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Energy in the Eighties—Energy Law Symposium: LNG in Southern California*ψ

In Malibu, California, on November 15, 1980, Pepperdine University School of Law hosted a symposium¹ which focused on energy decision-making and the attorney's role in the energy regulatory process. A cross section of viewpoints was represented including: officers from the utility companies; personnel from federal and state regulatory agencies; landowners from the proposed siting area; and others who play an important role in deciding whether and how to bring LNG to California. The Symposium provided a forum for a panel discussion of the siting process. Western Liquefied Natural Gas's attempt to bring liquefied natural gas to Southern California was used as a role model to illustrate the many concepts essential to the energy facilitating siting process and environmental decision-making in California.

After a brief introduction delineating the history of the proposed liquefied natural gas site, an edited version of the Symposium transcript is set forth. The Symposium should prove interesting to those who have followed the attempt to build a liquefied natural gas terminal at Point Conception, as well as to those who are interested in the procedure used to receive approval for construction of a major energy facility.

* Contained in the following text is an article by Robert E. Lutz. This article is a modification of Mr. Lutz's keynote address which was delivered to open the Symposium.

ψ Primary credit for compiling the record of the Symposium, providing the background research, and coauthoring the introduction goes to Brian Beyer, a second-year law student at Pepperdine. Assisting in the research, and responsible for coauthoring the introduction, is Douglas Maner, a third-year law student at Pepperdine.

1. Symposium Project Directors:

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INTRODUCTION²

A significant part of Southern California's non-transportation energy is provided by natural gas. Late in the 1960's, Pacific Gas and Electric Company (PG&E) and Pacific Lighting Corporation, in conjunction with their wholly owned subsidiary, Western Liquefied Natural Gas Terminal Associates (WLNG), determined that the supply of natural gas in California was not sufficient to meet projected demand. To ensure that Southern California's natural gas needs would be met, WLNG planned a project involving the importation of liquefied natural gas (LNG) from Indonesia and Alaska. In 1973, an agreement was reached with an Indonesian natural gas supplier, Pertamina, to supply a portion of the LNG. The remainder was to come from Alaska.

To receive, process, and distribute the LNG, WNLG planned to locate a giant terminal on the coast of California. Extensive private engineering, financial, and land use studies were commenced and eventually focused on three proposed terminal sites—Los Angeles Harbor, Oxnard, and Point Conception. WLNG then commenced application with federal, state, and local authorities for permission to build a terminal.

At this point the project ran into major difficulties. Spirited opposition to the project came from groups who challenged the need for LNG in Southern California at this time, questioned the safety aspects of LNG, opposed the manner in which the LNG terminal site was being selected, and feared the potential adverse ecological consequences of an LNG terminal. The permitting process began eight years ago, and hearings are still being conducted at both the federal and state levels. An overview of these eight years of unsuccessful attempts to receive project approval should illustrate some factors in the delay.

In 1973, WLNG sought approval from federal, state, and local agencies in order to build the LNG terminal. On the federal level, the Federal Power Commission (FPC), now the Federal Energy Regulatory Commission (FERC), had ultimate authority over project approval. The FERC is primarily concerned with the economic feasibility of energy projects.

On the state level, the California Coastal Commission (CCC) had the authority to deny the project if it found that the energy the terminal would provide was not needed by the state, or if the terminal posed a significant threat to the environment. In con-

2. The following overview is taken primarily from Ahern, *California Meets the LNG Terminal*, 7 COASTAL ZONE MANAGEMENT J. No. 2-3-4 (1980).

trast to the FERC's financial concerns, the CCC was oriented more toward safety and environmental concerns.

Locally, the city or county governments where the terminal was proposed had authority to order both an environmental impact report and to approve or deny the project's location. The local governing bodies were most concerned with the effect a LNG terminal would have on the immediate area.

The initial step for WLNG was to select many different proposed locations and to begin studying the feasibility of each. From an original list of locations stretching along the entire California coast, WLNG narrowed them down to just three suitable sites—Los Angeles Harbor, Oxnard, and Point Conception. However, each site posed a different set of problems.

In Los Angeles, local officials sought to have the terminal built in Los Angeles Harbor because they felt it would generate revenue and create jobs for the local populace. However, the federal government opposed this site due to the threat posed to the nearby residents. It was determined that the proximity was too close to the Palos Verdes earthquake fault. Nonetheless, the Los Angeles City Council, with the recommendation of the Board of Harbor Commissioners, approved the location by an eleven-four vote in mid-1977.

In Oxnard, the City Council was originally in favor of the terminal. As more citizens became aware that one-fifth of Oxnard's population lived within two miles of the proposed site, controversy increased. Several citizen action groups helped to organize opposition to the proposed Oxnard site. They stressed the risk of a gas spill at or near the terminal. Local officials became increasingly hesitant about granting approval for the project as the controversy intensified. Studies were ordered and the permitting process was delayed until these studies could be completed.

The other site under consideration was at Point Conception in Santa Barbara County. Since the 1969 oil spill, local citizens and government officials have become very insistent that any potential threat to the environment or its inhabitants be minimized as much as possible before allowing a major industrial project to begin. In 1976, to receive approval for the terminal site at Point Conception, WLNG faced the following: a 1.6 million dollar environmental impact report; a legal challenge to the adequacy of the report; deliberations by the Board of Supervisors and the Planning Commission; and if it received approval, WLNG had to

receive a majority vote on a voter referendum on the County ballot. It has been estimated that this would have taken from three to five years. While WLNG was seeking project approval on the local level, it were also lobbying for approval with the various state agencies involved.

At the state level, the CCC had ultimate authority to grant approval for a LNG terminal. Also involved at the state level were the California Public Utilities Commission (CPUC) and the California Energy Commission (CEC). These two agencies represented California in the LNG hearings before the FPC in Washington D.C. The CPUC, like the FPC, is primarily a financial regulatory agency which regulates the rates, costs, and financing of California's major utilities. Because of its financial orientation, the CPUC spent less time studying the safety risks of the LNG terminal than it did researching financing and overall need for the project. Based on financial considerations, the CPUC favored the Oxnard site.

In contrast, the CEC had a completely different viewpoint. It challenged the CPUC's preference for the Oxnard site because the CPUC had allegedly failed to consult other state agencies. They proceeded to raise serious questions about the need for LNG and its safety. This inter-agency dispute increased the controversy surrounding WLNG's permit application. It also raised conflicting viewpoints before the FPC proceedings in Washington D.C. and made its decision more difficult. Even if WLNG were granted approval on both local and state levels, a negative decision by the federal government would effectively end the project. Due to the power granted the federal government by the Supremacy Clause, it could override any state or local decisions.

The uncertainty and lack of a unified federal policy on LNG siting did not give WLNG much hope that it could count on federal agencies to surmount many of the obstacles presented at the state and local levels. There existed no comprehensive set of regulations that would tell WLNG just what was required in order to receive project approval. Instead, it had to depend on local building codes, American Petroleum Institute standards, and national fire codes for guidance. This made LNG terminal siting, design, and operation plans very difficult to conceive and even more difficult to get approved.

In the three and one-half years that had passed since WLNG had first sought project approval, an impasse was reached from which there seemed no escape. The Los Angeles City Council wanted the terminal, but the federal agencies involved would not grant the permit. Point Conception, the only remote site, faced a

long and expensive approval process with no guarantee of success.

The FPC/FERC and Economic Regulatory Administration appeared ready to approve Oxnard as a terminal site, but other federal agencies and congressmen challenged the Oxnard site. Even if Oxnard were to receive local and federal approval, it appeared doubtful that the CCC would grant its approval. Due to all of the questions raised about LNG safety, it would have been difficult to convince the CCC, which placed primary importance on human safety, that a populated area such as Oxnard would be the best place for the LNG terminal. On the other hand, it would have been equally difficult to convince the CCC to approve Point Conception as a terminal site. This is because of the threat that it would pose to one of the last undeveloped stretches of the California coastline with its scenic views, secluded surf, and abundant marine life.

Faced with this apparent stalemate, WLNG, in 1977, decided to seek the help of California's Governor and State Legislature. WLNG's goal was to bypass the local governments and the CCC and give the authority to grant the permit to the CPUC, which had already shown its desire to have a LNG terminal in California. In the debate which ensued in the State Legislature, two viewpoints soon become apparent. Those who sided with the CEC, along with environmentalists and concerned local citizens, favored an offshore site with stringent safety regulations. The gas utilities, business, and labor groups considered the safety risks less important because the terminal was needed without further delay in order to prevent loss of energy and jobs.

The California LNG Terminal Siting Act of 1977 (Act) was a compromise between the two views. The CPUC was given ultimate permit authority at the state level instead of local governments and the CCC. The CCC would rank the sites, some of which could be selected by WLNG, and then let the CPUC make the final decision. The site could not be offshore, and it could not be near a major population center.

The CCC's elected eighty-two sites for consideration. However, due to the Act's population standards, most of the Southern California sites were eliminated. The Northern California sites were also ruled out because of weather conditions that would make tanker operations dangerous and soil and seismic conditions that would render operation of the plant hazardous. Only three sites

survived this demanding selection process: Camp Pendleton, which was rejected at the demand of the U.S. Marine Corps; Rattlesnake Canyon in San Luis Obispo County, which was removed from consideration because a large and costly breakwater was required; and Deer Canyon in the Santa Monica Mountains, which was eliminated for public safety reasons. Of the eighty-two sites selected by the CCC and the public, all had been found unacceptable.

According to the Act, the permit applicant has the right to select a site to be considered along with the other sites regardless of any previous determination of the site's merit by the CCC. WLNG then selected Point Conception for consideration. Earthquake faults had been discovered at the site similar in size to the ones which prompted the CCC to reject the Las Varas site in Santa Barbara County. Since Point Conception was the last site, it was granted conditional approval by the CCC on July 31, 1978. WLNG must still prove that the presence of these earthquake faults presents an acceptable risk before final approval will be given. Even if Point Conception is approved by the CCC and CPUC, it appears unlikely that it will receive federal approval because the FERC has stated that the site does not meet its seismic siting criteria. Given that all sites considered have been certified as unsafe for a LNG terminal, it would be difficult for WLNG to return to the Legislature and request approval for any site previously rejected as unsafe. Unless Point Conception receives approval, it appears unlikely that a LNG terminal will be seen in California in the near future.

The foregoing establishes the factual setting leading up to the Symposium. The Symposium itself was moderated by Professor Charles Nelson,³ with a keynote presentation delivered by Professor Robert Lutz.⁴ There were two separate discussion panels, the

3. CHARLES I. NELSON (Pepperdine University School of Law)

Professor Nelson is a graduate of the University of Texas at Austin Law School (1965). Prior to joining the faculty at Pepperdine he was engaged in private practice in Waco, Texas. He is a member of the American Bar Association, the State Bar of Texas, Phi Alpha Delta Law Fraternity, and a Consultant to the Continuing Education of the Bar in California.

4. ROBERT E. LUTZ (Southwestern University School of Law)

Professor Robert Lutz received his B.A. degree magna cum laude from the University of Southern California, his J.D. from the University of California at Berkeley (Boalt Hall), and holds memberships in the California, American, and International Bar Associations. While attending Boalt Hall, he co-founded the *Ecology Law Quarterly*, a prominent environmental law review. He has been the recipient of grants from Fonds fur Umwelt Studien to conduct a comparative study of environmental laws of sixteen countries at the IUCN Environmental Law Centre (Bonn, Germany) and from the National Sea Grant Program of the U.S. Department of Commerce to study changes in ocean law. Recently, he returned from

first convened in the morning session⁵ and the second convened

the University of Munich where he did research on transnational natural resource regulation as a recipient of the Alexander von Humboldt Foundation Award.

Professor Lutz has published widely on environmental, administrative, and international law topics; he has presented papers and lectured extensively on the subjects of domestic, comparative, and international environmental law, and law of the sea at numerous national and international legal conferences. He has also served as a consultant to the National Science Foundation, International Union for the Conservation of Nature and Natural Resources, the U.S. Council on Environmental Quality, the Organization for Economic Cooperation and Development (OECD), and was chairman of the Association of American Law Schools (AALS) Section on Environmental Law. He is currently a Professor of Law at Southwestern University School of Law.

5. The morning panel included the following:

BRIAN BAIRD (California Coastal Commission)

Mr. Baird has been on the energy staff of the California Coastal Commission for the past three and one-half years. He was a member of the Coastal Commission LNG staff and worked on the feasibility of siting a LNG terminal offshore. Presently, he manages the power plant studies, oil spill contingency studies and evaluations, as well as managing several federal grants through the Coastal Energy Impact Program (CEIP).

THOMAS D. CLARKE (Assistant General Counsel, Pacific Lighting Corporation)

Mr. Clarke graduated from the University of Rhode Island with a B.S. in Business Administration in 1963 and received his J.D. from Hastings College of Law, University of California at San Francisco in 1969. He served with the Federal Power Commission, Office of the General Counsel, from 1967 to 1972. In 1972 he joined the Pacific Lighting Corporation.

E.R. ISLAND (Senior Counsel, Pacific Lighting Corporation)

Mr. Island received his B.A. from Fisk University, Nashville, Tennessee, and his J.D. from Harvard Law School. He is a member of the State Bar of California, Los Angeles County Bar Association, American Bar Association, Federal Power Bar Association, and National Bar Association.

Mr. Island has been employed by Pacific Lighting Corporation for ten years. He has practiced extensively before the Federal Energy Regulatory Commission (formerly the Federal Power Commission) and the California Public Utilities Commission (formerly the Federal Power Commission) and the California Public Utilities Commission. Mr. Island is the company's lead counsel for its LNG proposals at the federal regulatory level.

K. PHILLIP KNIERIM (Fulop, Rolston, Burns & McKittrick)

Mr. Knierim obtained his law degree from Columbia (1974), where he was executive editor of the Columbia Journal of Transnational Law. He is a member of the Beverly Hills, Los Angeles County, and the California Bar Associations. Currently, he is president of the Beverly Hills Bar Association Environmental Division. Mr. Knierim represents landowners in the Point Conception area who are opposed to the siting of the LNG Terminal at Cojo Bay and has become intimately involved with all phases of the California energy facility siting regulatory process.

KEITH C. MCKINNEY (President of WLNG Terminal Associates)

Mr. McKinney joined Southern California Gas Company in 1952, and was

in the afternoon session.⁶ Prior to the afternoon session, former

with various Pacific Lighting subsidiaries since that time until named to his present position in early 1977, with principal involvement in gas supply and transmission.

He attended the University of California at Berkeley following Army service in World War II, and received B.S. and M.S. degrees in Industrial Engineering.

Mr. McKinney is a Registered Professional Engineer, State of California, a Regional Director of the Cryogenic Society of America; a member of Sigma Xi, Tau Beta Pi, American Gas Association, the Pacific Coast Gas Association, the Los Angeles Area Chamber of Commerce, Town Hall of California, and the World Affairs Council.

JEFFREY F. LISS (Wald, Harkrader & Ross, Washington, D.C.)

Mr. Liss is engaged in a federal litigation practice, with emphasis on federal regulatory matters. Mr. Liss represents the Fred H. Bixby Ranch Company in the federal Point Conception LNG proceedings before the Federal Energy Regulatory Commission, the Economic Regulatory Administration of the Department of Energy, and the United States Court of Appeals for the District of Columbia.

Mr. Liss is a member of the adjunct faculty at the Washington College of Law, American University, and a member of the Maryland Commission on Fair Campaign Practices. A graduate of the University of Michigan Law School, Mr. Liss is currently a member of the District of Columbia Bar, the American Bar Association, and the 1980 Judicial Conference for the District of Columbia.

LIONEL B. WILSON (LNG Task Force, California Public Utilities Commission)

Mr. Wilson received his law degree from UC Davis (1969). He was an intern with the State Assembly Judiciary Committee, and Assistant District Attorney for Alameda County before joining the PUC as Staff Counsel in 1972. He has been with the LNG Task Force since 1977.

6. The afternoon panel included the following:

JOHN GEESMAN (Executive Director of the California Energy Commission)

Mr. Geesman has followed the development of LNG in California from its inception. He is a graduate of Yale College and the University of California at Berkeley, J.D. (1976). Prior to accepting his present position, he was a special advisor to Commissioner Ronald D. Doctor of the CEC and a private energy policy consultant. Mr. Geesman is a member of the California Bar.

CHARLES E. GREENBERG (Partner, Ball, Hunt, Hart, Brown & Baerwitz, Long Beach, California)

Mr. Greenberg is a graduate of Dartmouth College and the USC Law School (1959). Recently he has taught ABA, CEB, and California Business Law Institute programs in his specialty, the governmental processing of proposed new developments, and has been a guest lecturer at USC Law Center. He has been Deputy City Attorney for Los Angeles and for Long Beach and has served as a member of the Board of Governors of the Long Beach Bar Association. Mr. Greenberg has been a member of the Energy Resources Committee of the Long Beach Chamber of Commerce, Long Beach Coastal Program Advisory Committee, and Chairman of the Board of the Long Beach Legal Aid Foundation.

PETER JONKER (Manager of Governmental and Public Affairs for WLNG Terminal Associates)

Prior to his present position, Mr. Jonker was an attorney with Union Oil Company of California for eight years, dealing with environmental and regulatory matters. Previously, he was Union Oil's Regulations Coordina-

California State Assemblyman Charles Warren⁷ addressed the Symposium.

Introductory remarks to the Symposium were provided by Associate Dean James McGoldrick of Pepperdine Law School, after which Professor Nelson was introduced.

Nelson: I've expressed to several panelists and other people that I'm the best and the worst of choices for this role. I'm the worst of choices because I do not teach in the area of environmental law, nor have I had a great deal of experience in the area of environmental law or energy law. On the other hand, I am the best because my naiveté enables me to ask whatever questions I want without appearing either dumb or vernal in the process. So I will exercise that prerogative. I should also suggest to our panelists that if the questions I ask this morning are a little too pointed, out of bounds, or just not good questions, that your response be that which all presidents of the United States use:

tor and responsible for coordinating the Company's program for anticipating and responding to government environmental planning efforts.

A native of the Netherlands, he came to the United States in 1966 on a swimming scholarship to the University of Southern California. He received B.S. and M.S. degrees in chemical engineering, cum laude, from USC, and a law degree, with honors, from Western State College of Law.

He is a member of the California Bar, and of Tau Beta Pi, national engineering honor society.

MARC MCGINNES (Executive Director of the Environmental Defense Center, Santa Barbara, California)

Mr. McGinnes received his B.A. from Stanford and his law degree from the University of California at Berkeley (Boalt Hall). In addition, he has done graduate work in France. He teaches at Santa Barbara College of Law and at the University of California at Santa Barbara. Mr. McGinnes is author of *Principles of Environmental Law*. He has been in private practice and was past president of the Ecology Center in Santa Barbara.

7. CHARLES WARREN (Former Chairman, President's Council on Environmental Quality)

Mr. Warren was engaged in the practice of law until his election to the California State Assembly in 1962. Prior to his appointment as Chairman of CEQ in March, 1977, he was Chairman of the Assembly Resources, Land Use, and Energy Committee for the State of California. In addition, he was Chairman of the National Conference of State Legislatures Energy Task Force and a member of the Carter Energy Task Force. Mr. Warren's legislative accomplishments include sponsorship of the Energy Conservation and Development Act of 1974, Utilities Lifeline Act of 1975, Nuclear Safeguards Acts of 1976, Timberlands Preservation Act of 1976, California Environmental Quality Act Amendments of 1976, and the California Coastal Act of 1976. Mr. Warren is currently employed with Charles Warren and Associates in Sacramento and has on occasion acted as a consultant to the Fred H. Bixby Ranch Company.

“Thank you for your question. Since I don’t want to answer that one, let me answer the one I do want to answer,” and simply make your own question out of it.

It’s now my pleasure to introduce to you Professor Robert Lutz of Southwestern University Law School, who will deliver the major morning speech.

*Keynote Presentation*⁸

Lutz: Thank you, Professor Nelson.

8. The following text is a modification of the keynote address given by Professor Robert Lutz. Subsequent to the Symposium, Professor Lutz modified his speech and added footnotes to provide the necessary factual background for an understanding of the problem.