



## Chapter 3

# LEGAL OVERVIEW

## CHAPTER THREE: LEGAL OVERVIEW

This chapter briefly describes the main laws governing LNG terminals (Section 3.A); the permits and licenses needed (Sections 3.B.1 - 3.B.3); and the state agencies involved in Texas and Louisiana (Sections 3.B.4 -3.B.5). Section 3.C introduces the experts advocates might find helpful to consult. More detail is provided in the following chapters.

### A. What are the main laws governing LNG terminals?

#### 1. The Natural Gas Act (NGA)

The Natural Gas Act (NGA)<sup>72</sup> is arguably the most important law governing the import and export of LNG: it defines two of the major permits LNG terminals require,<sup>73</sup> sets the hierarchy of agencies, and governs judicial review. In general, the Federal Energy Regulatory Commission (FERC) and the Department of Energy (DOE) split authority for implementing the NGA's LNG rules, with FERC permitting the infrastructure to prepare the gas for export or import and DOE permitting the actual export or import of the gas commodity. In addition, FERC is designated as lead agency, coordinating with all other agencies that permit or consult on permitting.

For FERC, there are two key sections of the NGA relevant to LNG challenges: Section 3 and Section 7. Section 3 grants FERC the authority to approve or deny a developer's application to build an LNG terminal.<sup>74</sup> The terminal is the large facility that receives, pretreats, and liquefies the gas and then loads it onto LNG tankers. Section 7, meanwhile, grants FERC the authority to approve or deny a developer's application to build an interstate gas pipeline and the pipeline's associated components like compressor stations, header systems, valves, and related facilities.<sup>75</sup> Under Section 3 of the NGA, FERC is supposed to authorize a terminal unless it finds that the terminal "will not be consistent with the public interest."<sup>76</sup> Under Section 7 of the NGA, FERC is supposed to only authorize a pipeline if it finds that the pipeline is "required by the present or future public convenience and necessity; otherwise such application shall be denied."<sup>77</sup> Both analyses require FERC to balance the public benefits of a project against the adverse consequences; with respect to Section 7, FERC must additionally analyze whether the project is "needed." (See Chapter 4 for more on FERC's role.)

Note that this guide focuses on unique issues that arise when challenging LNG terminals—in other words, Section 3 authorizations. However, FERC applications for most new LNG projects will be *Joint* Section 3 and Section 7 applications (in which the applicant seeks a Section 3 *authorization* and Section 7 *certificate*), because the applicant usually needs to supply its new terminal with gas from a

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<sup>72</sup> 15 U.S.C. § 717 et seq.

<sup>73</sup> Specifically, an authorization from the Department of Energy and a Section 3 authorization from the Federal Energy Regulatory Commission. Projects that include LNG pipelines will also require a Section 7 certification from FERC, which is also defined under the NGA.

<sup>74</sup> 15 U.S.C. § 717b(e)(1) (Under Section 3, the Federal Energy Regulatory Commission (FERC) has "the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal" located onshore or in near-shore waters.) The Department of Energy delegated to FERC this authority under Natural Gas Act § 3(e), 15 U.S.C. § 717b(e), to license LNG terminals. Also see 42 U.S.C. § 7172(e) and DOE Delegation Order No. 0204-112, 49 Fed. Reg. 6684, 6690 (Feb. 22, 1984).

<sup>75</sup> 15 U.S.C. § 717f (as part of FERC's powers to permit "transportation facilities"). Other components might include metering and pig launcher/receivers to maintain the pipe.

<sup>76</sup> 15 U.S.C. § 717b(a). See 18 C.F.R. § 153 et seq.

<sup>77</sup> 15 U.S.C. § 717f(e).

pipeline.<sup>78</sup> (Expansions—e.g., the addition of a liquefaction train—are more likely to involve only Section 3, because there is already a pipeline connected to the terminal.) Even though this guide focuses on Section 3 issues, advocates should *always* challenge both Section 3 and Section 7 aspects of the project—as in the Jordan Cove project introduced in Chapter 1, sometimes the pipeline is more vulnerable than the terminal! Advocates can use this guide to identify issues to raise to challenge pipelines and their components, which will need many of the same permits highlighted in this guide, including Army Corps of Engineers permits, state section 401 certifications, and state air permits (e.g., for the compressors). However, some of the legal standards for FERC’s approval of a pipeline are different from its approval of a terminals (see Chapter 4, Section B.1). The approval of a pipeline also gives the developer the power of *eminent domain*,<sup>79</sup> which a terminal developer does not receive. This guide attempts to flag major differences between the approvals for terminals and pipelines when relevant; however, advocates should consult experienced counsel when litigating pipelines to ensure all concerns are presented properly and framed by the relevant law.<sup>80</sup>

As for **DOE’s** authority under the NGA, Section 3 grants DOE authority to approve or disapprove the actual import or export of the gas as a commodity.<sup>81</sup> The NGA standard for approving an application depends on whether the export or import is to or from a country with which the United States has a free trade agreement requiring national treatment for trade in gas (a FTA or non-FTA country).<sup>82</sup> According to the NGA, importing from, or exporting to, a FTA country “shall be deemed to be consistent with the public interest” and must be approved—leaving little room for challenge.<sup>83</sup> Meanwhile, DOE grants approval for imports or exports to a non-FTA country “unless” it finds the proposed exporting or importing “will not be consistent with the public interest”<sup>84</sup>—still a difficult standard to surmount, but at least not a pre-ordained conclusion. (See Chapter 5 for more on the DOE’s authorizations).

## **2. What is the NGA’s effect on local and state laws that might apply?**

The Natural Gas Act preempts (i.e., blocks) some avenues that states, tribes, and localities might otherwise have used to stop a project that FERC has authorized. Specifically, courts have interpreted the Natural Gas Act as broadly preempting state and local laws that otherwise would affect the decision of where to site a terminal. This means that in most circumstances local and state laws won’t be sufficient basis to stop a project unless they are coupled to three specific federal environmental laws, discussed below:<sup>85</sup>

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<sup>78</sup> For an example of a joint certification see FERC’s order under Section 3 and 7 authorizing the Rio Grande LNG terminal and its associated Rio Bravo pipeline: “Order Granting Authorizations Under Sections 3 and 7 of The Natural Gas Act,” 169 FERC ¶ 61,131 (Nov. 22, 2019) (since withdrawn) <https://cms.ferc.gov/sites/default/files/whats-new/comm-meet/2019/112119/C-2.pdf>.

<sup>79</sup> Basically, the power to take private and public land to build the pipeline if it can’t be obtained by negotiation with the landowner. See 15 U.S.C. § 717f(h); *PennEast Pipeline Co. v. New Jersey*, 594 U.S. \_\_ (2021) (clarifying that 15 U.S.C. § 717f(h) can be used to condemn state land as well).

<sup>80</sup> For information on challenging pipelines, refer to the “Landowner’s Rapid Response Guide” available at <https://pipelinecenter.org/>.

<sup>81</sup> The Secretary of Energy has assigned authority over the export of natural gas (originally held by the now-defunct Federal Power Commission), to the Assistant Secretary of Energy for Fossil Energy, not to FERC. See *Sierra Club v. Fed. Energy Regulatory Comm’n*, 827 F.3d 59, 63 (D.C. Cir. 2016).

<sup>82</sup> 15 U.S.C. § 717b(a) (non-FTA) & (c) (FTA).

<sup>83</sup> 15 U.S.C. § 717b(c).

<sup>84</sup> 15 U.S.C. § 717b(a).

<sup>85</sup> For additional information on preemption, see Chapter 10, Section C (“Other Topics”). For example, a city nuisance ordinance, standing alone, will not be powerful enough to stop a project. But local laws might not be pre-empted if they are expressly incorporated into a state’s Coastal Management Program under the Coastal Zone Management Act—one of the three federal environmental statutes unaffected by the NGA’s preemptive powers.

The preemptive power granted by the Natural Gas Act is restricted by its important “Savings Clause” in Section 3 establishing that “nothing in the [NGA] affects the rights of States” to stop or conditionally permit a gas project under the authority granted to states by three specific federal statutes.<sup>86</sup> These statutes are the **Clean Air Act**,<sup>87</sup> the Federal Water Pollution Control Act (**Clean Water Act**),<sup>88</sup> and the **Coastal Zone Management Act**.<sup>89</sup> In other words, these statutes are not preempted by the Natural Gas Act—a permit denied under one of these three laws is fatal to the project, no matter what FERC and DOE might otherwise approve. Because of this, this guide focuses on the Clean Water and Clean Air Act permits (Chapters 6-7 and Chapter 8, respectively). The Coastal Zone Management Act is introduced briefly in Chapter 10, but is not a focus of the guide because it is very state-specific.

Even though the Natural Gas Act is designed to circumvent local planning and zoning laws as well as state or local regulations that protect public safety and environmental quality, local decision-making can make a difference in three important ways that advocates should not overlook:

- Unlike applicants that FERC has approved to construct interstate gas pipelines, applicants with approvals for LNG terminals are not awarded the right to take land or force the grant of easements through eminent domain. Where a terminal requires the use of state, county or municipality-owned land, the company cannot just “take” it. Thus, local planning, zoning, and safety laws may be relevant in tweaking the site location, for example, in establishing setbacks.
- Local and state deliberations—even if they are not tied to a permit or certification that might stop a project—may elicit information that an applicant has neglected to share with a federal or state permitting agency that contradicts the applicant’s position. Advocates can and should bring such additional information to the attention of permitting agencies by including it in public comments.
- Local or state laws that are expressly incorporated into a state’s plan enacting the three federal statutes that are not preempted (the Clean Water Act, Clean Air Act and Coastal Zone Management Act) might not be preempted. Decisions made at the state or local level can therefore sometimes “trickle up” into requirements that an LNG applicant must meet before it can receive permits under one of these three statutes. Determining whether a law has been successfully incorporated can be tricky—Chapter 10 Section C provides a basic introduction—so it is important to consult an experienced local attorney before relying on a local law to challenge a project.

In sum, advocates are encouraged to focus on the certifications and permits issued under the NGA (by FERC and DOE), the Clean Water Act, Clean Air Act, and CZMA. Other federal, state, and local laws can in some circumstances also be helpful, but an expert in these local laws should be consulted before too many resources are devoted to challenging permits that cannot actually stop a project.<sup>90</sup>

### **3. The National Environmental Policy Act (NEPA)**

Another very important statute for LNG projects is the **National Environmental Policy Act (NEPA)**, a federal law that requires federal agencies to assess the environmental effects of their proposed

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<sup>86</sup> 15 U.S.C. § 717b(d).

<sup>87</sup> 42 U.S.C. §§ 7401, *et seq.*

<sup>88</sup> 33 U.S.C. §§ 1251, *et seq.*

<sup>89</sup> 16 U.S.C. §§ 1451, *et seq.*

<sup>90</sup> For example, sometimes permits are required when a project proposes to cross a National Forest. If a proposed project *cannot* be built without crossing a National Forest, the project could potentially be stopped by just successfully challenging those permits. Check with an attorney to confirm the best strategy for each project.

actions prior to making decisions.<sup>91</sup> All projects that require a federal permit and are not excluded must go through an environmental review for each permit. (Whether a project is excluded can depend on the agency, in FERC's review, LNG terminals should not be excluded; in 2020 DOE decided to exclude LNG exports from NEPA. DOE's exclusion is discussed further in Chapter 5 Sections B.3 and D.3.). NEPA dictates the scope of that environmental review. FERC usually does the majority of work to comply with NEPA; other agencies that must comply with NEPA typically rely on FERC's analysis and assist in FERC's drafts as consulting agencies. These agencies are not absolved of their responsibilities to comply with NEPA just because FERC takes the laboring oar in ensuring that the NEPA-required information is compiled, so for a single project sometimes there may be multiple final and draft NEPA documents that have been authorized by multiple agencies.

For large projects like LNG pipelines and terminals that are expected to have significant impacts on the environment, the NEPA documents that will be drafted are a draft and final Environmental Impact Statement. These documents are hundreds of pages long and are designed to inform decisionmakers of the expected environmental and human health impacts of the project, including as compared to other alternative ways of fulfilling the purpose of the project (and comparing these impacts to a no-action alternative). The EIS documents are available for public review and comment; most challenges to LNG projects will rely heavily on critiquing what is (or is not) in these documents.

Because the NEPA review is largely conducted by FERC, Chapter 4 (which describes FERC's role) goes into further detail about the NEPA process, the NEPA regulations an agency must follow (which are currently in flux), and how advocates can participate.

#### **4. Are the NGA, NEPA, CWA, CAA and CZMA the only relevant laws I might cite in comments?**

No! Although they are arguably the most important federal laws for LNG permitting, they aren't the only ones that matter when deciding what to raise in comments. These laws often require that the applicant show compliance with other federal laws: such as the Endangered Species Act; National Historic Preservation Act; Emergency Planning and Community Right-to-Know Act; Marine Protection, Research and Sanctuaries Act; Resource Conservation and Recovery Act; the Magnuson-Stevens Fishery Conservation and Management Act; Comprehensive Environmental Response, Compensation and Liability Act; and the Migratory Bird Treaty Act, to name a few.

Don't be intimidated by the various laws at play—you do not need to be an expert in these laws to raise issues in comments. This guide highlights some ways in which these other laws intertwine with the main permits—and tries to explain which permits are more narrowly focused on one environmental media (e.g., air)—but the main takeaway is that you do not need to limit your comments to identifying violations of just the main governing laws (e.g., don't just focus on NEPA or the NGA when commenting on the environmental documents drafted by FERC—raise any concern you have with the project).

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<sup>91</sup> 42 U.S.C. §§ 4321-4347. The White House Council on Environmental Quality (CEQ) establishes federal regulations for implementing NEPA (see 40 C.F.R. §§ 1500-1508); these are in the process of being rewritten (see Chapter 4 Sections B.3 and B.5). Agencies can also establish separate but consistent NEPA regulations, which FERC has done. See 18 C.F.R. Part 380 et seq.

## 5. Does the terminal's location also affect what laws apply and what permits, certificates, and approvals are required?

Yes! The state is important—this guide focuses on projects in Louisiana and Texas. You also need to know what county / parish your facility is located in, and what local laws might apply.

For example, all US on-shore and near-shore terminals<sup>92</sup> will require FERC and DOE approval. The laws governing terrestrial versus deepwater permits are different: Chapter 10 (“Other Topics”) has more information on some of these differences, which for example, give a role to state governors, vests Clean Air Act authority in EPA, and places MARAD (which is part of the U.S. Department of Transportation) and the Coast Guard as co-lead agencies for review of the deepwater applications.

The Army Corps of Engineers rules and procedures will also be similar across state lines when it comes to the 404 permit (and section 10, section 103 and section 408 permits, if applicable) for on-shore and near-shore terminals. But the process for challenging an air permit will depend on which state you are in. In addition, the regime governing coastal use and water quality permits depends on your state. Tax abatement laws are also state-dependent and even county or parish / locality dependent.

It is also important to know the rules and approvals needed at the local county or parish level. Even though these permissions may not be levers to stop a project, they can be useful to build public awareness / support and elicit information about the project that might otherwise be difficult to gather. Local-level rules and approvals are beyond the scope of this guide; advocates should consult local experts to determine this on a project-by-project basis.

The location of the project can also affect where judicial appeals are heard. For example, any appeal of FERC or DOE’s orders must be brought “in the Circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia.”<sup>93</sup> Any appeal of a decision regarding an LNG project by a federal agency (other than FERC or the DOE), or a state agency “acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law” (other than the CZMA) must be brought in the U.S. Court of Appeals for the district in which an LNG facility is proposed to be built.<sup>94</sup> For Louisiana and Texas projects, the appeals court is usually either the Fifth Circuit or the D.C. Circuit. There can be unforeseen nuisances as to the proper location of an appeal given the unique facts of each project—make sure to consult with an attorney before filing an appeal to determine what courts are available and preferred for a specific challenge.

Finally, different Clean Air Act requirements will apply if a facility will be located in an area that meets National Ambient Air Quality Standards (“Attainment Areas”) vs areas that do not (“Nonattainment Areas”); generally, it will be more difficult to construct an LNG export facility in a Nonattainment area, as discussed in Chapter 8.

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<sup>92</sup> Typically within three miles of the shore.

<sup>93</sup> 15 U.S.C. § 717r(b). This creates a decision for the advocate as to which Circuit to target. Note that if multiple appeals are filed in both Circuits, the cases are normally consolidated into one via a lottery. An advocate may still seek to transfer the case to the preferred Circuit, however success is never guaranteed.

<sup>94</sup> 15 U.S.C. § 717r(d)(1). An action to challenge a federal agency’s failure (other than FERC) or a state agency’s failure to act (other than under the CZMA) must be brought in the U.S. Court of Appeals for the District of Columbia. 15 U.S.C. § 717r(d)(2).

## B. Who grants and what are the main permits, certificates, and approvals required?

There are many permits involved in an LNG project and thus many avenues to challenge a project. There are also many more agencies that participate in the process than there are required permits. This means that there are many potential partners to work with in raising concerns about the project. When working on a challenge, consider whether you may be able to leverage preexisting relationships with state agencies that are sympathetic to environmental / landowner / health and safety concerns (or forge new ones!).

### 1. Agencies and permits at the federal level

At the federal level, there are four main permits that almost all LNG terminal projects need: a DOE authorization, a FERC authorization (and FERC certificate, if a pipeline is involved), and at least two Army Corps permits (section 404 and section 10). Pursuant to the NGA, FERC must certify the infrastructure of the project and DOE must approve the export or import of the gas itself.<sup>95</sup> The Army Corps of Engineers is responsible for issuing Clean Water Act permits related to dredging and filling of wetlands, including 404 permits, section 10 permits, and section 103 and section 408 permits where applicable.

Other federal agencies provide a consulting role on these permits but are not usually authorized to issue any permits themselves. These federal consulting agencies may include EPA, Fish & Wildlife, the National Marine Fisheries Service, the National Park Service, and the Federal Aviation Administration, among others. State agencies are consulted as well, especially during FERC's review as lead agency, but by no means exclusively on the FERC part of permitting. For example, the state wildlife and fisheries agency can provide consulting comments to the Corps on a Clean Water Act § 404 permit, because the construction and operation of an LNG project will affect habitat and wildlife—the very things that these state agencies regulate.<sup>96</sup> A good rule of thumb to use to determine whether an agency will consult on a permit is whether the project might affect the resource that the agency regulates (actually or even just potentially). If so, you can assume that agency will be involved.

### 2. Agencies and permits at the state level

The state permitting agencies involved are those with power over air permits, federal consistency / coastal use permits, and water quality. (Occasionally this power is vested in a tribe or EPA, but that's not typical for terminals—pipeline projects more frequently involve tribes or EPA given the larger footprint.) Which state agencies are in charge will vary by state. Some state agencies consult on permits but don't issue their own permits (or at least LNG projects don't typically need permits from these agencies to construct or operate); these consulting agencies are often those with authority over transportation infrastructure, historical sites, parks, and wildlife.

A state environmental agency, with the relevant federally delegated authority, has the power to decide whether to grant an LNG project the following approvals:

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<sup>95</sup> LNG facilities sited at the Canadian or Mexican border for import or export also require a Presidential Permit. FERC must obtain a favorable recommendation from the Secretaries of State and Defense before issuing a Presidential Permit. If the Secretaries do not agree, the President decides directly. See Executive Order No. 10,485, 18 Fed. Reg. 5397 (Sept. 5, 1953), <https://www.archives.gov/federal-register/codification/executive-order/10485.html>.

<sup>96</sup> 16 U.S.C. § 460 et seq.

**Table 3.1: Approvals Required by State Environmental Permitting Agency**

<b>CLEAN WATER ACT § 401 WATER QUALITY CERTIFICATION</b>	<p>Every state adopts its own water quality standards under the Clean Water Act.<sup>97</sup> For each federal permit that a project requires, the LNG developer must check with the state to make sure those permits do not conflict with the state water quality standards, in a process known as a Clean Water Act § 401 water quality certification. States may waive their right to issue a certification, but an LNG applicant must at least apply for a certification from the state agency, otherwise the federal agency issue its permits. For example, the Corps can only issue a Clean Water Act § 404 permit if the state (or authorized tribe if on tribal land) has waived its rights or if it issues the water quality certification, declaring the discharge consistent with maintaining the state's water quality standards.<sup>98</sup> A certification is also needed for the federal activities covered by the FERC license as well.</p> <p><i>The Department of Environmental Quality (LDEQ) in Louisiana and the Railroad Commission in Texas exercise this power.</i></p> <p><b>Section 401 certifications are discussed further in Chapter 7.</b></p>
<b>CLEAN AIR ACT AND STATE AIR POLLUTION LAW PERMIT</b>	<p>Each state must establish an air permit program that complies with Clean Air Act regulations.<sup>99</sup> The state grants air permits for construction and operation under the federal law and consistent state regulations included in the EPA-approved state implementation plan (SIP) for the Clean Air Act. These permits typically are not denied but may: (1) increase disclosure of potential toxic emissions and affect the balancing of risks and benefits in an EIS or CZMA review; and (2) result in increased pollution control or monitoring requirements.</p> <p><i>The LDEQ in Louisiana and Commission on Environmental Quality and the Texas Commission on Environmental Quality (TCEQ) in Texas exercise this power.</i></p> <p><b>State air permits are discussed further in Chapter 8.</b></p>
<b>COASTAL USE PERMIT OR COASTAL CONSISTENCY STATEMENT</b>	<p>LNG export terminal activities must not conflict with a state's Coastal Zone Management Act (CZMA) plan.</p> <p><i>Louisiana Dept. of Natural Resources (LDNR) exercises this power in Louisiana; the Railroad Commission and General Land Office exercise this power in Texas.</i></p> <p><b>This guide does not cover coastal permits in-depth; for a basic overview of these requirements, see Chapter 10.</b></p>
<b>STATE SUPERFUND OR BROWNFIELD CLEANUP AUTHORITY</b>	<p>An onshore or near shore LNG facility may require approval for cleanup of contaminated land before construction. If the land is a federal Superfund site, EPA would oversee cleanup.<sup>100</sup> If not, the state agency would manage it under a state superfund law or voluntary cleanup program. These cleanup approvals typically are not denied but may result in increased site investigation for toxic contamination and affect the balancing of risks and benefits in an EIS or coastal management review. The approval process may also result in increased pollution control or monitoring requirements.</p> <p><b>This guide does not cover permits required for site cleanup.</b></p>

<sup>97</sup> Clean Water Act, § 303(c).<sup>98</sup> 33 U.S.C. § 1341(a).<sup>99</sup> 42 U.S.C. § 7661a(d)(1) and 40 C.F.R. part 70.<sup>100</sup> Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601, et seq., commonly known as the Superfund Law.

States also have authority to set permit requirements for wastewater discharges,<sup>101</sup> storm water discharges,<sup>102</sup> and industrial pretreatment (if a facility is discharging into the local sewage treatment system or trucking its discharge to a local sewage treatment plant).<sup>103</sup> Such permits typically are not denied but may result in increased pollution control or monitoring requirements. This guide does not discuss the permits for discharge and pretreatment in depth; this has not historically been a leverage point for challenging facilities.

### 3. Local level

As discussed in Section 3.A.2, the Natural Gas Act contains provisions that make it difficult to challenge an LNG export or import terminal at the local level, as it preempts many state and local laws.

#### PRACTICE TIP

Work with a local attorney familiar with your state's CZMA laws and Coastal Management Plan (CMP) to identify if the CMP incorporates any helpful local ordinances (or allows for such ordinances to be passed). Incorporation allows localities pass laws that could be used to stop LNG projects that the NGA would otherwise preempt.

But local laws may not be preempted by the Natural Gas Act when the state's Coastal Management Plan (which is required by the Coastal Zone Management Act) specifically provides for local involvement, as was the case in Oregon, in which local laws were leveraged in the fight against the Jordan Cove LNG terminal. Advocates unfamiliar with their state's CMP should reach out to local land use and coastal zone management attorneys to understand what local laws and ordinances still apply.

In addition, local authorities will often be instrumental in approving tax exemptions and providing other incentives to attract the project. For example, in Texas the local school boards have had the authority to grant or deny tens of millions of dollars of tax breaks to LNG facilities under the state's industrial tax exemption program (referred to as "Chapter 313," for the program's location in the tax code). In Louisiana, the local school boards, parishes governing board, and local sheriff have similar authority under the Governor's executive order regulating the Louisiana Industrial Ad Valorem Tax Exemption Program (known as "ITEP"). For more information on tax exemptions, see Chapter 9.

### 4. For a Louisiana terminal, which agencies are involved and what are their roles?

Louisiana state agencies involved in the LNG export permitting process are listed in below.<sup>104</sup>

<sup>101</sup> With EPA delegation, the state has authority to grant wastewater discharge permits under the Clean Water Act § 402's National Pollutant Discharge Elimination System (NPDES) and the state's water pollution law.

<sup>102</sup> Storm water discharges may be regulated by an individual permit, or by a pre-existing "general" permit.

<sup>103</sup> If the LNG facility plans to discharge industrial wastes into the sewer system (or truck it to the sewage treatment plant), it may meet the threshold to require an Industrial Wastewater Pretreatment Permit. Such dischargers must meet national General Pretreatment Regulations, 40 C.F.R. § 403, as well as the rules of the local agency that manages the sewage system and treatment plant. The General Pretreatment Regulations bar discharge of any pollutant, such as oil or a solvent, that may impair sewage treatment, pass through untreated, cause a fire or clog the system. If no federal pretreatment standard exists for a pollutant, the state or local government may set a limit or requirement.

<sup>104</sup> Excellent resources for Louisiana advocates have been compiled by Tulane Environmental Law Clinic's Community Engagement Program here: *Louisiana Resident Resources*, <https://law.tulane.edu/sites/law.tulane.edu/files/Files/TELC%20ERLI%20LA%20Resources.pdf>. Attached as App. 1.

**Table 3.2: Louisiana Agency Decision-Makers or Advisors on Onshore/Near-Shore Projects**

LOUISIANA AGENCY	AGENCY'S AUTHORITY
Louisiana Dept. of Environmental Quality (LDEQ)	<p><b>Air permits.</b> The LDEQ has EPA-approved power to issue or deny air permits for onshore/near-shore LNG facilities, that permit (or permits<sup>105</sup>) will satisfy the Clean Air Act's various permitting requirements:</p> <ul style="list-style-type: none"> <li>• Part 70 (Title V) Operating permit</li> <li>• Prevention of Significant Deterioration (PSD) construction permit</li> <li>• Nonattainment New Source Review (NNSR) permit</li> <li>• Acid Rain (Title IV) permit</li> <li>• Clean Air Interstate Rule (CAIR) approval.<sup>106</sup></li> </ul> <p><b>Clean Water Act § 401 Water Quality Certification.</b> Has EPA-delegated power to issue or deny a § 401 Water Quality Certification, without which the terminal cannot be built. An appeal of the LDEQ's decision can be filed in federal court within 30 days after notice is provided.</p> <p><b>Wastewater discharge permits.</b> Has EPA-delegated authority to issue wastewater discharge permits under the Louisiana Pollutant Discharge Elimination System (LPDES).<sup>107</sup> LDEQ must allow at least 30 for public comment on such permits,<sup>108</sup> and shall hold a hearing whenever public requests indicate significant public interest in the draft permit. LDEQ may also hold a hearing whenever, in its discretion, it decides that a hearing might "clarify" an issue.<sup>109</sup> Note that Louisiana wastewater regulations apply to vessels as well as land-based facilities.<sup>110</sup></p> <p><b>Contaminated land cleanup.</b> Manages Louisiana's law addressing cleanup of inactive and abandoned hazardous waste sites. A seller of a known hazardous waste site must assess the site and either clean up the site or obtain an approved cleanup plan prior to real property transfer.<sup>111</sup> Also approves or denies site investigation and cleanup plans under Louisiana's Voluntary Remediation Program, after public notice and opportunity for a public hearing,<sup>112</sup></p>
Louisiana Dept. of Natural Resources (LDNR)	<p>Issues <b>Coastal Use Permits</b> (CUPs) for activities that take place on lands that lie within Louisiana's designated "coastal zone." Its Coastal Use Plan is approved by NOAA under the federal CZMA. The coastal use permit acts as a consistency decision—i.e., that the use is consistent with the state's CZMA.</p> <p>LDNR must also conduct a public trust analysis when state lands and water bottoms are potentially affected.<sup>113</sup></p>

<sup>105</sup> LDEQ may issue separate permits under each Clean Air Act permitting requirement, but in practice the agency typically issues one combined permit. Chapter 8 discusses in more depth.

<sup>106</sup> The Louisiana Environmental Quality Act, L.R.S. 30:2054, provides the Secretary of the LDEQ with broad legal authority for regulating air quality. For a Part 70 source, the public is allowed at least 30 days to comment on the proposed permit action. LAC 33:III.531.A.3.C (Part 70) and LAC 33:111.509.Q (Prevention of Significant Deterioration construction permits).

<sup>107</sup> Louisiana Administrative Code (LAC) 33:IX.2301 to 33:IX.7129.

<https://www.deq.louisiana.gov/index.cfm?md=resource&tmp=category&catid=regulations-lac-title-33>

<sup>108</sup> LAC 33:IX.3113.B.

<sup>109</sup> LAC 33:IX.3117.

<sup>110</sup> LAC 33:IX.701 to 323:IX.713.

<sup>111</sup> LRS 30:2271 to 30:2279, with regulations at LAC 33:VI.101 to 33:VI.803.

<sup>112</sup> La. R.S. 30: 2285.1 and 2286.1. See program description at <https://www.deq.louisiana.gov/page/brownfields>.

<sup>113</sup> LRS 41:1701.

LOUISIANA AGENCY	AGENCY'S AUTHORITY
Louisiana Office of State Lands	<p>The Louisiana Office of State Lands is in the Division of Administration. The head of this office is not a separately elected official but instead answers to the Commissioner of Administration, who is appointed by the Governor.</p> <p>Has the authority to issue or deny a <b>permit and lease</b> for use of “State Water Bottoms” (state-owned underwater land held in trust by the state for the public).<sup>114</sup></p> <p>Develops a <b>comprehensive state master plan</b> for administration of state lands and water bottoms, which “shall ensure that all public lands and water bottoms are protected, administered, and conserved in a manner consistent with the constitution.”<sup>115</sup> The plan is subject to approval by the Governor, the Attorney General, the Department of Wildlife and Fisheries, and the Department of Natural Resources.<sup>116</sup></p>
Louisiana Dept. of Transportation and Development (DOTD)	<p>Has authority to issue approvals for such activities as driveway access, trestle crossing, and temporary conveyor crossing. For example, Tellurian’s proposed Driftwood LNG facility requires the widening of a state highway to accommodate workers.<sup>117</sup></p>
Louisiana Dept. of Wildlife and Fisheries (LDWF) <i>It issues permits for dredging of state water bottoms but exempts ports and terminals.</i>	<p>Can advise FERC on environmental review under NEPA and the Corps on § 404 and Rivers &amp; Harbors Act permits regarding impacts on fisheries resources, endangered species, and migratory birds.<sup>118</sup></p> <p>While this agency has authority to approve or deny a Scenic Rivers Permit under the <b>Louisiana Scenic Rivers Act</b>,<sup>119</sup> the law may be preempted. But if LDWF finds that an activity could have an adverse impact on a designated Scenic River,<sup>120</sup> such as a road, rail or pipeline crossings; discharges; piers; structures; or water withdrawals, that finding may be relevant for water quality certification or review under NEPA or the CZMA.</p>
Louisiana Dept. of Culture, Recreation and Tourism, Division of Archaeology	<p>Can provide advice under the National Historic Preservation Act, § 106 and NEPA environmental review.<sup>121</sup></p>
Port Authorities	<p>May lease facilities for an LNG terminal or conduct dredging or other activity that accommodates it.</p>

## 5. For a Texas terminal, which agencies are involved and what are their roles?

Texas state agencies involved in the LNG export permitting process are in listed the following table.

<sup>114</sup> LRS 41:1701-1714.

<sup>115</sup> LRS 41: 1701(C).

<sup>116</sup> LRS 41: 1701(C).

<sup>117</sup> Harry Weber, “Tellurian to prepare Driftwood LNG site for construction, build new pipeline,” *S&P Global*, June 22, 2021, <https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/062221-tellurian-to-prepare-driftwood-lng-site-for-full-construction-build-new-pipeline>

<sup>118</sup> 16 U.S.C. § 460 et seq. See also 16 U.S.C. §§ 661 et seq., and §§ 688, 703, and 1536(a)(2).

<sup>119</sup> LRS 56:1840 et seq.

<sup>120</sup> The list of designated Scenic rivers is at <https://www.wlf.louisiana.gov/page/scenic-rivers-descriptions-and-map>.

<sup>121</sup> 136 C.F.R. § 800.

**Table 3.3: Texas Agency Decision-Makers or Advisors on Onshore/Near-Shore LNG Projects**

TEXAS AGENCY	AGENCY'S AUTHORITY
Texas Commission on Environmental Quality (TCEQ).	<p><b>Air permits.</b> Has EPA-approved power to issue or deny air permits for onshore/near-shore LNG facilities.</p> <p>Has jurisdiction over odor contaminants. Texas law requires that the TCEQ must consider “possible adverse short-term or long-term side effects of air contaminants or nuisance odors... on the individuals attending the school facilities” in deciding on issuance of a permit for a facility “within 3,000 feet of an elementary, junior high, or senior high school.”<sup>122</sup></p> <p><b>Wastewater discharge permits.</b> Recently gained EPA-delegated authority to issue wastewater discharge permits under the Texas Pollutant Discharge Elimination System (TPDES).<sup>123</sup></p> <p>Has primary duty to implement a Pretreatment Program for discharges into sewers or sewage treatment plants.<sup>124</sup></p>
<p><b>Texas General Land Office (GLO)</b><sup>125</sup></p> <p>The GLO Commissioner is elected every four years.<sup>126</sup></p>	<p>Has the power to issue or deny a lease or easement for use of state-owned underwater land.<sup>127</sup> Depending on the parcel involved, this authority may be shared with the School Land Board.</p> <p>Has the power to issue or deny “coastal consistency determinations” for projects pursuant to its NOAA-approved Coastal Management Plan.<sup>128</sup> It does not issue coastal use permits, but rather ensures that other state agencies’ permit programs are consistent with the Coastal Management Plan. The Railroad Commission of Texas appears to be in charge of coastal consistency determinations for oil and gas projects; the division of authority between GLO and RRC for consistency determinations is difficult to define; both may have responsibilities for LNG projects.</p> <p>Must protect the public trust in state lands, underwater lands and waters.</p> <p>Oversees the coastal Oil Spill Response Program for spills greater than 240 barrels, but not LNG. LNG spills are managed by the RRC.</p>
<p><b>The Railroad Commission of Texas</b> regulates the state’s oil and gas industry, gas utilities, pipeline safety, liquefied petroleum gas industry safety,</p>	<p><u>Clean Water Act § 401 Water Quality Certification.</u> Has EPA-delegated power to issue or deny a Clean Water Act § 401 Water</p>

<sup>122</sup> 15 TAC § 382.052. (The Texas Clean Air Act is found in chapter 382 of the Texas Administrative Code.)

<sup>123</sup> TCEQ, “TCEQ to administer Clean Water Program, EPA Announces,” Jan. 15, 2021,

[https://www.einews.com/pr\\_news/534610695/tceq-to-administer-clean-water-program-epa-announces](https://www.einews.com/pr_news/534610695/tceq-to-administer-clean-water-program-epa-announces).

<sup>124</sup> TWC § 26.047 and TCEQ rules contained in Title 30 Texas Administrative Code (30 TAC) Chapter 315.

<sup>125</sup> The GLO manages state lands and mineral rights, including properties in West Texas, Gulf Coast beaches and bays and all “submerged” lands 10.35 miles out into the Gulf of Mexico, as well as state agency acreage and timberlands in East Texas. The GLO leases these lands to benefit the Permanent School Fund, an endowment to support Texas public schools.

<sup>126</sup> Texas Constitution, Art. 4, § 23. <https://law.justia.com/constitution/texas/sections/cn000400-002300.html>.

<sup>127</sup> Tex. Nat. Res. Code (TNRC), § 51.291. <https://codes.findlaw.com/tx/natural-resources-code/nat-res-sect-51-291.html>.

<sup>128</sup> See also Texas General Land Office, “Texas Coastal Management Program Biennial Report 2019-2020,” Dec. 2020, <https://www.glo.texas.gov/coast/coastal-management/forms/files/2019-2020-cmp-biennial-report.pdf>.

TEXAS AGENCY	AGENCY'S AUTHORITY
<p>and surface coal and uranium mining.<sup>129</sup> It has delegated responsibilities under several federal laws.<sup>130</sup></p>	<p>Quality Certification,<sup>131</sup> without which the LNG terminal cannot be built.</p> <p>Along with the GLO, has the power to issue or deny coastal consistency determinations for projects pursuant to its NOAA-approved Coastal Management Plan. It does not issue coastal use permits, but rather ensures that other state agencies' permit programs are consistent with the Coastal Management Plan. The Railroad Commission of Texas appears to be in charge of coastal consistency determinations for oil and gas projects; the division of authority between GLO and RRC for consistency determinations is difficult to define; both may have responsibilities for LNG projects.</p> <p><u>Contaminated land cleanup.</u> Manages Texas's law addressing cleanup of inactive and abandoned oil and gas waste sites. Works with the TCEQ if the site also contains industrial waste.<sup>132</sup> A seller of a known hazardous waste site must clean it up or obtain an approved cleanup plan before transferring ownership.</p> <p>Approves or denies site investigation and cleanup plans under Texas's Voluntary Remediation Program, after public notice and opportunity for a public hearing. Also provides <b>funding for free site assessments and cleanups</b> of brownfields under certain conditions. Note: Houston, San Antonio and some other cities also have brownfield programs.</p> <p>Approves or denies permits for <i>intrastate</i> pipelines.<sup>133</sup></p>
Texas Dept. of Transportation <sup>134</sup>	Has authority to issue approvals for such activities as access to any roadway that is part of the state highway system.
Texas Parks and Wildlife Department	Can advise FERC and the Army Corps about impacts on fisheries, endangered species and migratory birds, particularly with regard to state-listed species. <sup>135</sup>

<sup>129</sup> The RRC exists under provisions of the Texas Constitution, which provides that when a RRC is created by law, it shall be comprised of three commissioners elected statewide for 6-year terms, staggered such that one Railroad Commissioner is elected every two years. Texas Constitution, Art. XVI, § 30(b).

<sup>130</sup> In addition to the Clean Water Act, the Railroad Commission has responsibilities under the federal Surface Coal Mining Control and Reclamation Act, Safe Drinking Water Act, Pipeline Safety Act and Resource Conservation Recovery Act.

<sup>131</sup> TX Admin. Code Tit. 16, Part 1, Ch. 3, Rule § 3:30(b)(2)(B)(iii) (Memorandum of Understanding between the Railroad Commission of TX and the TX Commission on Environmental Quality).

<sup>132</sup> See Memorandum of Understanding between TCEQ and RRC, 16 Texas Admin. Code § 3.30. Also see Texas Admin. Code, Title 30, Chapter 335, Subchapter K (Texas Superfund Rules) and Texas Health and Safety Code, Ch. 361, Subch. S and § 361.602 (Voluntary Cleanup Program).

<sup>133</sup> TNRC, § 81.051. The Railroad's jurisdiction over pipelines and other oil and gas operations is exclusive and preempts municipality or county ordinances or regulations except that measures addressing aboveground activity, including fire and emergency response, traffic, lights, noise or reasonable setback requirements, may be allowed so long as it is "commercially reasonable" and "does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator" and is not otherwise preempted. TNRC, § 81.0523(c).

<sup>134</sup> The Texas Department of Transportation oversees construction and maintenance of state highways within its jurisdiction, and regulates access to the state highway system.

<sup>135</sup> See 16 U.S.C. §§ 661 et seq. (Fish and Wildlife Coordination Act); *id.* §§ 703 et seq. (Migratory Bird Treaty); *id.* § 1536(a)(2) (federal agency consultation requirement).

TEXAS AGENCY	AGENCY'S AUTHORITY
Texas Historical Commission	Can provide advice under the National Historic Preservation Act, § 106 and NEPA environmental review. <sup>136</sup>
Texas Water Development Board (TWDB) <sup>137</sup>	May advise on the availability of water to meet facility needs, if relevant.
Port Authorities	May lease facilities for an LNG terminal or conduct dredging or other activity that accommodates it.

### C. What sort of experts might be helpful in challenging an LNG project?

Although often it is possible to file comments based on commonsense concerns, it can be helpful to consult with a technical expert in the field so that your comments are as robust as possible. In some permitting processes—for example, for state air permits—experts may be essential in order to convince an agency of the errors in an application. In addition, courts give more weight to expert opinion. As a first step, an attorney can help you navigate the cost-benefits of experts including when and who to retain.

Ideally, experts should be found and retained as soon as it becomes apparent that a company will seek to build or expand an LNG facility. A single expert may be useful in challenging multiple permits, as long as the subject matter is within that expert's field of knowledge. Credible experts should have years of experience in the subject matter on which they are opining, either academically or in the field (preferably both). Although an in-state expert may be preferable in terms of experience with the project area and reduced travel costs (which are not always an issue), be mindful that out-of-state experts may need to be retained if in-state options have conflicts of interests and/or ties to fossil fuel industry work.

Sections 4.E and 6.B.10 go into more depth about experts that can be useful in FERC and Corps challenges, respectively. In general, the following experts can be useful places to start:

For FERC permits:

- An economics expert to review the socioeconomic sections of environmental documents (including industry's effects on job creation and real property values); ideally this person will have experience as an ecological economist, to quantify the lost value from replacing wetlands and other natural areas with industry, an area of overlap with the Corps permits;
- If any protected species may be harmed, an expert in that species or someone generally knowledgeable about the protection of wildlife;
- An industrial safety expert knowledgeable in reliability and safety issues related to vessels as well as terrestrial industrial sites;

<sup>136</sup> 136 C.F.R. § 800.

<sup>137</sup> The Texas Water Development Board also issues bonds not for developing reservoirs, water facilities, and flood control projects. Texas Constitution, Art. III, § 49c.

For DOE permits:

- An expert in macroeconomics—for example how increased supply of gas affects the use of renewables;

For Corps challenges:

- A wetlands delineation expert who can help identify wetlands, jurisdictional waters, and special aquatic sites (these legal terms are described in detail in Chapter 4);
- A “404(b)(1) Guidelines” expert (a particular series of laws the Corps must follow before issuing a 404 permit);
- An expert familiar with the success (or failure) of mitigation plans located in the same area as the proposed project;

For 401 water quality certifications:

- A water quality expert, preferably one who is already familiar with the state’s rules including the designated uses of waterbodies, numeric and narrative criteria, and other water quality standards;

For air permits:

- An expert who can evaluate emissions estimates (to identify defective quantifications that underestimate emissions and help a facility evade more stringent requirements);
- An expert familiar with the costs and types of pollution control technology that a state might require;
- An air quality expert with experience in air modeling, especially in modelling coastal regions, as the ocean often impacts the air flow and currents that disperse pollutants in a different manner than if the project was located inland.

As for where to find experts, consult other advocates and attorneys who have challenged facilities in your area, even if they have not worked specifically on LNG projects. In addition, EIP’s Center for Applied Environmental Science is a potential resource for advocates looking for referrals and funding for experts. Information about the Center and its list of independent experts can be found here: <https://caes.info/about/>.