27. ExxonMobil, Cove Point, Cheniere and the Center for LNG state that the NOPR's requirement that the mandatory pre-filing procedures apply to "significant" modifications to existing LNG terminals is inconsistent with, if not contrary to, the mandate of Congress as expressed in EAct 2005. These commenters assert that section 311(d) of EAct 2005 clearly reflects Congress' intent that the mandatory

procedures should apply only to the siting and construction of new LNG terminals.

28. ExxonMobil, Cove Point and DISTRIGAS of Massachusetts LLC (DOMAC) express concern because “significant modifications involving state and local safety considerations” are not defined and the criteria by which the Director would assess any modifications are not clearly set out. DOMAC believes the Director of OEP is given too much discretion.

29. Cove Point asserts that state and local safety considerations are not useful criteria, since they are involved, to some extent, in virtually all LNG terminal applications. ExxonMobil emphasizes that the role of local and state safety officials is not clearly explained and argues that under EPA Act 2005 section 311(d), considerations regarding the need for consultation on safety issues only come into play for new LNG terminals. ExxonMobil also claims that when dealing with modifications to existing LNG facilities or to LNG facilities approved but not yet constructed, the need for resubmission of all 13 resource reports originally filed by the applicant is questionable, since not all of the resource reports deal with safety issues.

30. DOMAC states that the regulations should include the specific guidelines to be used by the Director in making determinations regarding whether modifications to an existing LNG terminal will be subject to a mandatory pre-filing process. ExxonMobil asserts that the NOPR’s mandatory 180-day stand-down period for significant modifications could interfere with timely approval of an expansion of the capacity of an already approved but unconstructed LNG project. Cove Point and other commenters emphasize that modifications at existing LNG terminals generally involve

relatively less environmental impact and shorter time periods.

31. Cove Point adds that if the Commission maintains the requirement that significant modifications follow the mandatory pre-filing process, then prospective applicants should be permitted to submit draft EAs. ExxonMobil argues that if Commission retains this requirement, the regulations should clearly provide that only new safety issues being raised for the first time will justify requiring another pre-filing process for existing and approved LNG projects.

32. DOMAC believes that modifications should be deemed significant only if they are primarily intended to significantly increase an existing LNG terminal's throughput capacity on a sustained basis. As a threshold, DOMAC suggests that the prospective modifications result in at least a 10 percent increase in annual throughput to warrant requiring an existing LNG terminal operator to undertake a 6-month pre-filing process before it can file an application. Similarly, Trunkline LNG Company, L.L.C. (Trunkline LNG) requests that the Commission clarify that the mandatory pre-filing process will not be required for modifications to existing LNG terminals unless the current storage or send out capability is significantly increased.

33. El Paso requests that the final regulations set forth certain modifications to existing LNG terminals which it asserts involve no significant impacts or state and local safety concerns and therefore should qualify as categorical exclusions because there is no need for an EA. Specifically, El Paso recommends that categorical exclusions be codified for miscellaneous rearrangement and replacement of facilities at existing LNG terminals; new facilities installed within an existing structure at an

existing LNG terminal; and new facilities installed within an existing disturbed area and with an estimated cost ceiling under the current cost ceiling for activities under pipelines' Part 157 blanket certificates.

34. In order to prevent 6-month delays of simple modifications to LNG projects that are already approved but not yet constructed, Sempra Global contends the Commission should clarify that modifications appearing to simply require a supplemental EA should not be deemed to be “significant.” Moreover, Sempra Global suggests that the pre-filing process regulations should provide that proposed projects be allowed to exit the pre-filing process before the end of six months if the Director subsequently determines that the proposal appears to require no more than an EA.

#### **Commission Response**

35. As discussed, proposed section 157.21(a) provided that in addition to new LNG terminals and related jurisdictional natural gas facilities, the mandatory pre-filing procedures would apply to any modifications of existing LNG facilities that the Director finds to be “significant modifications that involve state and local safety considerations.” After considering the comments seeking clarification of that provision or an explanation of the criteria by which the Director will evaluate any prospective modification, the Commission agrees the proposed regulatory text needs to be revised.

36. A more precise description of the sort of modifications that the Commission intends to be subject to the mandatory pre-filing process is “modifications that involve significant state and local safety considerations that have not been previously

addressed.” The regulatory text in this Final Rule is revised accordingly. It should be clear from this revision that, when dealing with prospective modifications to existing or approved LNG projects, the emphasis is not on the nature or scale of the modification itself, but rather the significance or scale of the modification’s impact on state or local safety considerations.

37. As discussed above, the Commission recognizes that section 311(d) of EAct 2005 mandates the minimum 6-month pre-filing process only in connection with applications for the siting, construction and operation of new LNG facilities.

However, as in the case of related jurisdictional natural gas facilities, nothing in EAct 2005 or the NGA in any way limits the Commission’s authority to include within the purview of the mandatory pre-filing rules modifications to an existing or approved LNG terminal that involve significant state and local safety considerations that have not been previously addressed.

38. Further, section 311(d) of EAct 2005 adds a new section 3A(b) to the NGA which defines state and local safety considerations to include: (1) the kind and use of the facility; (2) the existing and projected population and demographic characteristics of the location; (3) the existing and proposed land use near the location; 4) the natural and physical aspects of the location; (5) the emergency response capabilities near the facility location; and (6) the need to encourage remote siting. Although not all of these factors may have application to a given project to make prospective modifications to an existing or approved LNG terminal, they provide the Director with specific criteria

for evaluating any proposed modifications.<sup>11</sup>

39. In addition, in section 157.21(e)(2) of the final regulations, the Commission has identified certain prospective modifications that will be subject to the mandatory pre-filing process. As examples, the new regulatory text cites the addition of LNG storage tanks; increased throughput which will require additional tanker arrivals or the use of larger vessels; and changing the purpose of the facility from peaking to base load.

40. In any instance where the Director determines that proposed modifications warrant application of the mandatory pre-filing procedures, the Director can determine during the informal consultation required under paragraph 157.21(c) if an applicant-prepared EA will be appropriate.

41. In view of the clarification and regulatory text revisions discussed above, the Commission does not believe that it is necessary to include in the final regulations additional criteria or definitions for the Director's use in reaching a determination whether prospective modifications to an existing or approved LNG terminal should be subject to a mandatory pre-filing process. However, the Commission believes that it may be possible in the future to identify modifications to existing or approved LNG terminals that can be categorically excluded, as suggested by some commenters, from

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<sup>11</sup> Section 385.1902(a) of the Commission's regulations, 18 C.F.R. § 385.1902(a) (2005), provides that any action by the Director under delegated authority is a final agency action subject to a request for rehearing under Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.713 (2005). Thus, in any instance where the Director finds that prospective modifications at an existing LNG terminal does or does not involve significant state or local safety concerns warranting a requirement that the prospective applicant undertake the pre-filing process, the Director's finding would be subject to a request for rehearing by the Commission.

the need for an environmental assessment and the scope of the mandatory pre-filing procedures. It also may be possible in the future to adopt regulations, as suggested by a number of commenters, to provide blanket authority for LNG terminal operators to undertake certain routine activities subject to standard environmental conditions, as pipelines can under their Part 157 blanket certificates. However, in order to undertake any such initiatives, the Commission first needs the benefit of the experience that will come with application of this Final Rule's procedures.

### **Prospective Applicants Already Engaged in the Pre-Filing Process**

42. Broadwater Energy (Broadwater) and North Baja ask that the Commission clarify in the final rule that the mandatory pre-filing process regulations are to be implemented prospectively and shall not apply to prospective applicants for LNG projects already engaged in the voluntary pre-filing process prior to the effective date of the pre-filing process regulations.

### **Commission Response**

43. The Commission denies Broadwater's and North Baja's requested clarification. New section 3A(a) of the NGA, as added by section 311(d) of EPAct 2005, provides that the Commission's "regulations shall require that the pre-filing process commence at least 6 months prior to the filing of an application for authorization to construct an LNG terminal . . . ." In any case where a prospective applicant for authority to site and construct a new LNG terminal was already engaged in the Commission's pre-filing process on the date of enactment of EPAct 2005, the Commission believes that it is consistent with Congressional intent to require at least a 6-month pre-filing process to

ensure that there has been opportunity for the thorough exploration of state and local safety considerations, as envisioned by the section 311 of EAct 2005. However, the Commission does not believe that it is inconsistent with this objective to take into account the time which a prospective applicant has already been involved in the pre-filing process. Therefore, the Commission will consider the 6-month period to have begun on the date on which the prospective applicant for authority to site and construct a new LNG terminal or related facilities was authorized to engage in the pre-filing process.

#### **Jurisdiction over Facilities used to “Process” Gas**

44. Trunkline LNG and INGAA request the Commission to clarify that it is not seeking through the LNG pre-filing process regulations to assert jurisdiction over the processing of natural gas. This clarification request is spurred by the fact that EAct 2005 defines “LNG terminal” to include all natural gas facilities that are used to “process” natural gas.<sup>12</sup> According to Trunkline LNG and INGAA, the intent of Congress, in including as part of an LNG terminal those facilities that process gas, was to describe the “process” of converting liquid natural gas back to its gaseous state, rather than, for example, the non-jurisdictional processing of natural gas where liquids are removed from a raw gas stream for their economic value.

#### **Commission Response**

45. Section 311 of EAct 2005 adds a definition of "LNG terminal" to section 2 of the NGA. The definition states, in pertinent part, that "LNG Terminal means all

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<sup>12</sup> See EAct 2005 section 311(b)(11).



natural gas facilities located onshore or in state waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas . . . ."

46. New section 3(e)(1) of the NGA, as added by section 311 of EPAct 2005, states that "[t]he Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."

47. Congress specifically provided for the new NGA definition of LNG terminal to include facilities to "gasify, liquefy, or process natural gas." There would seem to be no purpose for the inclusion of the term "process" if the Commission were to interpret it, as urged by the commenters, as necessarily having exactly the same meaning as the term "gasify". However, the Commission agrees that its jurisdiction under the legislation with respect to processing of natural gas is limited to the siting, construction and operation of processing facilities that are part of an LNG import or export terminal and therefore included in the facilities for which a prospective applicant must seek authorization under section 3 of the NGA.

48. The Commission does not view EPAct 2005 as having in any way expanded the scope of section 7 of the NGA to processing facilities or processing as an activity. Thus, for example, if a company plans to construct facilities in proximity to a planned LNG terminal in order to remove liquids from regasified LNG sent out from the LNG terminal, the processing facilities will be neither import facilities for which NGA section 3 authorization is necessary nor facilities for the interstate transportation of gas for which NGA section 7 authority would be necessary. That being the case, the Commission will have no authority to authorize the siting or construction of facilities

to process LNG or regasified LNG except to the extent such facilities are part of an LNG terminal. However, notwithstanding the non-jurisdictional status of any processing facilities, the environmental review of the LNG terminal project would have to include any facilities to be constructed for the purpose of processing regasified LNG from a new LNG terminal.

### **Pipeline Facilities to Receive Regasified LNG from Terminals in Federal Waters**

49. Woodside Natural Gas, Inc. requests that the Commission clarify application of the mandatory pre-filing process to companies that may have filed permit applications pursuant to the Deepwater Port Act with other federal agencies for pipelines and other facilities that will be located in state waters but will be used to transport regasified LNG from a terminal located in federal or deepwaters.

### **Commission Response**

50. A prospective applicant to construct a pipeline that will transport regasified LNG from an LNG terminal in federal or deepwater will not be subject to the Commission's mandatory pre-filing process. To the extent authorization under section 7 of the NGA is necessary for a portion of a pipeline to access an LNG terminal in federal or deepwater, the Commission encourages prospective applicants to undertake the pre-filing process on a voluntary basis. The Commission notes, however, that the U.S. Coast Guard is the agency responsible for approving the siting and construction of an LNG terminal located in federal waters, and it is for the U.S. Coast Guard, not the Commission, to consider in a single NEPA document the environmental impacts of such an LNG terminal and any related pipeline facilities, including pipelines over

which the Commission retains jurisdiction under the NGA.

### **Need for Flexibility – Time Requirements**

51. Cheniere, Cove Point, Nisource, Inc. (Nisource Pipelines),<sup>13</sup> Duke Energy, and INGAA are concerned that the NOPR's approach is in one way or another too rigid and too sharp a departure from the voluntary pre-filing program heretofore in place. A number of commenters state that they believe a more flexible pre-filing process is necessary and appropriate. Duke Energy states that the regulations should expressly provide that the Director has ability to modify procedures and deadlines to reflect unique circumstances.

52. Cove Point and Duke Energy assert that, unlike the flexible pre-filing process currently in use, many of the timelines and requirements proposed in the NOPR are unreasonable and unduly rigid, which could substantially lengthen the pre-filing process. Duke Energy comments that the inflexibility of the pre-filing process could have a "chilling effect" on prospective applicants who might shy away from voluntarily participating in the pre-filing process because they will not find it suitable to the circumstances of their proposed project. According to Cove Point, many of the deadlines should be established on a case-by-case basis, not on a rigid, tight schedule. Cheniere states that the Commission should consider a more flexible timeline for filing the application. Williston Basin Interstate Pipeline Company (Williston Basin) also

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<sup>13</sup> Nisource, Inc. owns and operates four interstate pipelines: Columbia Gas Transmission Corporation, Columbia Gulf Transmission Company, Crossroads Pipeline Company and Granite State Gas Transmission, Inc.

comments that certain requirements may not be necessary in a given case, yet the regulations seem to eliminate discretion in the submittal of certain information. As an example, Williston Basin offers the requirement that a prospective applicant set up a website, regardless of the fact that public participation in a given case might not justify the time and expense involved.

53. Several commenters direct their attention to specific time requirements. INGAA, for example, states that the most onerous part of the pre-filing process is the preparation of Resource Reports 1 through 12, and therefore, the time for filing those reports should be extended from 60 to 120 days. ExxonMobil states that since decisions by the Director are triggering events for deadlines that a prospective applicant must meet, the Commission should impose in the regulations a time limit for the Director to act on requests to commence the pre-filing process and requests for findings on whether proposed modifications to existing or previously approved LNG terminals must be subject to the pre-filing process. Williston Basin is concerned that the timing requirements of proposed sections 157.21(f)(9) and 157.21(f)(10) are tied to the end of the scoping comment period, but the regulations do not state when the scoping period will begin or end.

### **Commission Response**

54. The Commission acknowledged in the NOPR that, heretofore, when a prospective applicant has submitted a request to undertake the Commission's optional pre-filing process, it generally has been seven to eight months before an application

was filed.<sup>14</sup> However, the minimum pre-filing period mandated by Congress for new LNG terminals is six months. Therefore, the NOPR proposed filing specifications in section 157.21(f) structured so that the potential exists for the pre-filing process to be completed in six months.

55. As discussed above, the Commission recognizes the need for flexibility in the application of the substantive and procedural requirements of the pre-filing procedures, in both mandatory and elective situations. The success of the pre-filing guidelines used by the Commission's staff and prospective applicants in recent years is attributable in significant measure to their flexibility. It is obvious that more time may be needed for the pre-filing process for some projects than for others. Further, in situations where the prospective applicant is not required to undertake the pre-filing process, there should be discretion for shortening the pre-filing process, if it can be completed in less than six months. The Commission also recognizes that in some instances certain required filings may not be applicable or may not need to be filed again, if sufficiently up-to-date information has been filed in a previous proceeding or by another prospective applicant in its resources reports for a contemporaneous related project.

56. In recognition of the above considerations, the Commission proposed in the NOPR to revise section 375.309(z) of the regulations to delegate to the OEP Director the authority to "[a]pprove, on a case-specific basis, and make such decisions and issue

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<sup>14</sup> 112 FERC ¶ 61,232 at P 6 (2005).

guidance as may be necessary in connection with the use of the pre-filing procedures in § 157.21, Pre-filing procedures and review process for LNG terminal facilities and other natural gas facilities prior to filing of applications. The commenters' concerns that the pre-filing procedures may be too rigid may be due to the Commission's failure to emphasize in the NOPR the discretion that the Director will have in the pre-filing process to make appropriate adjustments to schedules and modifications or waivers of filing requirements. Based on experience with the pre-filing procedures in recent years, the Commission sees no need for the regulations to establish time limits, as suggested by some commenters, for the Director to take certain actions, such as granting or denying requests to commence the pre-filing process and reaching findings on whether proposed modifications to an existing or previously approved LNG terminal must be subject to the pre-filing process.

#### **Waterway Suitability Assessment (WSA)**

57. Proposed section 157.21(f)(13) of the regulations would have required a prospective applicant to certify at the commencement of the mandatory pre-filing process that a Follow-on WSA will be submitted to the U.S. Coast Guard no later than when the application for LNG terminal facilities authorization is filed with the Commission. Cheniere and Cove Point point out that, heretofore, a WSA has not been mandatory for all proposed projects. Cheniere observes that a WSA has no application where there are no marine issues, and Cove Point adds that the requirement in proposed section 157.21(a)(1) that a prospective applicant file a preliminary WSA

with the U.S. Coast Guard when it files its initial filing seeking initiation of the pre-filing process effectively lengthens the process well beyond six months.

### **Commission Response**

58. In response, the Commission is adding section 157.21(d)(12) to require that a prospective applicant certify in its initial filing seeking initiation of the pre-filing process that a Letter of Intent (LOI) and a Preliminary WSA have been submitted to the U. S. Coast Guard. In addition, the Commission is revising proposed 157.21(f)(13) to require that a prospective applicant file, upon the Director's issuance of a notice commencing the prospective applicant's pre-filing process, a certification that a Follow-On WSA will be submitted at the time the application is filed or that no LOI or WSA is required by the U.S. Coast Guard.

### **Cooperation with State and Local Officials and Other State and Local Issues**

59. The California PUC and the California Energy Commission assert that the NOPR's proposed regulations fail to adequately ensure that prospective applicants for LNG facilities will cooperate with state and local officials. The Maine Governor's Office states that objective, timely, accurate and project-specific information is essential in order to ensure that all pertinent federal, state and local decisions are made only after a thorough identification and evaluation of all environmental, public safety and other issues. The California PUC states that while the proposed regulations ensure that Commission staff receives all needed information, the only requirement regarding state and local agencies is that the prospective applicant provide in its initial filing a list of relevant state and local agencies in the project area with permitting requirements

and a statement indicating whether these agencies are aware of applicant's intent to use the pre-filing process and have agreed to participate in the process.

60. The California PUC emphasizes that EAct 2005 added several new provisions to the NGA to ensure the opportunity for participation by a state commission and, if not the same, the agency appointed by the governor pursuant to new section 3(A)(b) of the NGA added by section 311(d) of EAct 2005.<sup>15</sup> The California PUC asserts that the Commission should require that prospective applicants provide such state agencies notice of the pre-filing process and all information provided to Commission staff during the process. In addition, the California PUC states that to ensure state and local officials' meaningful participation in the proceeding, prospective applicants should be required to serve their formal applications upon the appropriate state commission and, if not the same, the governor-designated agency. The California Energy Commission urges the Commission to ensure in the final rule that state and local governments will

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<sup>15</sup> As amended by EAct 2005, new section 3(A)(b) of the NGA provides that the governor of a state in which an LNG terminal is proposed to be located shall designate a state agency and that the Commission shall consult with such state agency regarding state and local safety considerations prior to acting on the application for the proposed LNG terminal. New section 3(A)(c) of the NGA provides that the state agency may furnish an advisory report on state and local safety considerations to the Commission not later than 30 days after an application for LNG facilities is filed with the Commission and that the Commission shall respond specifically to the issues raised by the state agency. New section 3(A)(d) of the NGA provides that after an LNG terminal is operational, the state agency may conduct safety inspections, report any alleged safety violations to the Commission, and the Commission shall transmit information regarding such allegations to the appropriate federal agency. New section 3(e)(2)(B) of the NGA requires the Commission to give notice of the hearing on an application for the siting and construction or expansion of an LNG terminal to the state commission and, if not the same, the governor-appointed state agency.



have timely access to non-internet public (NIP) and critical energy infrastructure (CEII) information.

61. In particular, the California PUC and California Energy Commission assert that prospective applicants should be required to file information specifically addressing state and local safety concerns that need to be addressed in the safety advisory report, which section 311(d) of EAct 2005 requires the governor-appointed agency to submit within 30 days after an application is filed. As proposed, states the California PUC, there is no regulation requiring that a prospective applicant notify the state commissions and governor-designated agencies recognized by EAct as having substantial roles in the pre-filing process for LNG projects.

62. The California Energy Commission also argues that the deadlines for prospective applicants to file draft Resource Report 13 and a WSA do not provide adequate opportunity for state and local agencies to review these safety-related materials before a state's safety advisory report is due. The Maine Governor's Office states that in addition to needing more time for state and local officials to assess these reports, the final rule should require that Resource Report 13 contain information needed to facilitate local and state officials' assessments of public safety issues and preparation of states' advisory safety reports.

63. The Maine Governor's Office also states that the Commission should clarify the Commission staff's role in the pre-filing process expressly includes cooperation with the applicant and state and local agencies to facilitate development of the state-local public safety plan and other reviews. In addition, the Maine Governor's Office

contends that the Commission should revise proposed section 157.21(d) to require the prospective applicant to describe the specific means and actions by which it intends to coordinate with state and local officials to facilitate development of the safety plan. Moreover, the Maine Governor's Office states that section 157.21(f) should establish milestones regarding consultation with state and local officials to facilitate safety studies and development of safety plans; section 157.21(d) should be amended to require a prospective applicant to indicate its schedule and plans for addressing compliance with permitting and other local land use requirements; the Commission's staff should consult with applicants and state and local officials regarding the nature and contents of resource reports; and the final rule should specify that a prospective applicant's project website provide download access to project-related information submitted during the pre-filing process and that the project applicant make hard copies of such documents available for inspection in the community in which the LNG terminal will be located.

### **Commission Response**

64. In response to the comments, the Commission has revised the regulatory text in section 157.21(d)(5) to require, in the case of prospective applicants for LNG facilities, that the list of relevant federal and state agencies (1) identify the agency designated by the governor of a state for purposes of consulting with the Commission regarding a new LNG terminal project to be located in the state or regarding modifications to an existing or approved LNG terminal which would raise significant new safety concerns, and (2) state that the governor-designated agency is aware of the prospective

applicant's intention to use the pre-filing process. In addition, the Commission has revised the regulatory text in section 157.21(d)(11) to require that a prospective applicant's Public Participation Plan describe how the prospective applicant intends to respond to requests for information from the governor's designated agency for consultation regarding state and local safety considerations with respect to LNG facilities.

65. Once the pre-filing process is under way it is the responsibility of each stakeholder, including a state agency, to make the prospective applicant aware early in the process of the information it needs to perform its functions. State agencies' officials can make known at the beginning or early in the pre-filing process what materials they wish to receive. Of course, a state agency may adopt its own regulations to require that prospective applicants also file information with the state agency. However, the Commission does not believe this is necessary. If a prospective applicant is not forthcoming in providing requested information, a state agency may request that the Commission's staff or OEP Director provide assistance to ensure that the state agency receives in a timely manner the information needed to fulfill its responsibilities.<sup>16</sup>

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<sup>16</sup> The Commission also notes that much, if not most, of the information and materials filed by a prospective applicant during the pre-filing process will be in the Commission's eLibrary and accessible and downloadable via the Commission's Home Page on the internet (<http://www.ferc.gov>), as well the Commission's Public Reference Room. The majority of filings with the Commission are available on eLibrary within 2 days. An agency also may register for an eSubscription to be notified of filings in a particular docket number and may contact the Administrative Law Section of the

66. The Commission emphasizes that is not aware of there being a problem in past pre-filing processes of prospective applicants' failing to cooperate in providing state agencies with such materials in a timely manner. Prospective applicants generally appreciate the fact that it is in their own best interests to cooperate with state and local agencies during the pre-filing process in order to expedite completion of the pre-filing process and the ultimate success of their planned projects. Further, since the Commission believes that EAct 2005's mandate that the Commission's regulations must require that prospective applicants for authority to site and construct new LNG terminals cooperate with state agencies, the Commission believes that this objective is significantly promoted by its implementation of a mandatory pre-filing process for new LNG terminals, as required by EAct 2005. In any event, however, the Commission wishes to make clear from the outset that it does not read the legislation as obligating the prospective applicant to provide state agencies with material that is not clearly required by those state agencies' regulations for the permits or purposes in which those agencies are involved. Not all state agencies may want to receive all of the information filed by a prospective applicant with the Commission, and prospective applicants likely would be unnecessarily

burdened by a rigid requirement that they provide state agencies with pre-filing materials that a state agency has not specifically indicated that it wants to receive.

67. As discussed in the NOPR, the pre-filing procedures set forth in the new regulations, like the current pre-filing procedures, require that prospective applicants engaged in the pre-filing process comply with the environmental conditions in Part 380 of the Commission's regulations. The Part 380 regulations admonish prospective applicants to file with appropriate state agencies as early as possible to avoid having the various permitting processes run consecutively rather than concurrently. The Part 380 regulations also require that prospective applicants submit extensive information and documentation which will be in the public record for the pre-filing process.<sup>17</sup>

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<sup>17</sup> During the pre-filing process under the existing guidelines and under the new regulations codified by this Final Rule, prospective applicants have to comply with a number of regulations that require the submission of information relevant to state agencies' responsibilities or cooperation with such agencies. Section 380.3(b)(3) requires that a prospective applicant consult with appropriate federal, regional, state, and local agencies during the planning stages of a project to ensure that all potential environmental impacts are identified. Section 380.3(b)(4) requires that the prospective applicant submit applications for all federal and state approvals as early as possible in the planning process. Section 380.3(b)(5) requires that the prospective applicant notify the Commission's staff of all other federal actions required for completion of a project so that the Commission's staff may coordinate with other interested federal agencies. Section 380.12(c)(2)(i)(D) requires that the prospective applicant provide any correspondence with the appropriate State Historic Preservation Officer or duly authorized Tribal Historic Preservation Officer for tribal lands regarding whether properties eligible for listing on the National Register of Historic Places would be affected by the project. Section 380.12(c)(2)(i)(E) requires that the prospective applicant provide correspondence with the U. S. Fish and Wildlife Service and National Marine Fisheries Service regarding the potential impact of facilities on federally listed threatened and endangered species. Section 380.12(c)(2)(i)(F) requires,

Much of this record information is relevant to agencies with responsibilities relating to state and local safety concerns and can be requested by such agencies. Given that longer lead times may be required for certain state authorizations which are required under federal mandate, it is in the prospective applicant's best interest to file as soon as possible all information that relevant state agencies will want to consider.<sup>18</sup>

68. Based on the Commission's experience in recent years, the pre-filing process has allowed opportunity and time for state agencies to participate, request information

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in the case of facilities that will be located in a designated coastal zone management area, that a prospective applicant provide a consistency determination or evidence that the owner has requested a consistency determination from the state's coastal zone management program. Section 380.12(j)(12) requires that a prospective applicant demonstrate that applications for rights-of-way or other land use for a project will be filed with federal land-management agencies with jurisdiction over land that would be affected by the project.

<sup>18</sup> The California Energy Commission raises the need for appropriate state agencies to have timely access to critical energy infrastructure information (CEII). Section 388.112 of the Commission's regulations, 18 C.F.R. § 388.112 (2005), sets forth procedures to be followed by any person submitting documents containing CEII. These procedures apply only to submissions of CEII to the Commission. CEII, as defined in section 388.113 of the regulations, includes information about proposed or existing natural gas facilities that could be used by a person planning an attack on critical energy infrastructure. The Commission's procedures in section 388.112 are designed to ensure that CEII is not placed in the Commission's public records. Section 157.21(h) of this Final Rule's regulations provides that a prospective applicant using the pre-filing procedures of this section shall comply with the procedures in § 388.112 for the submission of documents containing critical energy infrastructure information, as defined in § 388.113. However, the Commission strongly encourages prospective applicants to ensure that CEII information is made available at the same time to the Commission and the state agency designated by the Governor pursuant to new section 3(A)(b), as added by section 311(d) of EAct 2005, for consultation with the Commission for purposes of EAct 2005's provisions relating to LNG terminal facilities. The Commission's regulations in no way hinder a prospective applicant providing CEII information as is required by permitting agencies as part of their normal deliberations.

and formulate and present their views. However, the Commission will monitor the operation of the pre-filing procedures and regulations adopted by this Final Rule in order to determine whether further action is needed to address issues or problems relating to the pre-filing process. State agencies as well as other stakeholders may at any time bring to the Commission's attention perceived problems in how the pre-filing procedures are working.

### **Section 153.12**

69. The NOPR proposed to remove section 153.12 because it refers to the collaborative procedures in section 157.22, which the Commission is eliminating in view of the new pre-filing procedures in section 157.21. BP Energy states that to avoid any confusion as to the applicability of the mandatory pre-filing regulations of Part 157 to applications under NGA section 3 for authorization to site, construct, modify and operate LNG terminals, an express statement to that effect, such as is included in section 153.12 needs to be retained. Consequently, states BP Energy, the Commission should not remove section 152.12 in its entirety as proposed in the NOPR.

### **Commission Response**

70. The Commission agrees that it will be useful to preserve section 153.12's reference to the applicability of the definitions in section 157.1, as well as expressly confirm the applicability of the mandatory pre-filing procedures contained in section 157.21 to applications under section 3 of the NGA filed under subpart B of Part 153. Accordingly, the Commission will revise section 153.12 as suggested by BP Energy.

**Section 157.21(d)(2)**

71. Reacting to the requirement in proposed section 157.21(d)(2) that the prospective applicant's initial filing requesting the pre-filing process include a "description of the zoning and availability of the proposed site and marine facility location," Keyspan LNG, L.P. (Keyspan) seeks clarification confirming that state and local zoning laws are preempted by the NGA and that the Commission will not be controlled by state and local administration of zoning laws in making its determination with respect to an application to construct LNG facilities pursuant to NGA section 3.

**Commission Response**

72. Proposed section 157.21(d) requires a prospective applicant's submission of information of the type heretofore included in a written request to use the voluntary pre-filing process. The Commission considers this information essential to its staff being able to fulfill its role in the pre-filing process. As described in the NOPR, that role includes: (1) assisting the prospective applicant in developing initial information about the proposal and identifying affected parties (including landowners and agencies); (2) issuing a Scoping Notice and conducting scoping for the proposal; (3) facilitating issue identification and resolution; (4) conducting site visits, examining alternatives, meeting with relevant federal, state and local and other stakeholders, and participating in the prospective applicant's public information meetings; (5) initiating the preparation of a preliminary EA or preliminary DEIS, which may include cooperating agency review; and (6) reviewing draft resource reports for the application that is to be filed with the Commission.



73. Proposed section 157.21(d)(2)'s request for "a description of the zoning and availability of the proposed site and marine facility location" should be viewed with only the above-described purposes in mind. While current zoning and availability are considerations that the Commission will take into account in weighing the public interest, section 157.21(d)(2) should not be interpreted as suggesting that the Commission will ultimately be controlled by state and local administration of zoning laws in making its determination regarding whether approval a proposed site for LNG terminal facilities is in the public interest.

**Section 157.21(f)(2)**

74. BP Energy states that proposed section 157.21(f)(2) appears to assume but is not clear that the Director will identify the third-party contractor at the time that the Director issues its notice commencing the applicant's pre-filing process. BP Energy asks that the Commission clarify this section.

**Commission Response**

75. The Commission clarifies that, consistent with current practice under the pre-filing procedures, the Director's notice will identify the third-party contractor. The Final Rule reflects that practice in section 157.21(e)(2).

**Section 157.21(f)(3)**

76. Section 157.21(f)(3) requires a prospective applicant using the pre-filing procedures to inform "stakeholders" of the proposed project within 14 days of the Director's issuance of a notice commencing the pre-filing process. INGAA and Cove Point ask the Commission to clarify the term "stakeholder." INGAA recommends that

the prospective applicant be required to contact affected agencies, public officials and known interest groups. The Maryland Conservation Council, stressing the benefits of non-governmental organization (NGO) participation, urges the Commission to require prospective applicants to contact regionally active NGOs prior to initiation of the pre-filing process and scoping process. The Maryland Conservation Council contends that environmental NGO stakeholders can put forward alternative points of view and distribute accurate information, thereby ensuring against rumors and uncertainties surrounding the proposed project and the pre-filing process. As a result, the Maryland Conservation Council asserts that changes to the engineering and design can occur early in the project's timetable, citing the Cove Point LNG facility situation as an example of the benefits of NGO involvement.

### **Commission Response**

77. Stakeholder means any agency or identifiable individual who may have a stake in the outcome of the project. This would include federal permitting agencies, state commissions and, if not the same, agencies designated by governors for purposes of consulting with the Commission on state and local safety considerations, state and local permitting agencies (especially those for federal authorizations as defined in federal legislation), local responders, affected tribes, appropriate NGOs, and affected landowners as defined in section 157.6(d) of the regulations. The Commission believes it is sufficient that appropriate NGOs be informed in the same manner and at the same time as all other stakeholders.

**Applicability of Commission's Ex Parte Rules**

78. Cove Point states that the Final Rule should clarify that the Commission's ex parte rules do not prohibit communications with the Commission's staff during the pre-filing process phase of a project.

**Commission Response**

79. Since there is no right under the Commission's regulations for interested persons to intervene in the pre-filing process, the process is not subject to Rule 2201 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2201, which governs off-the-record communications.

**Gas Interchangeability Issues**

80. AGA urges the Commission to address the issue of gas interchangeability by requiring that a "gas supply resource report" assessing the impact of the imported LNG be incorporated into the pre-filing process. Furthermore, AGA contends that stakeholders to be contacted at the pre-filing stage should include those utilities that might receive imported LNG in their market areas, so that they might be able to resolve any gas interchangeability issues.

**Commission Response**

81. On May 19, 2005, the Commission issued a notice in Docket No. PL04-3-000 to seek comments on issues relating to gas interchangeability and the need to assure interchangeability of gas supplies in situations where regasified LNG is introduced into the market. The Commission is considering the comments and what regulatory steps it should take relating to gas interchangeability issues. Pending further action in Docket

No. PL04-3-000, the Commission finds that it is premature to determine the extent to which it will be necessary or appropriate for such issues to be raised in a pre-filing proceeding under this Final Rule's procedures. The OEP Director, however, will have the discretion to determine whether gas interchangeability issues need to be addressed in a particular pre-filing proceeding. If the Director finds that such issues should be addressed in the pre-filing proceeding, local utilities concerned about such issues will be stakeholders.

## **II. SUMMARY OF REGULATIONS**

82. As discussed above and proposed in the NOPR, this Final Rule, in large measure, adopts the formal pre-filing process that the Commission currently utilizes when prospective applicants voluntarily elect to use the process. However, in this Final Rule, the Commission is making several revisions to the regulatory text set forth in the NOPR. First, section 153.2 of the regulations is amended by a new paragraph setting forth the definition of "LNG terminal" in the new section 3A of the NGA added by section 311(d) of EPLA 2005:

(d) LNG Terminal means 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 a waterborne vessel, but does not include:

(1) Waterborne vessels used to deliver natural gas to or from any such facility; or

(2) Any pipeline or storage facility subject to the jurisdiction of the Commission under section 7 of the Natural Gas Act.

83. Section 153.2 of the regulations is amended by also adding the following definitions:

(e) For purposes of this part and section 157.21, related jurisdictional natural gas facilities means any pipeline or other natural gas facilities which are subject to section 7 of the NGA; will directly interconnect with the facilities of an LNG terminal, as defined in paragraph (d) of this section; and which are necessary to transport gas to or regasified LNG from:

- (1) A planned but not yet authorized LNG terminal; or
- (2) An existing or authorized LNG terminal for which prospective modifications are subject pursuant to section 157.21(e) to a mandatory pre-filing process.

(f) Waterway Suitability Assessment (WSA) means a document used by the U.S. Coast guard in assessing the suitability of a waterway for LNG marine traffic pursuant to 33 C.F.R. §127.007. The Preliminary WSA initiates the process of analyzing the safety and security risks posed by proposed LNG tanker operations to a

port and waterways, and the Follow-On WSA provides a detailed analysis of the same issues.

84. A new paragraph (c) is added to section 153.6 to state that no application for a new LNG terminal, modifications to an existing or approved LNG terminal found by the Director to involve significant, new safety considerations, or related jurisdictional gas facilities may be made before 180 days after the date of a notice by the OEP Director announcing commencement of a prospective applicant's pre-filing process under the procedures of section 157.21, as discussed above and described below. A new definition is added to section 157.1 to provide that, for the purposes of section 157.21, "Director" means the Director of the Commission's Office of Energy Projects.

85. New section 157.21 establishes the pre-filing process for LNG terminal facilities, as well as other natural gas facilities. The procedures are mandatory for any prospective applicant for authorization to site, construct and operate facilities included within the definition of "LNG terminal," as defined in proposed section 153.2(d), and for any related jurisdictional natural gas facilities. The pre-filing procedures also are mandatory in cases where the Director finds that modifications to existing LNG terminal facilities involve significant state and local safety considerations that have not been previously addressed. As discussed below, the pre-filing review process remains voluntary for natural gas facilities not directly interconnected with LNG terminals.

86. To initiate the pre-filing review process under new section 157.21, a prospective applicant for LNG terminal facilities is required to make a filing containing certain material, as described below. New section 157.21(a)(2) provides that an application

for LNG terminal facilities or related jurisdictional gas facilities (1) shall not be filed until at least 180 days after the date that the Director issues notice of the commencement of the prospective applicant's pre-filing process, and (2) shall contain all the information specified by Commission staff.

87. The information that a prospective applicant is required to submit pursuant to section 157.21(a)(2) includes draft environmental material in accordance with the provisions of Part 380 of the regulations implementing the Commission's procedures under NEPA. The requirements in Part 380 of the Commission's regulations supplement CEQ's regulations.<sup>19</sup> The procedures in Part 380 essentially follow CEQ procedures concerning early and efficient review of environmental issues, public notice and participation, scoping, interagency cooperation, comments, and timing of decisions on proposals.

88. The environmental material required by the Part 380 regulations is embodied in sections 380.12, 380.13, 380.14 and 380.15 and Appendix A to Part 380. Section 380.12 describes resource reports which list, in detail, the information the Commission needs to conduct an environmental review of a proposal under NEPA. It consists of 13 resource reports ranging from a detailed project description to descriptions of the existing environment and potential impacts on environmental resources such as water use and quality, fish, wildlife and vegetation, cultural resources, land use and aesthetics, and air and noise and, for LNG terminal facilities, engineering and design material.

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<sup>19</sup> The CEQ's regulations are set at 40 C.F.R. Parts 1500 through 1508 (2005).

89. Sections 380.13 and 380.14 provide procedures and detailed descriptions of what the prospective applicant is expected to do to help the Commission comply with its obligations under the Endangered Species Act and the National Historic Preservation Act. Section 380.15 identifies best practices for the prospective applicant to follow when siting and maintaining facilities. Appendix A to Part 380 is a checklist of minimum environmental filing requirements.

90. Currently, when a prospective applicant elects to undertake the Commission's voluntary pre-filing procedures, it is required to use or file, as appropriate, all of the above-described Part 380 materials as it formulates its project and then files the application with the Commission. The procedures require that prospective applicants required or requesting to use the pre-filing process file draft environmental material in accordance with the provisions of Part 380 of the regulations implementing the Commission's procedures under NEPA, as described above. This will allow the Commission to review the environmental materials and make suggestions on how they can be improved before the filing of the application.

91. Section 157.21(a)(3) requires that prospective applicants for LNG terminal facilities and any related jurisdictional gas facilities provide any necessary information for the environmental review. Information also may be required for facilities not subject to the Commission's NGA jurisdiction, such as intrastate pipeline and Hinshaw pipeline facilities that will be interconnected with the LNG terminal.

92. Section 157.21(b) also states that a prospective applicant approved to use the pre-filing procedures for facilities not related to LNG terminal facilities should not file



an application until at least 180 days after the date that the Director issues a notice approving use of the pre-filing procedures. However, whereas a prospective applicant for LNG facilities would be precluded from filing an application before the 180-day period has ended, the regulations do not preclude a prospective applicant for facilities not related to LNG facilities from filing an application within 180 days.

93. Any prospective applicant required or potentially required to use the pre-filing process for LNG terminal facilities and related facilities or any prospective applicant requesting to use the pre-filing process for non-LNG related facilities is required by section 157.21(c) to first consult with the Director on the nature of the project, the content of the pre-filing request, and the status of the prospective applicant's progress toward obtaining the information required for the pre-filing request described in paragraph (d) of this section. This consultation will also include discussion of the specifications for the applicant's solicitation for prospective third-party contractors to prepare the environmental documentation for the project.

94. Section 157.21(d) identifies the information that a prospective applicant's initial filing to initiate the pre-filing process must include. For LNG terminal facilities, the initial filing must include a description of the schedule desired for the project, including the expected application filing date and the desired date for Commission approval, and a description of the zoning and availability of the proposed site and marine facility location.

95. For natural gas facilities not related to LNG terminal facilities, section 157.21(d) provides that a prospective applicant's initial filing must include an

explanation of why the prospective applicant wants to use the process, including any critical timing considerations, the expected application filing date and the desired date for Commission approval.

96. Filings by all prospective applicants to initiate the pre-filing process are required by section 157.21(d) to include:

- a detailed description of the project, including location maps and plot plans to scale showing all major plant components, that will serve as the initial discussion point for stakeholder review;
- a list of the relevant federal and state agencies in the project area with permitting requirements, and a statement indicating that those agencies are aware of the prospective applicant's intention to use the pre-filing process (including contact names and telephone numbers) and whether the agencies have agreed to participate in the process. For LNG terminal facilities, the list shall identify the agency designated by the governor of the state in which the project will be located to consult with the Commission regarding state and local safety considerations. The filing also shall describe how the applicant has accounted for agency schedules for issuance of federal authorizations and when the applicant proposes to file with these agencies for their respective permits or other authorizations;
- a list and description of the interest of other persons and organizations who have been contacted about the project (including contact names and telephone numbers);

- a description of what work has already been done, e.g., contacting stakeholders, agency consultations, project engineering, route planning, environmental and engineering contractor engagement, environmental surveys/studies, and open houses. This description shall also include the identification of the environmental and engineering firms and sub-contractors under contract to develop the project.;
- For natural gas facilities other than LNG terminal facilities and related jurisdictional natural gas facilities, proposals for at least three prospective third-party contractors from which Commission staff may make a selection to assist in the preparation of the requisite NEPA document, or a proposal for the submission of an applicant-prepared draft Environmental Assessment as determined during the initial consultation described in paragraph (c) of this section;
- acknowledgement that a complete Environmental Report and complete application are required at the time of filing;
- a description of a Public Participation Plan which identifies specific tools and actions to facilitate stakeholder communications and public information, including a project website and a single point of contact. This plan shall also describe how the applicant intends to respond to requests for information from federal and state permitting agencies, including, if applicable, the governor's designated agency for consultation regarding state and local safety considerations with respect to LNG facilities; and

- certification that an LOI and Preliminary WSA have been submitted to the U. S. Coast Guard or, for modifications to an existing or approved LNG terminal, that the U. S. Coast Guard did not require such information.

97. Section 157.21(e) states that the pre-filing process for a prospective applicant will be deemed to have commenced on the date the Director issues a notice setting forth a finding that the prospective applicant has adequately addressed the requirements of section 157.21.<sup>20</sup> The date of such notice shall be used in determining whether the date an application is filed is at least 180 days after commencement of the pre-filing process. Section 157.21(e) also provides for the Director to make determinations whether prospective modifications to an existing LNG terminal will involve significant state and local safety considerations that have not been previously addressed. Prospective applicants for such modifications to existing LNG facilities are required to undertake the pre-filing review process.

98. Existing section 375.308(z) describes the Director's delegated authority with respect to the collaborative pre-filing procedures in section 157.22. This Final Rule removes existing section 157.22 from the regulations since the Final Rule implements the pre-filing procedures and review provided for in new section 157.21. Therefore,

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<sup>20</sup> The Commission recognizes that there will be instances where prospective modifications to existing or approved LNG terminals will not involve significant state and local safety considerations that have not been previously addressed. Nevertheless, it generally will be necessary for prospective applicants to substantially comply with the requirements of subsections (a), (c) and (d) of section 157.21 in order for the Director to make a finding on whether prospective modifications will involve significant new or additional safety considerations. However, the Director will have discretion in determining whether the information supplied by a prospective applicant is adequate.

the existing text in paragraph (z) of section 375.208 is replaced with new text which provides for the Director's issuance of notices to commence the pre-filing process under new section 157.21, after the Director has found that a prospective applicant has adequately addressed the above-described requirements. The new text in section 375.308(z) also provides for the Director to post guidance on the Commission's website to clarify the procedures and on how prospective applicants can achieve compliance with the pre-filing process and regulations.

99. Section 157.21(f) provides that, upon the Director's issuance of a notice commencing a prospective applicant's pre-filing process, the prospective applicant must:

- Within seven days<sup>21</sup> and after consultation with Commission staff, establish and notify Commission staff of the dates and locations at which the prospective applicant will conduct open houses and meetings with stakeholders (including agencies) and Commission staff.
- Within 14 days, conclude the contract with the selected third-party contractor.
- Within 14 days, contact all stakeholders not already informed about the project.

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<sup>21</sup> As provided in Rule 2007 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2007 (2005), the day on which the Director's notice is issued will be excluded in counting days for purposes of determining the date a filing is due. Further, if the due date for a filing would fall on a Saturday, Sunday, holiday, or day on which the Commission closes early due to adverse conditions, the following business day becomes the due date.

- Within 30 days, submit a stakeholder mailing list to Commission staff.
- Within 30 days, file a draft of Resource Report 1 in accordance with section 380.12(c) of the regulations and a summary of the alternatives considered or under consideration.
- On a monthly basis, file status reports detailing the applicant's project activities including surveys, stakeholder communications, and agency meetings.
- Be prepared to provide a description of the proposed project and to answer questions from the public at the scoping meetings held by Commission staff.
- Be prepared to attend site visits and other stakeholder and agency meetings arranged by the Commission staff, as required.
- Within 14 days of the end of the scoping comment period, respond to issues raised during scoping.
- Within 60 days of the end of the scoping comment period, file draft Resource Reports 1 through 12.
- At least 60 days prior to filing an application, file revised draft Resource Reports, if requested by Commission staff.
- At least 90 days prior to filing an application, file draft Resource Report 13 (for LNG terminal facilities).

- Certify that a Follow-on WSA will be submitted to the U. S. Coast Guard no later than the filing of an application with the Commission (for LNG terminal facilities and modifications thereto, if appropriate). If appropriate, the applicant shall certify that the U. S. Coast Guard has indicated that a Follow-On WSA is not required.

100. Section 157.21(g) provides that Commission staff and third-party contractor involvement during the pre-filing process will be designed to fit each project and will include some or all of the following:

- Assisting the prospective applicant in developing initial information about the proposal and identifying affected parties (including landowners, agencies, and other interested parties).
- Issuing an environmental scoping notice and conducting scoping for the proposal.
- Facilitating issue identification and resolution.
- Conducting site visits, examining alternatives, meeting with agencies and stakeholders, and participating in the prospective applicant's public information meetings.
- Reviewing draft Resource Reports.
- Initiating the preparation of a preliminary EA or draft EIS, which may include cooperating agency review.

101. Paragraph (h) of section 157.21 provides that a prospective applicant using the pre-filing procedures shall comply with the procedures in section 388.112 of the

regulations for the submission of documents containing CEII, as defined in § 388.113 of the regulations.

102. Once an application is accepted by the Commission, whether the environmental analysis can proceed will be highly dependent on how well the applicant responded to issues raised by Commission staff and the stakeholders during the pre-filing process described above.

### **III. Environmental Analysis**

103. The Commission is required to prepare an EA or EIS for any action that may have a significant adverse effect on the human environment.<sup>22</sup> No environmental consideration is raised by the promulgation of a rule that is procedural in nature or does not substantially change the effect of legislation or regulations being amended.<sup>23</sup>

104. The Final Rule establishes pre-filing review procedures which are mandatory for prospective applicants for new LNG terminal facilities, certain modifications to existing or approved LNG terminals and related jurisdictional gas facilities. The Final Rule's pre-filing procedures are elective for prospective applicants for natural gas facilities not related to LNG terminals. In neither case do the procedures substantially change the regulatory requirements to which applications for such facilities are subject. Rather, the Final Rule will result in certain regulatory requirements being satisfied prior to the filing of an application, as opposed to being satisfied at the time, or after

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<sup>22</sup> Order No. 486, *Regulations Implementing the National Environmental Policy Act*, 52 FR 47897 (Dec. 17, 1987), FERC Stats.& Regs. Preambles 1986-1990 ¶ 30,783 (1987).

<sup>23</sup> 18 C.F.R. § 380.4(a)(2)(ii) (2005).



the filing, of the application. The use of the procedures generally will affect the timing of the filing of applications, not when regulatory requirements are met. Further, the Final Rule implements regulatory changes mandated by Congress in EPAct 2005 for new LNG terminals.

#### **IV. Regulatory Flexibility Act Statement**

105. The Regulatory Flexibility Act of 1980 (RFA)<sup>24</sup> generally requires a description and analysis of proposed regulations that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such an analysis if proposed regulations would not have such an effect. Under the industry standards used for purposes of the RFA, a natural gas pipeline company qualifies as “a small entity” if it has annual revenues or \$6 million or less.

106. Most companies regulated by the Commission do not fall within the RFA’s definition of a small entity.<sup>25</sup> Based on the Commission’s experience using the proposed pre-filing procedures, they will only be used for major construction projects. Most, if not all, LNG-related projects subject to mandatory pre-filing review would be projects costing millions of dollars. Most, if not all, non-LNG related projects for which prospective applicants will elect to use the proposed pre-filing procedures will be projects costing millions of dollars. Because of the scale and nature of projects

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<sup>24</sup> 5 U.S.C. §§ 601-612.

<sup>25</sup> 5 U.S.C. § 601(3), citing to section 3 of the Small Business Act, 15 U.S.C. § 623. Section 3 of the Small Business Act defines a “small-business concern” as a business which is independently-owned and operated and which is not dominant in its field of operation.

likely to be reviewed under the pre-filing procedures, the Commission doubts that any existing or new company using the pre-filing procedures will be a small entity under the RFA's standards. In addition, the RFA directs agencies to consider four regulatory alternatives in a rulemaking to lessen the impact on small entities: (1) tiering or establishment of different compliance or reporting requirements; (2) classification, consolidation, clarification or simplification of compliance and reporting requirements; (3) performance rather than design standards; and (4) exemptions. In this Final Rule the Commission has adopted an alternative by delegating to the OEP Director authority with the discretion to grant waivers and make modifications as appropriate for the use of pre-filing procedures as in section 157.21.

107. Accordingly, the Commission hereby certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities. FERC-537, "Gas Pipeline Certificates: Construction, Acquisition and Abandonment," identifies the Commission's information collections relating to Part 157 of its regulations, which apply to natural gas facilities for which authorization under section 7 of the NGA is required.

#### **V. Information Collection Statement**

108. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting, record keeping, and public disclosure (collections of information) imposed by an agency.<sup>26</sup> Accordingly, pursuant to OMB regulations, the

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<sup>26</sup> 5 C.F.R. § 1320.11 (2005).

Commission is providing notice of its proposed information collections to OMB for review under section 3507(d) of the Paperwork Reduction Act of 1995.<sup>27</sup> Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Interim OMB approval of the information collections contained in the NOPR was received on September 26, 2005 in response to the Commission's request for OMB review under emergency clearance procedures. The requirements in the subject rulemaking will be submitted to OMB for review and final approval.

109. The Final Rule will affect the following existing information collections:

110. FERC-539, "Gas Pipeline Certificates: Import/Export Related," identifies the Commission's information collections relating to Part 153 of its regulations, which apply to facilities to import or export natural gas and for which authorization under section of the NGA is necessary. FERC-537, "Gas Pipeline Certificates: Construction, Acquisition and Abandonment," identifies the Commission's information collections relating to Part 157 of its regulations, which apply to natural gas facilities for which authorization under section 7 of the NGA is required.

111. FERC-577, "Gas Pipeline Certificates: Environmental Impact Statement," identifies the Commission's information collections relating to Part 380 implementing NEPA requirements relating to the construction of natural gas facilities.

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<sup>27</sup> 44 U.S.C. § 3507(d) (2005).

112. Interested persons may obtain information on the reporting requirements or submit comments on the collections of information and the associated burden estimates including suggestions for reducing this burden by contacting the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426 (Attention: Michael Miller, Office of the Executive Director, 202-502-8415 or e-mail [michael.miller@ferc.gov](mailto:michael.miller@ferc.gov).) Comments may also be sent to the Office of Management and Budget (Attention: Desk Officer for the Federal Energy Regulatory Commission, fax: 202-395-7285 or e-mail: [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov).)

113. Public Reporting Burden: The Commission did not receive specific comments concerning its burden estimates and uses the same estimates here in the Final Rule. Comments on the substantive issues raised in the NOPR are addressed elsewhere in the Final Rule.

114. The burden estimates for complying with the additional filing requirements contained in this rule pursuant to the procedures in new section 157.21 are set forth below. As reflected, the burden estimates are higher for a respondent/prospective applicant for LNG terminal facilities than for a respondent/prospective applicant for other natural gas facilities.

Data Collection	No. of Respondents	No. of Responses	Hours Per Response	Total Annual Hours
FERC-537	10	1	47	470
FERC-539	10	1	103	1,030
FERC-	20	1	1,402	28,040

577				
Totals				29,540

115. From these burden estimates there must be subtracted the original data collection requirements in OMB's record relating to section 157.22 which this rulemaking proposes to remove from the Commission's regulations. The numbers in OMB's record for section 157.22 are:

FERC-537: 13,230 hours

FERC-539: 270 hours

FERC-577: 13,580 hours

116. When the burden estimates for proposed section 157.21 are reduced to reflect the removal of section 157.22, the net data collection estimates for this rule are:

FERC-537: -12,760 hours

FERC-539: 760 hours

FERC-577: 14,460 hours

Total: 2,460 hours (net increase)

Total Annual Hours for Collection: 2,460 hours. For LNG terminal facilities and LNG-related pipeline facilities, these are mandatory information collection requirements. For non-LNG related natural gas facilities, these information collection requirements are voluntary but are still subject to OMB review.

Information Collection Costs: The Commission sought comments on the cost to comply with these requirements. No comments were received. The Commission has

projected the average annualized cost for all respondents to be \$4,920,000 (2,460 hours x \$100.00 per hour x 20 respondents).

Title: FERC-537 "Gas Pipeline Certificates: Construction, Acquisition and Abandonment"; FERC-539, "Gas Pipeline Certificates: Import/Export Related"; FERC-577, "Gas Pipeline Certificates: Environmental Impact Statement."

Action: Proposed Information Collection

OMB Control Nos.: 1902-0060 (FERC-537); 1902-0062 (FERC-539); 1902-0128 (FERC-577).

The applicant shall not be penalized for failure to respond to these collections of information unless the collections of information display valid OMB control numbers.

Respondents: Business or other for profit.

Frequency of Responses: One-time implementation.

Necessity of Information: On August 8, 2005, Congress enacted EAct 2005. Section 311(d) of EAct 2005 amends the NGA to insert a new section, section 3A, which requires that the Commission shall promulgate regulations on the pre-filing process for LNG terminals within 60 days from enactment of EAct 2005. Congress and the Commission consider the promulgation of these regulations to be a matter of critical importance to the state and local safety concerns regarding the construction and development of LNG terminals. The Commission must issue a final rule by October 7, 2005. The Commission seeks emergency processing of this proposed information collection because the use of normal clearance procedures is reasonably likely to cause a statutory ordered deadline to be missed. The Final Rule revises the requirements

contained in 18 CFR Parts 157 and 153 to add a requirement that applicants for authorization to construct LNG terminals must comply with a pre-filing process and that such process must commence at least 6 months prior to the filing of any application with the Commission for authorization to construct such facilities.

## **VI. Document Availability**

117. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

118. From FERC's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

119. User assistance is available for eLibrary and the FERC's website during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at [FERCOnlineSupport@FERC.gov](mailto:FERCOnlineSupport@FERC.gov)), or the Public Reference Room at 202-502-8371, TTY (202)502-8659 (e-mail at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov)).

**Effective Date**

120. These regulations are effective **[insert date thirty days following publication in Federal Reigister]**.

121. The Commission has determined with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, received on October 4, 2005, that this Final Rule is not a major rule as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>28</sup> The Commission will submit the Final Rule to both houses of Congress and the General Accounting Office.<sup>29</sup>

**List of subjects in Part 153:** Exports; Imports; Natural gas; Reporting and recordkeeping requirements.

**List of subjects in 18 CFR Part 157:** Administrative practice and procedure; Natural gas; Reporting and recordkeeping requirements.

**List of subjects in 18 CFR Part 375:** Authority delegations (Government agency; Seals and insignia; Sunshine Act.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>28</sup> 5 U.S.C. § 804(2) (2005).

<sup>29</sup> 5 U.S.C. § 801(a)(A) (2005).



In consideration of the foregoing, the Commission proposes to amend Parts 153, 157 and 375 of Chapter I, Title 18, Code of Federal Regulations, as follows:

**PART 153 – APPLICATIONS FOR AUTHORIZATION TO CONSTRUCT, OPERATE, OR MODIFY FACILITIES USED FOR THE EXPORT OR IMPORT OF NATURAL GAS**

1. The authority citation for Part 153 continues to read as follows:

Authority: 15 U.S.C. 717b, 717o; E.O. 10485, 3 CFR, 1949-1953 Comp., p. 970, as amended by E.O. 12038, 3 CFR, 1978 Comp., p. 136, DOE Delegation Order No. 0204-112, 49 FR 6684 (February 22, 1984).

2. In § 153.2, new paragraphs (d), (e) and (f) are added, to read as follows:

**§ 153.2 Definitions.**

\* \* \* \* \*

(d) LNG Terminal means 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 a waterborne vessel, but does not include:

- (1) Waterborne vessels used to deliver natural gas to or from any such facility; or
- (2) Any pipeline or storage facility subject to the jurisdiction of the Commission under section 7 of the Natural Gas Act.

(e) For purposes of this part and section 157.21, related jurisdictional natural gas facilities means any pipeline or other natural gas facilities which are subject to section

7 of the NGA; will directly interconnect with the facilities of an LNG terminal, as defined in paragraph (d) of this section; and which are necessary to transport gas to or regasified LNG from:

(1) A planned but not yet authorized LNG terminal; or

(2) An existing or authorized LNG terminal for which prospective modifications are subject pursuant to section 157.21(e)(2) to a mandatory pre-filing process.

(f) Waterway Suitability Assessment (WSA) means a document used by the U.S. Coast guard in assessing the suitability of a waterway for LNG marine traffic pursuant to 33 C.F.R. §127.007. The Preliminary WSA initiates the process of analyzing the safety and security risks posed by proposed LNG tanker operations to a port and waterways, and the Follow-On WSA provides a detailed analysis of the same issues.

3. In § 153.6, a new paragraph (c) is added, to read as follows:

**§ 153.6 Time of filing.**

\* \* \* \* \*

(c) When a prospective applicant for authorization for LNG terminal facilities, related jurisdictional natural gas facilities or modifications to existing LNG terminal facilities is required by § 157.21(a) to comply with that section's pre-filing procedures, no application for such authorization may be made before 180 days after the date of issuance of the notice by the Director of the Office of Energy Projects, as provided in § 157.21(e), of the commencement of the prospective applicant's pre-filing process under § 157.21.

4. The title and text of § 153.12 are revised to read as follows:

**§ 153.12 Pre-filing procedures for applications for authorization to site, construct, maintain, connect or modify facilities to be used for the export or import of natural gas.**

The definitions in § 157.1 and the pre-filing procedures in § 157.21 of this chapter are applicable to applications under section 3 of the Natural Gas Act filed pursuant to subpart B of this part.

**PART 157 - APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT**

5. The authority citation for Part 157 continues to read as follows:

AUTHORITY: 15 U.S.C. §§ 717 – 717w; 3301-3432; 42 U.S.C. 7101-7352.

6. At the end of § 157.1, a new paragraph is added, to read as follows:

**§ Definitions.**

\* \* \* \* \*

For the purposes of § 157.21 of this Part, Director means the Director of the Commission's Office of Energy Projects.

7. Section 157.21 is added, to read as follows:

**§ 157.21 Pre-filing procedures and review process for LNG terminal facilities and other natural gas facilities prior to filing of applications.**

(a) LNG terminal facilities and related jurisdictional natural gas facilities. A prospective applicant for authorization to site, construct and operate facilities included within the definition of "LNG terminal," as defined in § 153.2(d), and any prospective applicant for related jurisdictional natural gas facilities must comply with this section's pre-filing procedures and review process. These mandatory pre-filing procedures also shall apply when the Director finds in accordance with paragraph (e)(2) of this section that prospective modifications to an existing LNG terminal are modifications that involve significant state and local safety considerations that have not been previously addressed. Examples of such modifications include, but are not limited to, the addition of LNG storage tanks; increasing throughput requiring additional tanker arrivals or the use of larger vessels; or changing the purpose of the facility from peaking to base load.

When a prospective applicant is required by this paragraph to comply with this section's pre-filing procedures:

(1) The prospective applicant must make a filing containing the material identified in paragraph (d) of this section and concurrently file a Letter of Intent pursuant to 33 U.S.C. §127.007, and a Preliminary Waterway Suitability Assessment (WSA) with the U. S. Coast Guard (Captain of the Port/Federal Maritime Security Coordinator). The latest information concerning the documents to be filed with the Coast Guard should be requested from the U. S. Coast Guard. For modifications to an existing or approved LNG terminal, this requirement can be satisfied by the prospective applicant's certifying that the U. S. Coast Guard did not require such information.

(2) An application:

(i) Shall not be filed until at least 180 days after the date that the Director issues notice pursuant to paragraph (e) of this section of the commencement of the prospective applicant's pre-filing process; and

(ii) Shall contain all the information specified by the Commission staff after reviewing the draft materials filed by the prospective applicant during the pre-filing process, including required environmental material in accordance with the provisions of Part 380 of this chapter, "Regulations Implementing the National Environmental Policy Act."

(3) The prospective applicant must provide sufficient information for the pre-filing review of any pipeline or other natural gas facilities, including facilities not subject to the Commission's Natural Gas Act jurisdiction, which are necessary to transport regassified LNG from the subject LNG terminal facilities to the existing natural gas pipeline infrastructure.

(b) Other natural gas facilities. When a prospective applicant for authorization for natural gas facilities is not required by paragraph (a) of this section to comply with this section's pre-filing procedures, the prospective applicant may file a request seeking approval to use the pre-filing procedures.

(1) A request to use the pre-filing procedures must contain the material identified in paragraph (d) of this section unless otherwise specified by the Director as a result of the Initial Consultation required pursuant to paragraph (c) of this subsection; and

(2) If a prospective applicant for non-LNG terminal facilities is approved to use this section's pre-filing procedures:

(i) The application will normally not be filed until at least 180 days after the date that the Director issues notice pursuant to paragraph (e)(3) of this section approving the prospective applicant's request to use the pre-filing procedures under this section and commencing the prospective applicant's pre-filing process. However, a prospective applicant approved by the Director pursuant to paragraph (e)(3) of this section to undertake the pre-filing process is not prohibited from filing an application at an earlier date, if necessary; and

(ii) The application shall contain all the information specified by the Commission staff after reviewing the draft materials filed by the prospective applicant during the pre-filing process, including required environmental material in accordance with the provisions of Part 380 of this chapter, "Regulations Implementing the National Environmental Policy Act."

(c) Initial consultation. A prospective applicant required or potentially required or requesting to use the pre-filing process must first consult with the Director on the nature of the project, the content of the pre-filing request, and the status of the prospective applicant's progress toward obtaining the information required for the pre-filing request described in paragraph (d) of this section. This consultation will also include discussion of the specifications for the applicant's solicitation for prospective third-party contractors to prepare the environmental documentation for the project, and whether a third-party contractor is likely to be needed for the project.

(d) Contents of the initial filing. A prospective applicant's initial filing pursuant to paragraph (a)(1) of the section for LNG terminal facilities and related jurisdictional natural gas facilities or paragraph (b)(1) of this section for other natural gas facilities shall include the following information:

(1) A description of the schedule desired for the project including the expected application filing date and the desired date for Commission approval.

(2) For LNG terminal facilities, a description of the zoning and availability of the proposed site and marine facility location.

(3) For natural gas facilities other than LNG terminal facilities and related jurisdictional natural gas facilities, an explanation of why the prospective applicant is requesting to use the pre-filing process under this section.

(4) A detailed description of the project, including location maps and plot plans to scale showing all major plant components, that will serve as the initial discussion point for stakeholder review.

(5) A list of the relevant federal and state agencies in the project area with permitting requirements. For LNG terminal facilities, the list shall identify the agency designated by the governor of the state in which the project will be located to consult with the Commission regarding state and local safety considerations. The filing shall include a statement indicating:

(i) that those agencies are aware of the prospective applicant's intention to use the pre-filing process (including contact names and telephone numbers);

(ii) whether the agencies have agreed to participate in the process;

(iii) how the applicant has accounted for agency schedules for issuance of federal authorizations; and

(iv) when the applicant proposes to file with these agencies for their respective permits or other authorizations.

(6) A list and description of the interest of other persons and organizations who have been contacted about the project (including contact names and telephone numbers).

(7) A description of what work has already been done, e.g., contacting stakeholders, agency consultations, project engineering, route planning, environmental and engineering contractor engagement, environmental surveys/studies, and open houses. This description shall also include the identification of the environmental and engineering firms and sub-contractors under contract to develop the project.

(8) For LNG terminal projects, proposals for at least three prospective third-party contractors from which Commission staff may make a selection to assist in the preparation of the requisite NEPA document.

(9) For natural gas facilities other than LNG terminal facilities and related jurisdictional natural gas facilities, proposals for at least three prospective third-party contractors from which Commission staff may make a selection to assist in the preparation of the requisite NEPA document, or a proposal for the submission of an applicant-prepared draft Environmental Assessment as determined during the initial consultation described in paragraph (c) of this section.



(10) Acknowledgement that a complete Environmental Report and complete application are required at the time of filing.

(11) A description of a Public Participation Plan which identifies specific tools and actions to facilitate stakeholder communications and public information, including a project website and a single point of contact. This plan shall also describe how the applicant intends to respond to requests for information from federal and state permitting agencies, including, if applicable, the governor's designated agency for consultation regarding state and local safety considerations with respect to LNG facilities.

(12) Certification that a Letter of Intent and a Preliminary WSA have been submitted to the U. S. Coast Guard or, for modifications to an existing or approved LNG terminal, that the U. S. Coast Guard did not require such information.

(e) Director's notices.

(1) When the Director finds that a prospective applicant for authority to site and construct a new LNG terminal has adequately addressed the requirements of paragraphs (a), (c) and (d) of this section, the Director shall issue a notice of such finding. Such notice shall designate the third-party contractor. The pre-filing process shall be deemed to have commenced on the date of the Director's notice, and the date of such notice shall be used in determining whether the date an application is filed is at least 180 days after commencement of the pre-filing process.

(2) When the Director finds that a prospective applicant for authority to make modifications to an existing or approved LNG terminal has adequately addressed

the requirements of paragraphs (a), (c) and (d) of this section, the Director shall issue a notice making a determination whether prospective modifications to an existing LNG terminal shall be subject to this section's pre-filing procedures and review process. Such notice shall designate the third-party contractor, if appropriate. If the Director determines that the prospective modifications are significant modifications that involve state and local safety considerations, the Director's notice will state that the pre-filing procedures shall apply, and the pre-filing process shall be deemed to have commenced on the date of the Director's notice in determining whether the date an application is filed is at least 180 days after commencement of the pre-filing process.

(3) When a prospective applicant requests to use this section's pre-filing procedures and review for facilities not potentially subject to this section's mandatory requirements, the Director shall issue a notice approving or disapproving use of the pre-filing procedures of this section and determining whether the prospective applicant has adequately addressed the requirements of paragraphs (b), (c) and (d) of this section. Such notice shall designate the third-party contractor, if appropriate. The pre-filing process shall be deemed to have commenced on the date of the Director's notice, and the date of such notice shall be used in determining whether the date an application is filed is at least 180 days after commencement of the pre-filing process.

(f) Upon the Director's issuance of a notice commencing a prospective applicant's pre-filing process, the prospective applicant must:

(1) Within seven days and after consultation with Commission staff, establish the dates and locations at which the prospective applicant will conduct open houses and meetings with stakeholders (including agencies) and Commission staff.

(2) Within 14 days, conclude the contract with the selected third-party contractor.

(3) Within 14 days, contact all stakeholders not already informed about the project, including all affected landowners as defined in paragraph § 157.6(d)(2) of this section.

(4) Within 30 days, submit a stakeholder mailing list to Commission staff.

(5) Within 30 days, file a draft of Resource Report 1, in accordance with § 380.12(c), and a summary of the alternatives considered or under consideration.

(6) On a monthly basis, file status reports detailing the applicant's project activities including surveys, stakeholder communications, and agency meetings.

(7) Be prepared to provide a description of the proposed project and to answer questions from the public at the scoping meetings held by OEP staff.

(8) Be prepared to attend site visits and other stakeholder and agency meetings arranged by the Commission staff, as required.

(9) Within 14 days of the end of the scoping comment period, respond to issues raised during scoping.

(10) Within 60 days of the end of the scoping comment period, file draft Resource Reports 1 through 12.

(11) At least 60 days prior to filing an application, file revised draft Resource Reports 1 through 12, if requested by Commission staff.

(12) At least 90 days prior to filing an application, file draft Resource Report 13 (for LNG terminal facilities).

(13) Certify that a Follow-on WSA will be submitted to the U. S. Coast Guard no later than the filing of an application with the Commission (for LNG terminal facilities and modifications thereto, if appropriate). The applicant shall certify that the U. S. Coast Guard has indicated that a Follow-On WSA is not required, if appropriate.

(g) Commission staff and third-party contractor involvement during the pre-filing process will be designed to fit each project and will include some or all of the following:

(1) Assisting the prospective applicant in developing initial information about the proposal and identifying affected parties (including landowners, agencies, and other interested parties).

(2) Issuing an environmental scoping notice and conducting such scoping for the proposal.

(3) Facilitating issue identification and resolution.

(4) Conducting site visits, examining alternatives, meeting with agencies and stakeholders, and participating in the prospective applicant's public information meetings.

(5) Reviewing draft Resource Reports.

(6) Initiating the preparation of a preliminary Environmental Assessment or Draft Environmental Impact Statement, the preparation of which may involve cooperating agency review.

(h) A prospective applicant using the pre-filing procedures of this section shall comply with the procedures in § 388.112 for the submission of documents containing critical energy infrastructure information, as defined in § 388.113.

8. Section 157.22 is removed in its entirety.

**PART 375 – THE COMMISSION**

9. The Authority citation for part 375 continues to read as follows:

Authority: 5 U.S.C. 551 – 557; 15 U.S.C. 717 – 717w, 3301 – 1 3432;  
16 U.S.C. 791 - 825r, 2601 – 2645; U.S.C. 7101 – 7352.

10. In § 375.308, paragraph (z) is removed and replaced with the following:

**§ 375.308 Delegations to the Director of the Office of Energy Projects.**

\* \* \* \* \*

(z) Approve, on a case-specific basis, and make such decisions and issue guidance as may be necessary in connection with the use of the pre-filing procedures in § 157.21, " Pre-filing procedures and review process for LNG terminal facilities and other natural gas facilities prior to filing of applications."

## **APPENDIX**

### **Commenters**

Trunkline LNG Company, L.L.C  
Center for Liquified Natural Gas  
El Paso Corporation Pipeline Group  
Broadwater Energy  
Woodside Natural Gas, Inc.  
BP Energy Company  
Williston Basin Interstate Pipeline Company  
Exxon Mobil Corporation  
Cheniere LNG, Inc.  
Public Utilities Commission of the State of California  
Dominion Cove Point LNG, LP  
California Energy Commission  
Distrigas of Massachusetts LLC  
National Association of Regulatory Utility Commissioners  
Sempra Global  
North Baja Pipeline, LLC  
State of Maine, Office of the Governor  
Maryland Conservation Council  
Duke Energy Gas Transmission  
Nisource Pipelines  
Interstate Natural Gas Association of America (INGAA)  
Downeast LNG, Inc  
Keyspan LNG, L.P  
American Gas Association