IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-73650 & 04-75240

CALIFORNIANS FOR RENEWABLE ENERGY, INC.

&

CALIFORNIA PUBLIC UTILITIES COMMISSION

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION

Respondent.

AMICUS CURIAE BRIEF OF CALIFORNIA EARTH CORPS

Supporting Reversal of the Order of the Federal Energy Regulatory Commission
FERC Docket Nos. CP04-58-000 and CP04-58-001

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I. INTEREST OF THE AMICUS CURIAE

CALIFORNIA EARTH CORPS ("CEC") is a California nonprofit corporation based in the Long Beach area of Los Angeles. Its mission is, in part, to protect citizens and the environment from the dangers posed by energy facilities such as liquefied natural gas ("LNG") terminals, and to promote a safe and clean environment for all. CEC is comprised of members, many of them people of color and low or modest income, who are residents of the area surrounding the Port of Long Beach. They will be directly affected by this Court's decision regarding the Federal Energy Regulatory Commission's ("FERC") assertion of exclusive federal jurisdiction over the Sound Energy Solutions ("SES") proposal to site and operate an LNG terminal facility in the Port of Long Beach to serve *intra*state markets in California.

CEC has the authority to file this amicus brief pursuant to FRAP 29(a).

II. SUMMARY OF THE ARGUMENT

SES's LNG proposal raises significant public health and safety issues that, throughout United States history, have been the jurisdictional province of state and local agencies through their police power. These issues include the acute public safety hazards associated with siting a major LNG terminal

that will handle huge volumes[1] of a bulk, concentrated[2] hazardous substance (natural gas), in the midst of a busy industrial port and proximate to commercial and residential neighborhoods. In addition, the entire port and the specific proposed site are built on seismically unstable soils and are underlain by significant earthquake hazards.

In California, these issues historically have been addressed by the California Public Utilities Commission ("CPUC") pursuant to its express state constitutional and statutory authorities, together with other California state and local agencies. CPUC has exercised its traditional state police power to regulate intrastate industrial gas facilities and activities in order to protect public health and safety of its citizens.

Yet here, FERC seeks to prevent the CPUC from exercising its traditional and mandated jurisdiction over SES and the proposed LNG facility and operations. FERC asserts it has the exclusive authority to permit and regulate the SES facility, **not** as either an interstate or an intrastate facility, but rather as a facility handling gas in foreign commerce. As FERC

[1] At any one time, the proposed SES LNG facility will have two full storage tanks of LNG, each holding 160,000 cubic meters of LNG (total: 320,000 cubic meters of LNG), and a moored LNG vessel holding another 160,000–200,000 cubic meters of LNG, for a potential onsite total of 480,000-520,000 cubic meters of LNG. This is the regasified equivalent of several billion standard cubic feet of natural gas SES Application for authority to Site, Construct, and Operate LNG Import Terminal Facilities. See pps. 9-10.

describes this authority and its antecedents, it does not – because it cannot – point to any clear, explicit Congressional directive of the kind traditionally used to preempt state police power for some overriding national purpose, (e.g., the Atomic Energy Act of 1954, 42 U.S.C. section 2011 et seq., giving the federal government the exclusive jurisdiction over the possession, use, and production of nuclear energy and special nuclear material, and identifying specific limited powers remaining with the states)). Rather, FERC presents an unprecedented, concocted, "belt and suspenders" argument of implied authority to justify its claim of exclusive jurisdiction over a facility of a kind historically permitted and regulated by the CPUC and the agencies of the State.

Congress has given FERC no direct authority for such radical preemptive action, either in Section 3 of the Natural Gas Act or elsewhere. FERC's claimed need for uniform regulatory requirements for LNG facilities already is addressed partially by federal minimum regulatory standards already embraced by the CPUC; FERC's desire for uniform national siting criteria is altogether inappropriate for siting of hazardous industrial facilities in seismically active California urban coastal areas. CEC

[2] The process of liquefying natural gas reduces 600 standard cubic feet of natural gas to 1 cubic foot of LNG. There are approximately 35.3 cubic feet of LNG in one cubic meter of LNG.

respectfully submits that FERC presents an inappropriate and legally insufficient basis for assertion of exclusive federal jurisdiction, which threatens to undo decades of satisfactory division of authorities between federal and state gas regulators along the dividing lines of interstate and intrastate commerce.

Finally, FERC lacks completely the specialized knowledge it needs to wield the state's traditional police power and supplant the CPUC and California state and local agencies as safeguard of the California public against the complex seismic and other hazards posed by the SES Project. Consequently, FERC's exercise of exclusive jurisdiction over the siting of this particular LNG facility and others serving foreign-originated gas in intrastate markets, if allowed, risks subjecting Californians to unnecessary and avoidable danger.

Accordingly, CEC supports the CPUC in its petition to reverse FERC's claim of exclusive jurisdiction.

III. ARGUMENT

A. Traditional State Police Power Includes the Power to Regulate for the Health and Safety of Local Populations in This Case.

The SES project, proposed to be sited in a seismically active area and on unstable soils, involves hazardous facilities and operations that pose grave threats to the health and safety of local populations and commercial

and industrial activities. The Supreme Court consistently has asserted that "the regulation of health and safety matters is primarily, and historically, an area of local concern." *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 719 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 438 (2002); *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)(states have traditionally maintained the police power to regulate to protect the health and safety of their citizens); *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92, 94-96 (1933)("Protection against accidents presents ordinarily a local problem. Regulation to ensure public health and safety is an exercise of the police power.").

In fact, in *Erie Railroad Co. v. Board of Public Utility Commissioners*, 254 U. S. 394 (1921), the United States Supreme Court held that states had a *constitutional right* to regulate for the safety of their citizens, even with respect to operations in interstate commerce. The *Erie* Court declared,

> *the State*. . . from which, ultimately, the railroads derive their right to occupy the land, *has a constitutional right to insist that they shall not be made dangerous to the public* . . . To engage in interstate commerce the railroad must get on the land and to get on to it must comply with the conditions imposed by the State for the safety of its citizens.

Id. at 410-411 (emphasis added).

Courts long have recognized the rights of the states to protect the safety of their citizens through the regulation of natural gas. *See Jamieson v. Indiana Natural Gas & Oil Co.*, 128 Ind. 555, 565 (1891)(finding natural gas an inherently dangerous product to citizens and requiring the state to regulate locally through its police power); *Winkler v. Anderson*, 104 Kan. 1 (1919)(holding state police power extensive enough to restrict drilling of gas wells to protect public safety).

If regulation of conventional natural gas facilities is an appropriate subject of state police power regulation, the case for state regulation of facilities handling LNG, which through cryogenic technology concentrates the heat value of natural gas by a factor of 600, is especially compelling. The United States Department of Transportation ("US DOT") has expressly recognized the dangers of LNG "for people living near LNG storage facilities where the sudden release of a large volume of LNG can engulf surrounding areas with a flammable vapor cloud and create the potential for conflagration." 53 Fed. Reg. 47084, 47087 (November 21, 1988). These hazards are magnified amidst current concerns over facility exposure to terrorist activities.[3]

[3] The California Energy Commission (CEC) wrote FERC seeking expanded discussion of safety issues in the EIS/EIR: "[It] should identify the consequences of a worst-case situation created by a terrorist attack on the facility, specifically providing information on

California has traditionally exercised this power through the CPUC, its constitutionally and statutorily-mandated state agency for certificating and regulating natural gas facilities. Here, the CPUC seeks a role in ensuring that the proposed LNG facility and pipelines, which are proposed to store and handle natural gas solely intrastate, are sited, designed, built, and maintained in ways consistent with public safety, health, and environmental concerns. Its concerns are heightened because SES proposes to locate LNG facilities in the major industrialized Port of Long Beach, on unstable soil and in a seismically active region criss-crossed by as many as 27 fault lines, and closely proximate to the Long Beach urban center.

In the face of such traditional allocation of responsibility to state regulators of intrastate natural gas activities, FERC now has claimed exclusive jurisdiction – at the expense of the CPUC's traditional jurisdiction in California – over facilities that support LNG in intrastate commerce, where that LNG previously has moved in foreign commerce.

the release of liquid LNG, how it will vaporize, the fate and transport of the LNG vapor plume, and extent of the area potentially affected by both the flame and thermal radiation if the vapor plume were ignited." The letter advises that twelve state and local agencies involved in permitting or approving any LNG facility in California have formed the LNG Permitting Interagency Working Group, to develop information on LNG issues, issues of concern to the state, and understand roles and concerns regarding LNG facilities in California. CEC Letter to FERC, October 31, 2003,sending scoping comments on the Draft EIS., FERC Docket No. PF03-6-000

FERC lacks any express authority to assume such exclusive jurisdiction. Instead, FERC argues that it has implicit power to do so under Section 3 of the Natural Gas Act, 15 U.S.C. §717(b) (hereinafter "Section 3"). As discussed further below in Section III.B, nothing in Section 3 gives FERC any authority -- much less exclusive authority -- to regulate siting or design of natural gas facilities on the sole basis that they operate in foreign commerce. Without an express Congressional mandate to such effect, this Court should not remove from the states their traditional and important role in protecting the safety and health of their citizens regarding the siting and regulation of gas facilities, including LNG facilities, receiving foreign gas but serving intrastate markets only.

B. Nothing in the NGA Usurps the States' Traditional Health and Safety Police Power with Respect to Intrastate LNG Facilities—Even Where Such Facilities Are Linked With Foreign Commerce.

Against the strong tradition of state regulation discussed above, nothing in the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.,* removes this state power here. Importantly, this is true despite this proposed facility's link with foreign commerce.

Preemption analysis "starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *City of*

Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424, 438 (2002), *citing Medtronic v. Lohr*, 518 U.S. 470, 485 (1996); *see also Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 605 (1991).

Whereas the NGA provides for vigorous federal regulation of interstate commence, it provides for no federal role in regulating the *facilities* involved in foreign commerce of LNG (as opposed to merely "the fact of exportation or importation," in the words of one appellate court). *Border Pipe Line Co. v. Federal Power Comm'n,* 171 F.2d 149, 151 (D.C. Cir. 1948)("*Border*"); *see also* Section 3 (defining the federal role in LNG foreign imports). Moreover, the NGA provides for no federal role in intrastate commerce. *See* 15 U.S.C. § 717(b)-(c). Because the facility proposed here involves only foreign-commerce and intrastate components, not interstate, FERC's role is quite limited and simply is not concerned with the kind of regulation sought to be imposed by the State. *Border,* at 151.

In *Border*, the D.C. Circuit reviewed an order by FERC's predecessor agency[4] attempting to regulate a natural gas pipeline and export terminus in Texas that, like the facility proposed here, involved only intrastate distribution and foreign commerce. The gas pipeline was located wholly within Texas and had a terminus at the state's southern border, from which

gas was exported into Mexico. *Id.* at 150. Though the utility had already complied fully with the NGA's Section 3 requirement that exporters of natural gas obtain an export permit, FERC issued an order subjecting the utility to the much more elaborate requirements and facilities regulations applicable to interstate commerce facilities (set forth at 15 U.S.C. § 717f (hereinafter "Section 7")). *Id.*

Striking down that order as outside FERC's regulatory authority, the D.C. Circuit distinguished between foreign and interstate commerce and held that the NGA provides for detailed regulation of facilities within the latter, but not the former. "The plan of regulation revealed by the statute thus read seems reasonable," the Court wrote. "It seems reasonable, or at least not unreasonable, that Congress should be concerned **only with the fact of exportation or importation in the case of foreign commerce, but with rates, practices, accounting, facilities and financing in the case of domestic commerce**." *Id.* at 151 (emphasis added). By complying with Section 3's plain requirement of an export permit, the utility had satisfied the NGA, and FERC's attempt to impose additional restrictions was outside its statutory mandate. *Id.*

[4] The Federal Power Commission, which, for ease of reference, will be referred to as "FERC" throughout this discussion.

Here, as in *Border*, FERC is again overreaching by attempting to impose various conditions on an intrastate facility that has a foreign commerce connection—conditions that Congress itself neither intended nor authorized. *Border* teaches that because this project involves only foreign commerce and intrastate distribution, Section 3 limits FERC's powers over it. But Section 3 simply does not give FERC the sole and exclusive authority to ensure that a local community's health and safety concerns will be taken into consideration in the siting, design and maintenance of an LNG import facility. Instead, Section 3 is concerned only with the fact of exportation or importation; in fact, it affirmatively *precludes* FERC from imposing the type of regulations sought here. *See* 15 U.S.C. § 717b(a)-(c) (requiring that utilities obtain an order allowing foreign imports, but precluding FERC regulation by mandating that for LNG imports, applications for importation "be granted without modification or delay"); *compare* 15 U.S.C. § 717f (giving FERC authority to impose a variety of conditions on interstate natural gas facilities). Thus, the power (and duty) to ensure that import facilities for gas intended solely for intrastate commerce are consistent with local health and safety remains with the States, where it has long existed.

Cases likely to be cited by FERC suggesting otherwise are all meaningfully distinguishable as either: (1) involving facilities for gas in interstate commerce, or (2) relying on language in the NGA that was modified by a 1992 statutory amendment (or both). In *Distrigas*, for example, the D.C. Circuit held that FERC had sufficient authority to regulate a foreign import facility as part of its import permitting authority. *See Distrigas Corp. v. Federal Power Comm'n*, 495 F.2d 1057, 1064 (D.C. Cir. 1974)("*Distrigas*"). That case, however, is distinguishable in both of the ways outlined above. First, it involved a proposed foreign import facility that would distribute gas for sale "in both interstate and intrastate commerce." *Id.* at 1058. It is therefore no surprise that FERC's authority with respect to that facility is greater than its authority here. Indeed, the court in *Border*—a case that *Distrigas* expressly declined to overrule—itself had anticipated such a result. *Border* at 151 ("Of course, if a company be in both interstate and foreign commerce [as was Distrigas], one might burden the other and so produce the result which the burden of intrastate on interstate commerce causes. But we do not have that situation here."). *Border*'s limitations thus remain in full force in situations not implicating interstate commerce.

Second, and perhaps more importantly, *Distrigas* rested its holding on the flexibility formerly given to FERC within Section 3 to condition foreign import permits—but it predated a critical 1992 amendment to the NGA that eviscerates that flexibility. Section 3 formerly allowed FERC to grant import permits "with such modification and upon such terms and conditions as the Commission may find necessary or appropriate," *see* 15 U.S.C. § 717b(a), and *Distrigas* held that this power gave FERC the authority to impose on import permittees "the same detailed regulatory authority that it exercises with respect to interstate commerce." *Distrigas* at 1064. The 1992 amendment changed the law, however, to require an "expedited application and approval process" for all LNG import applications, in which import permits "shall be granted without modification or delay." 15 U.S.C. § 717b(b)-(c) (added by Pub. L. 102-486 (1992)). With this change, Congress has made clear that it is no longer within FERC's authority, as the *Distrigas* court found it was under the former law, to significantly burden LNG import permittees with regulations akin to those imposed on interstate facilities—foreclosing, for example, the kind of detailed regulations concerning the siting, design, operation, and maintenance of facilities found at 15 U.S.C. § 717f. This statutory amendment provides an independent reason for the inapplicability of *Distrigas* here, as well as further evidence that the power

(and duty) to ensure that import facilities are consistent with local health and safety remains with the States.[5]

Finally, even if FERC is deemed to have some regulatory authority over the import facilities proposed here, it cannot be held to have exclusive authority to protect the health and safety of local populations. As the Supreme Court has stated with respect to the purpose of the NGA, "[w]e have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority." *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 520 (1947)("*Panhandle*").

Though in a somewhat different context, the state appellant in *Panhandle* fought an argument (as does California here) that state

[5] Two other prominent appellate cases that have found exclusive federal jurisdiction under the NGA are also easily distinguished as involving only FERC's authority to regulate interstate pipelines under Section 7, not foreign commerce or intrastate facilities under Section 3. See *Northern Natural Gas Co. v. Iowa Util. Board*, 377 F.3d 817, 818 (8th Cir. 2004) (reviewing "the efforts of the State of Iowa to regulate the environmental effects of . . . interstate natural gas pipelines"); *Natural Fuel Gas Supply Co. v. Public Serv. Comm'n*, 894 F.2d 571 (2d. Cir. 1990) (deciding "the interrelationship between state and federal regulatory authorities governing . . . the interstate transportation of natural gas"). This distinction is critical because while the impressively detailed regulatory scheme set forth in the NGA for interstate pipelines may support a preemption holding, the 'barely there' approach with respect to foreign imports—which affirmatively *precludes* detailed regulation of import facilities—simply cannot do so. *Compare* 15 U.S.C. § 717b(b)-(c) (precluding significant regulation by requiring that applications for LNG imports "be granted without modification or delay") *with* 15 U.S.C. § 717f (vesting in FERC authority to impose a variety of conditions on interstate natural gas facilities).

regulation, if permitted, would "amount to a power of blocking the commerce or impeding its free flow." *Id.* at 522. But the Supreme Court held that the "supposed national interest in uniform regulation" advanced by FERC was not sufficient to require preemption under the NGA, at least where experience had not yet shown such impedance to occur. *Id.* Here, the vital local interests at stake in this case, the statutorily limited role of FERC in protecting these interests, and the long tradition of successful state protection of these interests demand the same result.

C. Permitting the State to Protect the Health and Safety of Its Population Accords with the Purpose of the NGA, and is Good Public Policy.

1. The Federal Interest In Allowing And Tracking Foreign Imports Does Not Abrogate (And Is Not Inconsistent With) State Interest In Ensuring That Facilities Handling Such Imports Are Safe.

The *Panhandle* case gives a clear summary of the purpose of the NGA:

> The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. The act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.

Panhandle, 332 U.S. at 517-518. Where, as here, with foreign commerce and intrastate commerce, Congress showed restraint in delineating federal

powers under the NGA, it did so meticulously and in full knowledge that unarticulated powers would remain with the States.

> It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, **and particularly more effective state regulation**, were construed . . . to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption.

Id. at 519 (emphasis added).

2. The Federal Government Has Provided Further Support For Nationally-Consistent State Regulation of Intrastate Natural Gas Facilities Through the Natural Gas Pipeline Safety Act.

Principal Congressional purposes of the federal Natural Gas Pipeline Safety Act ("NGPSA"), 49 U.S.C. §60105, included the establishment by the US DOT of uniform minimum design and safety standards for natural gas pipelines and related facilities, including LNG, for gas in interstate commerce. It also established a certification process for states that adopt the NGPSA standards as minimum standards in the exercise of their jurisdiction over *intra*state gas facilities, including LNG facilities.

The NGPSA therefore is structured in a way that is entirely consistent with the traditional distribution of authorities – exclusive federal jurisdiction over gas facilities in interstate commerce, and state jurisdiction over gas in intrastate commerce – but with the added feature that a state certificated

under the NGPSA, in exercising its traditional police power over natural gas facility safety, will apply at least the prevailing NGPGA-prescribed standards. This mechanism lessens the need for FERC to preempt state exercise of jurisdiction over LNG facilities traditionally viewed as serving intrastate commerce.

3. The California State Constitution and the California Public Utilities Code Expressly Designate the CPUC As the Agency Responsible For Exercising California's Police Power Over Natural Gas Corporations and the Safety of Natural Gas Facilities.

Through the California Constitution and the California Public Utilities Code, the CPUC is expressly delegated the responsibility to exercise California's police power over the safety of natural gas facilities. A recent CPUC decision summarizes,

> The Commission [CPUC] has the power and the obligation under Article XII, Section 6 of the California Constitution and Sections 451, 701 and 761 of the California Public Utilities Code to actively supervise and regulate natural gas public utilities in California and to do all things which are necessary to ensure adequate and reliable public utility service to California ratepayers at just and reasonable rates.

See *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal. 3d 850, 861-862; *Sale v. Railroad Commission* (1940) 15 Cal.2d 607, 617.

In furtherance of the exercise of its police power over the safety of gas facilities in intrastate commerce, the CPUC has sought to harmonize its rules

with the federal regulatory structure established under the NGPSA. In CPUC General Order 112-E ("GO 112-E"), [Decision No. 95-08-053 September 11, 1995] "State of California Rules Governing Design, Construction, Testing, Operation, and Maintenance of Gas Gathering, Transmission, and Distribution Piping Systems", the CPUC expressly adopted the NGPSA regulations for application to intrastate gas facilities in California, expressly including LNG facilities, as part of the minimum standard "...requirements for the design, construction, quality of materials, locations, testing, operations and maintenance of facilities used in the gathering, transmission and distribution of gas and in liquefied natural gas facilities to safeguard life or limb, health, property and public welfare and to provide that adequate service will be maintained by gas utilities operating under the jurisdiction of the commission."

Significantly, the CPUC carries out its state constitutional and statutory responsibilities for natural gas safety matters through formal public

[6] GO 112-E, §101.2 "These rules are incorporated in addition to the Federal Pipeline Safety Regulations, specifically, Title 49 of the Code of Federal Regulations (49 CFR), Parts 190, 191, 192, 193, and 199, which also govern the Design, Construction, Testing, Operation, and Maintenance of Gas Piping Systems in the State of California. These rules do not supersede the Federal Pipeline Safety Regulations, but are supplements to the Federal Regulations." GO 112-E, §102.1: "The purpose of these rules is to establish, in addition to the Federal Pipeline Safety Regulations, minimum requirements for the design, construction, quality of materials, locations, testing, operations and maintenance of facilities used in the gathering, transmission and distribution of gas and in liquefied natural gas facilities to safeguard life or limb, health, property and public welfare and to

proceedings conducted by administrative law judges and CPUC Commissioners. These proceedings, which can be held at local venues near the site of proposed facilities, afford participation by interested parties and the general public alike. They involve formal and informal public testimony, including expert testimony, and opportunities for in-depth cross-examination of project proponents and expert witnesses on matters related to public health and safety. This procedure allows state and local agencies and interested organizations and individuals to participate directly in the process for delineating and addressing the various public safety issues potentially posed by prospective gas facility projects. Moreover, it results in a complete public record, developed by the state's lead agency for protecting its citizens, commerce, and industry against public safety risks posed by natural gas facilities, for later use by other state and local agencies in their decisions on proposed gas facilities.

Again, in the absence of clear Congressional directive otherwise, this Court should not allow FERC to prevent the CPUC from exercising its clear state constitutional and statutory mandate to regulate LNG facilities serving only *intra*state commerce, where the gas has originated in a foreign nation.

provide that adequate service will be maintained by gas utilities operating under the jurisdiction of the commission."

4. The CPUC's Procedures Are Integral to the Informed Exercise of Jurisdiction by the Other State and Local Agencies.

FERC apparently now does not seek to occupy the entire field of regulation of the SES facility, as it belatedly has acknowledged the Congressionally-delegated authorities of at least three California state agencies: the California Coastal Commission; the California Air Resources Board and the local Air Pollution Control District; and the California Regional Water Quality Control Board. FERC stated,

> The outcome in this proceeding will not impact state agencies that have delegated authority to act pursuant to federal law, including state agencies that have been delegated duties with respect to the [Coastal Zone Management Act], Clean Water Act, and Clean Air Act, and we anticipate relying on these state agencies' efforts to confirm compliance with federal statutory requirements.

107 FERC Paragraph 61,263, Sound Energy Solutions, Docket No. CP04-58-001, at p. 39, ¶90.

FERC's exact intent regarding accommodation of these agencies' jurisdictional decisions is unclear.[7] FERC does not detail the rationale under which it abruptly no longer seeks to preempt state and local agencies having certain Congressionally "delegated" authorities, while it continues to

[7] Other state agencies apparently would remain preempted. The California State Lands Commission (SLC) wrote FERC that it is the trustee of State-owned lands granted in trust, by the Legislature, to the city of Long Beach, pursuant to Chapter 676, Statutes of 1911 as amended, and has jurisdiction over marine terminal siting, standards and potential spills of LNG under the state Lempert-Keene-Seastrand Oil Spill Prevention

preempt from jurisdiction California's lead police-power agency, CPUC, whose authority is based in the U.S. Constitution[8] and a century of federal court decisions recognizing state police power to regulate the safety of intrastate gas facilities. FERC's response to the protests of the federal "delegee" state agencies has an imprecise, ad hoc, "made-up in the huddle" quality to it, suggesting that indeed FERC is still defining its premises for preemption of intrastate gas facilities in foreign commerce.

In any case, FERC's promise to allow certain state and local agencies to retain jurisdiction while preempting the CPUC's role itself impairs the other state agencies' jurisdictional exercise. This is particularly true of the procedures of the California Coastal Commission ("CCC"), which oversees a state-legislatively authorized[9], federally-certified coastal zone management program under the federal Coastal Zone Management Act.[10] Federal certification of California's coastal regulatory program means that all actions of federal agencies, including FERC, affecting the coastal zone must be consistent with the state's certified management program, which includes California's system of permitting and review of most development projects

and Response Act (Act) of 1990. SLC Letter to FERC, October 30,2003, re EIS/EIR scoping.

[8] See *Erie Railroad Co. v. Board of Public Utility Commissioners*, 254 U. S. 394 (1921), cited and discussed hereinabove at pp. 5-6.

[9] California Coastal Act, California Public Resources Code Sections 30000 et seq.

located in the state's coastal zone. With respect to the SES LNG facility, the CCC asserts the right to review any amendments to the Long Beach Port Master Plan and any Harbor Development Permit issued by the Port of Long Beach, pursuant to its federally-approved coastal zone management plan. 107 FERC Docket No. CP04-58-001, at p.38, ¶84.

Congressional findings set forth in the CZMA are at direct odds with the letter and spirit of FERC's preemptive effort:

> The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

CZMA, § 1451(i). Congressional findings, (§302)(emphasis added).

The California Coastal Act governing exercise of the CCC's jurisdiction states, in part, "Where feasible, new hazardous industrial development shall be located away from existing developed areas." California Public Resources Code ("PRC"), § 30250(b); and, further, "New development shall: (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard." PRC, § 30253(1).

[10] Coastal Zone Management Act Of 1972, as amended through P.L. 104-150, The Coastal Zone Protection Act of 1996

In exercising its authority over the SES project, the CCC therefore must identify the hazards posed by the project and the potentially mitigating responses to the hazards. It also must identify measures for minimizing the risks to life and property posed by an LNG facility proposed to be sited in an area of high geologic hazard. Under prevailing state law and practice, the CCC would acknowledge the CPUC's lead state jurisdiction over natural gas facility safety rules and regulations, including the NGPSA regulations, and would incorporate CPUC's gas facility siting and safety decision into its federally-protected California Coastal Act decision-making.[11]

Clearly, if the CPUC is denied jurisdiction it will be without authority to conduct its standard formal proceeding inquiring into the gas safety issues raised by the SES project, particularly those raised by site-specific physical constraints and natural hazards, and by the proximity of neighboring industrial and commercial facilities, operations, and populations. Consequently, the CCC's LNG facility siting exercise will be without the customary input of California's lead agency for natural gas safety issues.

[11] The Coastal Act states, in part, "Except as otherwise specifically provided in this division, enactment of this division does not increase, decrease, duplicate or supersede the authority of any existing state agency..." CA PRC, Sec. 30401.

5. FERC's Preemption of the CPUC Has Prejudicially Impaired the California Environmental Quality Act ("CEQA") Process.

FERC's action has already materially disrupted and prejudicially impaired the scope and objectivity of California's multi-agency environmental review process. FERC asserts, "It is not our intent, in answer to the CPUC's concern, to preempt the CEQA review; rather we intend to make every effort to conform our federal NEPA inquiry and recommendation to the results of the state CEQA study." 107 FERC Paragraph 61,263, Sound Energy Solutions, Docket No. CP04-58-001, p.31 at ¶66. Yet, under CEQA, the state or local public agency with the most significant jurisdiction over a project will serve as lead or co-lead agency for preparation of the Environmental Impact Report ("EIR") on the project,[12] and based on its authority to issue a Certificate of Public Convenience and Necessity for natural gas projects, the CPUC, but for the jurisdictional dispute, would be the agency serving as CEQA Lead or at least Co-Lead Agency for the EIR. Given the Port of Long Beach's direct economic interest in the SES LNG Project, FERC's preemptive action means that the EIR under CEQA now is being prepared by an entity having a direct conflict

[12] (CEQA Guidelines Section 15367) -- the public agency that has the principal responsibility for carrying out or approving a project. Criteria for determining which agency will be the Lead Agency for a project are contained in Section 15051.

of interest, threatening the objectivity of the CEQA process and the EIR document.

The power to preempt the CPUC's jurisdiction over natural gas facility safety and siting is the power to limit the scope and depth of the state's inquiry – and its determinations – under CEQA. This is significant particularly because CEQA, unlike NEPA, requires that mitigating alternatives to the project as proposed that would reduce or eliminate potential significant adverse impacts, including risks posed by natural and public safety hazards, be adopted if the alternatives are feasible.

The Port of Long Beach as CEQA Lead Agency will not conduct public proceedings affording the same depth of public inquiry or development of public record on complex technical issues that go to the heart of public safety issues raised by the SES LNG Project, as the CPUC would do either as lead agency or simply as a "responsible" permitting agency under CEQA.[13]

[13] Nor, apparently, does FERC intend to pursue such public inquiry. Although the CPUC raised serious safety concerns in its protest at the FERC, the FERC did not set this matter for hearing. Instead, the FERC set it for a technical conference, which does not provide for discovery, cross-examination of witnesses, or a hearing transcript. See Rehearing Order at PP 60, 67, ER 247, 249.]

6. The Public Safety Issues Raised by the SES LNG Terminal Proposal Are Intensely Local and Site-Specific Issues. California State and Local Agencies Are Better Equipped than FERC to Address the Relevant Safety Issues of this Proposal.

Although FERC seeks uniform design, engineering, and siting criteria for LNG facilities, the variety of sites and settings at which LNG facilities are proposed makes such uniformity manifestly inappropriate and dangerous. LNG facilities and operations are inherently hazardous activities. Potential project sites vary dramatically from one another both as to natural and developed community hazards unique to the site; while some sites are fatally inappropriate, others may simply require responsive engineering.

Both State and City sources cite serious earthquake hazards at the proposed SES LNG Long Beach site. These are acknowledged in SES Resource Report No. 6, in which the SES consultant lists 27 local faults "potentially having a significant contribution to the ground-motion hazard at the LNG terminal site." SES Resource Report 6, Long Beach LNG Import Project, January 2004, at page 8; Table 6-3, at p. 9.

Compounding the earthquake-related risks at the SES LNG site, the California Department of Conservation, Division of Mines and Geology, "Official Map, Seismic Hazard Zones, Long Beach Quadrangle," [within

which the Port of Long Beach and most of the City of Long Beach are situated], dated March 25, 1999, identifies the proposed site as located within a "liquefaction zone," "an area where historic occurrence of liquefaction, or local geological, geotechnical and groundwater conditions indicate a potential for permanent ground displacement such that investigation as outlined in Public Resources Code §2693(c) would be required."

History illustrates the seriousness and immediacy of the earthquake risk: California DOC DMG Open File Report 98-19, "Seismic Hazard Evaluation of the Long Beach 7.5-Minute Quadrangle, Los Angeles County, California" reports,

> In the Long Beach Quadrangle, numerous effects attributed to liquefaction were noted following the 1933 Long Beach earthquake including numerous leaks in gas lines, water mains broken, roads cracked, and displaced pavement.... During the 1994 Northridge Earthquake significant damage occurred to facilities [in the Port of Los Angeles, near the southwestern corner of the Long Beach Quadrangle]...Features that developed at these localities, such as lateral spreading, settlement, and sand boils, manifested liquefaction.

Such effects have potentially devastating fire-related consequences,[14] which could be catastrophic at an LNG terminal site holding an intense concentration of potentially flammable material.

[14] The City of Long Beach General Plan includes the following text: "In the 1987 publication, Fire Following Earthquake issued by the All Industry Research Advisory

California state and local agencies now have been addressing seismic hazards related to industrial development for decades, and they continue to address them through a variety of special state programs related to seismic hazards.[15] In addition, California General Plan Law requires every city and county to adopt a "General Plan." California Government Code §65300 et seq. A required component of General Plans is a "Safety Element." Govt. Code §65302. The Legislature's intent in mandating the Safety Element is to ensure that local governments develop the regulatory tools necessary to protect the public's health, safety, and welfare against disasters and hazards. The Safety Element protects the community from any unreasonable risks associated with the effects of seismically induced surface rupture, ground shaking, ground failure, tsunami, seiche, dam failure, slope instability

Council, Charles Scawthorn explains how a post-earthquake urban conflagration would develop. The conflagration would be started by fires resulting from earthquake damage, but made much worse by the loss of pressure in the fire mains, caused by either lack of electricity to power water pumps, and /or loss of water pressure resulting from broken fire mains. Furthermore, increased density can affect risk. For example, narrower streets are more difficult for emergency service vehicles to navigate, the higher ratio of residents to emergency responders affects response times, and homes located closer together increase the chances of fires spreading." See City of Long Beach, Natural Hazards Mitigation Plan, Section 3, Community Profile, at p. 4-5.

[15] State legal requirements relevant to geologic hazards include the Alquist-Priolo Earthquake Fault Zoning Act (Public Resources Code § 2621 et seq.), which restricts development on the surface traces of known active faults, and the Seismic Hazards Mapping Act (Public Resources Code § 2690 et seq.), which directs the State Geologist to map potential ground shaking, liquefaction, earthquake-triggered landslide and other identifiable earthquake-related hazards in California. Additionally, the geologic hazards goals, policies, actions and maps strive to implement the 2002-2006 California

leading to mudslides and landslides, subsidence, liquefaction, and other seismic and geologic hazards; flooding; and wildland and urban fires. Safety elements also must address evacuation routes and minimum road widths and clearances around structures, as they relate to identified fire and geologic hazards.

Planning for hazardous industrial development in areas of earthquake hazard is a subject in which California citizens and California commerce have a direct stake. In contrast, FERC has little or no experience in exercising exclusive jurisdiction over hazardous facilities in such areas; furthermore, it has no safety exposure to the consequences of its decision.

Finally, siting of one or more LNG facilities in California requires a statewide perspective and knowledge at the state level to consider the best alternative LNG terminal site locations in the state to limit operational and natural hazards of LNG in the California market. These considerations are not properly made by a distant federal agency like the FERC, but rather should be made by the CPUC under the California constitution and statutes, the California Coastal Commission under the California Coastal Act and federal Coastal Zone Management Act, the California State Lands Commission, and/or local governments directly affected by the proposals.

Earthquake Loss Reduction Plan, which identifies as an implementation strategy

IV. CONCLUSION

For over a century, the CPUC, its professional staff, and the other agencies of state and local government have protected public safety related to siting and operation of hazardous industrial facilities. They have done so while serving the needs of intrastate commerce, including ensuring the flow of such hazardous foreign commercial commodities as crude oil, refined petroleum products, and liquefied petroleum gas into California markets. The CPUC has addressed in depth the complexities of siting hazardous gas, electrical, and petroleum facilities at kaleidoscopically diverse, earthquake-prone coastal and port areas, within the context of California's myriad local general planning and environmental laws.

FERC possesses none of this experience in California, yet, even without a clear Congressional mandate to do so, asserts a paramount, eclipsing federal interest in establishing a uniform, one-size-fits-all design and siting approach to LNG facilities handling foreign-originated LNG for the California market. If FERC is successful in seizing this jurisdiction and makes a poor decision, its decision-makers will be far removed from the consequences. CEC's members and other citizens of Long Beach will be living with them for decades to come.

incorporating seismic hazard data in general plans.

Based on the above, CEC respectfully requests that this Court reverse FERC's order asserting exclusive jurisdiction.

Dated: January 12, 2005

BERTRAND, FOX & ELLIOT

By: _____

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I hereby certify that I have this day caused copies of the foregoing **"AMICUS CURIAE BRIEF OF CALIFORNIA EARTH CORPS"** to be served upon the parties to these proceedings before this Court by sending to each party two copies thereof in the U.S. Mail, postage prepaid, addressed as follows:

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STATEMENT OF RELATED CASES: NONE

CALIFORNIA EARTH CORP'S CORPORATE DISCLOSURE STATEMENT (FRAP 26.1)

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae CALIFORNIA EARTH CORPS ("CEC") files the following Corporate Disclosure Statement.

CEC does not have a parent corporation. CEC also does not have any publicly held corporation that owns 10% of more of its stock.

Dated: January 12, 2005

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32 (a)(7)(C) AND NINTH CIRCUIT RULE 32-1