U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue SE
Washington, DC 20590

FEB 0 2 2012

Mr. Michael Rubin, Assistant Attorney General
Mr. Christian F. Capizzo, Special Assistant Attorney General
Rhode Island Department of the Attorney General
150 South Main Street
Providence, Rhode Island 02903

Re: PHMSA Docket No. 2004-19208

Dear Messrs. Rubin and Capizzo:

Enclosed please find an Order on Remand in this matter. Service of this Order by certified mail is deemed effective upon the date of mailing, or as otherwise provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED [71791000164203139556]

U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590

In the Matter of	
Appeal of Denials of Rulemaking Petitions by the City of Fall River, Massachusetts, Commonwealth of Massachusetts, and the State of Rhode Island.	**PHMSA Docket No. 2004-19208**

ORDER ON REMAND

The City of Fall River, Massachusetts (Fall River), and the Commonwealth of Massachusetts and State of Rhode Island (States) (collectively, Petitioners) have petitioned the Secretary of the U.S. Department of Transportation (Department or DOT) to promulgate regulations that establish minimum safety standards for determining the location of new liquefied natural gas (LNG) facilities as required under the Pipeline Safety Act of 1979 (PSA).[1] The Acting Associate Administrator of the Office of Pipeline Safety (OPS), Pipeline and Hazardous Materials Safety Administration (PHMSA), previously denied both petitions upon a finding that the Secretary has issued regulations that meet his obligations under the PSA.[2] The Petitioners filed a joint administrative appeal of those decisions, and the Administrator recently issued an order remanding the matter for further consideration.

[1] Pub. L. No. 96-129, 93 Stat. 989 (1979) (as originally codified at 49 U.S.C. §§ 1671 et seq. and currently codified at 49 U.S.C. §§ 60101 et. seq.).

[2] Acting Associate Administrator's Decisions at p. 1 (Oct. 25, 2006).

Recent events have affected the merits of this proceeding, but not to the extent that these petitions should be returned for reasons of deficiency. Moreover, to ensure that those events are fully considered and to avoid the need for additional administrative proceedings, the Acting Associate Administrator's previous decisions are being withdrawn and a new, consolidated decision is being issued on the merits of these petitions.

Like its predecessors, this new decision finds that the Secretary satisfied his obligation to establish minimum federal safety standards for determining the location of LNG facilities in a final rule issued shortly after the enactment of the PSA, and that the Department's current regulations still satisfy the applicable statutory provisions. As such, no further rulemaking is warranted at this time.

I. PROCEDURAL HISTORY

On December 19, 2003, Weaver's Cove Energy, LLC (Weaver's Cove) filed an application with the Federal Energy Regulatory Commission (FERC) to build an LNG import terminal on the banks of the Taunton River in Fall River.[3] In response, on September 8, 2004, the States filed a petition for rulemaking requesting that the Department comply with Section 152 of the PSA by issuing minimum federal safety standards for determining the location of LNG facilities.[4] The States argued that the regulations the Department issued did not set out the

[3] Weaver's Cove Energy, LLC, 112 FERC P 61070, 61527 (July 15, 2005).

[4] States' Pet. at 3. (Sept. 8, 2004).

required minimum safety standards for siting LNG facilities.[5] The States asserted that those regulations were more design standards than location standards.[6] The States also argued that the regulations should, but do not, include a preference for remote siting.[7] Finally, the States argued that even if those regulations complied with the statute when promulgated, they no longer do so in light of new technology and security threats to the nation.[8]

The States proposed that the Department add a provision that would encourage the remote siting of LNG import terminals and storage facilities. That provision "would prohibit the siting of new LNG storage or disposal facilities in areas where there are more than 5,000 people living or working within a one-mile radius of the facility, unless such facility is determined to be necessary to meet a significant regional need that cannot be met through other feasible alternatives."[9]

Fall River filed its own rulemaking petition with the Department on the same day as the States.[10] Fall River argued that the Department's preemptive requirements for thermal radiation, vapor gas dispersion, and wind forces protection, and the incorporated siting provisions in the *National Fire Protection Association 59A: Standard for the Production, Storage, and Handling*

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[5] *Id.* at 3.

[6] *Id.* at 4.

[7] *Id.* at 5.

[8] *Id.*

[9] *Id.* at 1.

[10] Fall River Pet. at 1. (Sept. 8, 2004).

of LNG (NFPA 59A), are design standards that do not prescribe the location of new LNG facilities.[11]

Fall River proposed that the Department consider issuing standards that would prohibit locating any new LNG facility: (1) where the existing or estimated future population within 2,500 feet of the proposed site exceeds 1,000 individuals or 250 individuals under the age of 12 or over the age of 65; (2) where the existing or estimated future population within one mile of the proposed site exceeds 5,000 individuals; (3) where deliveries of LNG by ship would necessitate the closure of any bridge that provides access for residents to the only hospital within a 10-mile radius; (4) where the population density or topography would make "impractical" the enforcement of a safety or security zone under the U.S. Coast Guard's regulations;[12] (5) within one mile of a school, day care center, nursing home, or hospital; (6) within 1,500 feet of a roadway servicing more than 7,500 vehicles per day or an existing or proposed commuter rail line; (7) below the Base Flood Elevation for a 100-year flood; (8) in a location that would require delivery ships to pass under any bridge servicing more than 40,000 vehicles per day or, in combination, servicing over 100,000 vehicles per day, or that is part of an interstate highway; (8) in a community where there are insufficient "medical, law enforcement, and fire protection capabilities to cope with the consequences" of an LNG fire; or (9) where an available, alternative, less-densely populated site exists within 100 miles, regardless of the additional expense, with preference being given to offshore sites whenever technically feasible.[13]

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[11] Fall River Pet. at 5. Fall River also challenged the adequacy of the U.S. Coast Guard's regulations for maintaining safety and security zones around LNG tankers. 33 C.F.R. §§ 165.1-165.40 (2008). PHMSA's initial decision made clear that it has no authority over those matters. Neither party challenges that portion of the decision on appeal.

[12] *See* 33 C.F.R. Part 165.

[13] *Id.* at 9-10.

On October 25, 2006, the Acting Associate Administrator denied both petitions.[14] The Acting Associate Administrator determined that the Department, through regulations already promulgated by the Materials Transportation Bureau (MTB), the Research and Special Programs Administration (RSPA), and PHMSA,[15] had satisfied all the requirements of Section 152 of the PSA, and that Fall River and the States had not shown that PHMSA's current siting standards failed to comply with the requirements of 49 U.S.C. § 60103(a).[16] On November 13, 2006, Petitioners filed a timely joint administrative appeal of those decisions.[17]

On October 13, 2011, the Administrator issued an order remanding this matter to the Associate Administrator for further consideration. The Administrator stated that the Petitioners had listed Weaver's Cove proposal to build a waterfront LNG plant in Fall River, Massachusetts, in identifying their interest in the issuance of new siting standards; that they had listed that same project in identifying the specific known cases that illustrated the need for that proposed action; and that FERC had recently terminated Weaver's Cove's application to build the Fall River LNG plant and vacated all of the authorizations issued in that proceeding. Consequently, the Administrator asked the Associate Administrator to determine whether the petitions still

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[14] AAA Decisions at 1.

[15] Effective February 20, 2005, PHMSA became responsible for regulating pipeline safety matters, a mission previously delegated to DOT's RSPA. Norman Y. Mineta Research and Special Programs Improvement Act, Pub. L. 108-426, § 108, 118 Stat. 2423-2429 (2004); *see also* 70 Fed. Reg. 8299 (February 18, 2005). MTB previously regulated pipeline safety matters on behalf of the Department of Transportation. Establishment of Materials Transportation Bureau, 40 Fed. Reg. 30,821 (July 23, 1975).

[16] AAA Decision at 1. The Department has placed certain difficult-to-locate documents in the docket to ensure that the Petitioners have access to the full legislative and regulatory history.

[17] Joint Appeal at 1. (Nov. 13, 2006). Later that same month, the U.S. Court of Appeals for the First Circuit denied Petitioners' petition for a writ of mandamus to compel DOT's promulgation of minimum safety standards for "deciding on the location" of new LNG facilities or, in the alternative, a decision on the merits of their pending rulemaking petitions, on procedural grounds. *In re City of Fall River, Mass.*, 470 F.3d 30, 33 (1st Cir. 2006).

complied with the requirements of § 190.331(b)(3)-(4) and, if not, whether they should be returned with a written statement of deficiency under § 190.331(d).

II. SUFFICIENCY OF PETITIONS FOR RULEMAKING

While it is clear that recent events have affected the merits of this proceeding, the petitions submitted by Fall River and the States still meet the minimum procedural requirements for consideration under § 190.331. [18]

Weaver's Cove abandoned its proposal to build an LNG plant in Fall River, and FERC has taken all actions necessary to terminate its proceeding for that project. Thus, much of the relief requested by the Petitioners is no longer necessary, including the issuance of interim siting standards for evaluating the suitability of the proposed location for the Fall River LNG plant.

The Petitioners are challenging the Secretary's compliance with his statutory obligations under the PSA, however, and the resolution of that broader question is still relevant in determining the location of other existing and proposed LNG facilities in the

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[18] Section 190.331 of the Pipeline Safety Regulations establishes the minimum procedural requirements for rulemaking petitions. It states, in relevant part:

> (b) Each petition filed under this section must—
> (1) Summarize the proposed action and explain its purpose;
> (2) State the text of the proposed rule or amendment, or specify the rule proposed to be repealed;
> (3) Explain the petitioner's interest in the proposed action and the interest of any party the petitioner represents; and
> (4) Provide information and arguments that support the proposed action, including relevant technical, scientific or other data as available to the petitioner, and any specific known cases that illustrate the need for the proposed action.
> (c) . . . .
> (d) The Associate Administrator . . . may return a petition that does not comply with the requirements of this section, accompanied by a written statement indicating the deficiencies in the petition.

United States. PHMSA also has taken a number of significant actions in recent years that are predicated on the viability of the current regulations; i.e., the Administrator's approval of two alternative vapor gas dispersion models[19] and OPS's issuance of additional technical guidance[20] and written interpretations on the application of the minimum federal safety standards for siting LNG facilities.[21] In other words, recent events have altered the context of this proceeding, but not to the extent that the petitions submitted by Fall River and the States should be returned for reasons of deficiency.

Moreover, to ensure that those events are fully and fairly considered and to avoid the need for additional administrative proceedings, the Acting Associate Administrator's decisions are being withdrawn in favor of a new, consolidated decision on the merits of these petitions. As discussed below, this new decision finds that the Secretary satisfied his obligation to establish minimum federal safety standards for determining the location of LNG facilities in a final rule issued shortly after the enactment of the PSA, and that the Department's current regulations still satisfy the applicable statutory provisions. As such, no further rulemaking is warranted at this time.

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[19] On October 7, 2011, the Administrator approved the use of two alternative vapor gas dispersion models under 49 C.F.R. § 193.2059: Det Norske Veritas (USA), Inc.'s PHAST-UDM (Process Hazard Analysis Software Tool – Unified Dispersion Model) and GexCon US Inc.'s FLACS (FLame ACceleration Simulator). Additional information on these approvals is available at www.regulations.gov.

[20] Liquefied Natural Gas Facilities: Obtaining Approval of Alternative Vapor-Gas Dispersion Models, 75 Fed. Reg. 53371-53374 (Aug. 31, 2010).

[21] *In the Matter of Mr. Jeff C. Wright*, PHMSA Interp. #PI-09-0007 (Jul. 31, 2009); *In the Matter of Ms. Dianne Phillips*, PHMSA Interp. #PI-10-0020 (Mar. 25, 2010); *In the Matter of Mssrs. Keppel and Miozza*, PHMSA Interp. #PI-10-0021 (Jul. 7, 2010); *the Matter of Fulbright & Jaworski L.L.P.*, PHMSA Interp. #PI 10-0005 (Jul. 16, 2010).

III. STATUTORY AND RULEMAKING BACKGROUND

Before turning to the merits of Petitioners' arguments, this decision provides a brief overview of the Department's regulation of LNG under its original statutory authority, the Natural Gas Pipeline Safety Act (NGPSA) of 1968,[22] and its current statutory authority, the PSA.

The NGPSA authorized the Secretary of Transportation to develop, prescribe, and enforce minimum federal safety standards for pipeline facilities and persons engaged in the transportation of gas. In January 1972, the Department issued a Notice of Proposed Rulemaking (NPRM) under that statute to establish interim "minimum Federal safety standards for liquefied natural gas (LNG)."[23] The Department stated that the adoption of interim standards was necessary "while the Department has the time and opportunity to study the entire matter of the regulation of LNG in detail."[24] In October 1972, the Department established interim LNG safety standards based on the 1971 edition of the NFPA 59A, the generally accepted LNG standard, discussed below.[25]

In 1974, in preparation for the development of permanent LNG safety standards, the Department commissioned an independent study known as the "ADL Study." The ADL Study recommended that NFPA 59A serve as the basis for permanent regulations pertaining to LNG facilities. It stated that:

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[22] Pub. L. No. 90-481, 82 Stat. 720 (1968), *reprinted in* 1968 U.S.C.C.A.N. 827-838 (currently codified with amendments at 49 U.S.C. §§ 60101 *et seq.*).

[23] Liquefied Natural Gas Safety Standards, 37 Fed. Reg. 145 (proposed January 6, 1972) (to be codified at 49 C.F.R. pt. 192).

[24] *Id.*

[25] Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards, Liquefied Natural Gas Systems, 37 Fed. Reg. 21,638 (October 13, 1972) (to be codified at 49 C.F.R. pt. 192).

> NFPA 59A was the basis for practically all codes – national, state, and local – for LNG facilities . . . and that it "[was] generally accepted as establishing the minimum requirements for design and construction of LNG facilities . . . [and that it] [was] logical, therefore, that NFPA 59A forms the basis for comparison of these codes, and the foundation on which to build any permanent regulation specifically applicable to LNG facilities."[26]

On April 21, 1977, the Department published an Advance Notice of Proposed Rulemaking (ANPRM) to establish permanent standards on "the design, including site selection, construction, operation, and maintenance of LNG facilities."[27] In the ANPRM, the Department stated that:

> The draft regulations are based in part on NFPA 59A, but more importantly, they address serious safety problems respecting an LNG facility that MTB believes are not adequately resolved by the present standards. Foremost among these problems are: (1) Protection of persons and property near a facility from thermal radiation caused by ignition of a major spill of LNG, (2) protection of persons and property near a facility from dispersion and delayed ignition of a natural gas cloud emanating from a major spill of LNG, and (3) mitigation of the potential for a catastrophic spill of LNG. The draft regulations suggest that these problems may be resolved by imposing more stringent exclusion zone requirements and other plant design requirements, particularly with respect to storage tanks, impounding systems, and environmental forces.[28]

The ANPRM provided a detailed rationale for each of the Department's draft regulations, noting that many of the proposed standards exceeded the requirements in the NFPA 59A or imposed more stringent requirements than those in that generally accepted standard.[29] The Department also explained why its siting criteria should not vary based on population density.

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[26] LNG Facilities; Federal Safety Standards, Development of New Standards, 42 Fed. Reg. 20,776, 20,776-77 (proposed April 21, 1977).

[27] *Id.* at 20,779 (to be codified at 49 C.F.R. pt. 193); *see also* Incorporation by Reference, 41 Fed. Reg. 13,589 (March 31, 1976) (to be codified at 49 C.F.R. pts. 192 and 195).

[28] 42 Fed. Reg. at 20,776.

[29] *Id.* at 20,777-78.

> [The Department] has not drafted the regulations to provide varying levels of safety for different population densities for the following reasons: First, while the overall risk presented by a facility would vary in proportion to the population because of the potential losses involved, MTB believes that the seriousness of potential hazards such as thermal radiation and vapor dispersion necessitates minimizing the exposure of individuals to those hazards. This would be accomplished under the draft regulation by limitations on activities inside an exclusion zone . . . and other uniformly applicable design requirements.
>
> Secondly, any reduction in the safety for areas of low population might be accompanied by an unacceptable increased risk to facility personnel.
>
> Thirdly, additional special design features necessary to maintain an acceptable level of safety in an area of growing population density might be economically impracticable long after initial siting and construction.
>
> Fourthly, the likelihood of failure at an LNG facility does not vary in proportion to population density.
>
> Finally, MTB does not have enough information to serve as a basis for suggesting varying levels of LNG facility safety even if they were deemed appropriate.[30]

The period for commenting on the ANPRM closed September 1, 1977. The Department received over 4,000 comments.

In February 1979, a month after Congress introduced the PSA and after completing its detailed analysis of the 4,000 ANPRM comments received, the Department issued an NPRM to establish new regulations on the design, siting, and construction of LNG facilities.[31] In the NPRM, the Department stated:

> The proposed standards would prescribe actions needed to minimize or prevent (1) the occurrence of accidents due to controllable causes (e.g., faulty construction) or uncontrollable causes (e.g., earthquakes) and (2) the potentially damaging effects of accidents that may occur. Some standards would require redundant or back-up measures for extra protection, as in the case of manual and automatic shut-off valves. Because of the severity of potential consequences, even more special precautions would have to be taken to prevent accidents which could result in a failure of an LNG storage tank.

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[30] *Id.* at 20,778.

[31] LNG Facilities; Federal Safety Standards, Development of New Standards, 44 Fed. Reg. 8142 (Feb. 8, 1979) (to be codified at 49 C.F.R. pt. 193).

> If an accident were to result in a spill of LNG, under the proposed [regulations] a second level of protection would be provided by impounding systems that are designed to hold LNG and pr[e]vent it from endangering other components, entering neighboring property, or rapidly turning to gas. Since there is a threat of ignition once LNG is released, [the proposed regulations] also would provide a final level of safety through safe distances around a facility . . . [that] would protect persons who live or work near the facility site by providing enough room for flammable gas to dissipate or enough separation from the heat of burning LNG at the site.[32]

In the NPRM, the Department provided a detailed analysis of each of the draft regulations, including the changes made in response to the comments received on the ANPRM and a comparison of the proposed standards with the NFPA Standard 59A.[33] The NPRM made clear that the proposed regulations differed from the NFPA Standard 59A in several respects and provided a higher margin of safety.[34] The NPRM concluded with the text of the proposed permanent LNG regulations, including Subpart B "Site Related Design Requirements."[35]

In November 1979, before the Department's Final Rule was issued, Congress enacted the PSA. Section 152 of the PSA[36] provided, in relevant part:

> Establishment of standards for LNG facilities
>
> (a) Safety standards respecting location, design, installation, construction, and initial inspection and testing of LNG facilities
>
> (1) Not later than 180 days after November 30, 1979, the Secretary shall establish, by regulation—
>
> (A) minimum safety standards for determining the location of any new LNG facility . . .
>
> (d) Factors considered in prescribing general safety standards

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[32] *Id.* at 8142.

[33] *Id.* at 8144-46.

[34] *Id.* at 8146-53.

[35] *Id.* at 8168-8172.

[36] 93 Stat. 999 (originally codified at 49 U.S.C. § 1674a and currently codified as amended at 49 U.S.C. § 60103).

> In prescribing general safety standards under subsection[] (a) . . . of this section, the Secretary shall take into consideration—
>
> (1) with respect to standards relating to the location of any new LNG facility—
>
> (A) the nature of the use of the facility;
>
> (B) the existing and projected population and demographic characteristics associated with the location involved;
>
> (C) the existing and proposed land uses near such location;
>
> (D) the meteorological, geological, topographical, seismic, and other natural physical aspects of such location;
>
> (E) the medical, law enforcement, and fire prevention capabilities existing near such location to cope with risks created by such facility; and
>
> (F) the need to encourage remote siting.[37]

On February 11, 1980, three months after the PSA was enacted, the Department issued its Final Rule establishing "comprehensive safety standards governing the design (including site selection) and construction of [LNG] facilities used in the transportation of natural gas by pipeline in or affecting interstate or foreign commerce."[38] Those standards included the following siting requirements:

- a general duty clause, requiring that "[an] LNG facility . . . be located at a site of suitable size, topography, and configuration" and that an "operator . . . determine all site-related characteristics which could jeopardize the integrity and security of the facility;"[39]

- provisions requiring that an operator (or governmental authority) control enough property around a facility to protect the public from the adverse effects of thermal radiation and flammable vapor gas dispersion in the event of an LNG release, and that certain mathematical models be used to calculate the dimensions of these so-called exclusion zones;[40]

- provisions requiring that an operator investigate the potential effect of seismic activity, flooding, soil, wind forces, and any other severe weather and natural

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[37] 93 Stat. 999 (originally codified at 49 U.S.C. § 1674(a).

[38] Liquefied Natural Gas Facilities; New Federal Safety Standards, 45 Fed. Reg. 9184 (February 11, 1980) (originally and formerly codified at 49 C.F.R. pt. 193 (1980)).

[39] 49 C.F.R. § 193.2055 (1980).

[40] 49 C.F.R. §§ 193.2057-2059 (1980).

conditions at a proposed location;[41]

- a provision requiring that an operator evaluate the effect of any adjacent offsite activities;[42] and
- a provision requiring that a site afford a safe distance between each facility at an LNG plant.[43]

The Department acknowledged in the preamble to the Final Rule that the recent enactment of the PSA had affected the promulgation of those regulations.[44] The Final Rule also summarized the history of the rulemaking that produced those new standards, including the 1974 ADL Study, the April 1977 ANPRM, and the February 1979 NPRM.[45]

The Final Rule noted that many of the commenters continued to argue for the unaltered adoption of the NFPA 59A. The agency was, however, "still not persuaded by this argument and continue[d] to see the need for development of new, more stringent Federal safety standards for LNG facilities."[46] The Department supported that position by citing, among other things, the findings and recommendations in the 1974 ADL Study and the recent enactment of the PSA.[47] The Final Rule concluded by providing yet another detailed analysis of each of the new LNG regulations including Subpart B's "Site-Related Design Requirements."[48]

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[41] 49 C.F.R. §§ 193.2061-2067 (1980).

[42] 49 C.F.R. § 193.2071 (1980).

[43] 49 C.F.R.

[44] 45 Fed. Reg. at 9184.

[45] *Id.* at 9184-85.

[46] *Id.* at 9185.

[47] *Id.* at 9184.

[48] *Id.* at 9189-9199. The Final Rule stated that the "Final Evaluation," an updated version of the Department's original cost-benefit analysis, showed that those siting regulations included five of the eight most

The Department received a petition for reconsideration shortly after issuing the Final Rule.[49] That petition asserted "that the final rules [were] defective because the record [contained] no evidence that MTB took into consideration in prescribing the rules the several factors listed in [Section 152 of the PSA,] particularly 'the need to encourage remote siting.'"[50] The Department rejected that challenge in an August 1980 Final Rule on reconsideration because it had determined that remote siting was an available option to operators in complying with the exclusion zones and that the exclusion zones provided the advantages of remote siting without the drawbacks of poor positioning relative to existing pipelines, markets and navigational needs.[51] As noted by the Acting Associate Administrator in his October 2006 decisions, the record indicates that the industry members who petitioned MTB for further review of MTB's LNG regulations abandoned their efforts after the August 1980 decision on reconsideration. Moreover, there were no further challenges to the siting requirement, or requests to DOT for additional rulemaking on this requirement, until the submission of the current petitions.

Fourteen years later, Congress modified Section 152 of the PSA as part of a re-codification of Title 49 of the United States Code.[52] Congress deleted the original 180-day deadline for the Department to issue minimum location standards for new LNG facilities,

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costly provisions. That included the regulations for thermal radiation protection, flammable vapor gas dispersion protection, seismic investigation and design, flooding, and wind forces protection. *Id.* at 9187.

[49] Liquefied Natural Gas Facilities; Reconsideration of Safety Standards for Siting, Design, and Construction, 45 Fed. Reg. 57,402 (August 28, 1980) (originally and formerly codified at 49 C.F.R. pt. 193 (1980)).

[50] *Id.* at 57,404.

[51] *Id.*

[52] Pub. L. No. 103-272, § 60103, 108 Stat. 1307 (Jul. 5, 1994) (renumbering 49 U.S.C. § 1674a as 49 U.S.C. §§ 60103(a)).

deeming that mandate "as executed."[53] The Department continued to revise its LNG regulations in the years that followed, mostly to incorporate new versions of the NFPA and to accommodate technological advances.[54]

In December 1998, the Department issued an NPRM to replace some of its regulations with functionally-equivalent provisions in the 1996 edition of the NFPA 59A.[55] The NPRM stated that these changes would "enable operators to utilize current technology, materials, and practices, thereby reducing costs and enhancing economic growth[,] . . . eliminate unnecessary or burdensome requirements while maintaining current levels of safety[,] . . . [and be] consistent with the President's goals of regulatory reinvention and improvement of customer service."[56] The NPRM noted that some of the Department's 1980 regulations, though based largely on that standard, had restated provisions in the 1972 edition of the NFPA 59A "[b]ecause of the difference in format and the need for regulatory language to facilitate enforcement."[57] However, as the NPRM explained:

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[53] H. Rep. No. 103-180 at 441 (1993), reprinted in 1994 U.S.C.C.A.N. 818, 1258.

[54] *See* Update of Standards Incorporated by Reference, 58 Fed. Reg. 14,519, 14,522 (March 18, 1993) (updating technical standards referenced in wind forces regulation); Metric Equivalents, 63 Fed. Reg. 37,500, 37,504-05 (July 13, 1998) (adding metric equivalents to numerical measurements); Research and Special Programs Administration, Liquefied Natural Gas Regulations—Miscellaneous Amendments, 62 Fed. Reg. 8402 (Feb. 25, 1997) (amending thermal radiation protection and flammable-vapor gas dispersion protection regulations); Pipeline Safety: Incorporation of Standard NFPA 59A in the Liquefied Natural Gas Regulations, 65 Fed. Reg. 10,950, 10,958-59 (March 1, 2000); Pipeline Safety: Liquefied Natural Gas Facilities; Clarifying and Updating Safety Standards, 69 Fed. Reg. 11,330, 11,336 (March 10, 2004) (updating technical standards referenced in regulations); Pipeline Safety: Update of Regulatory References to Technical Standards, 71 Fed. Reg. 33,402, 33,409 (June 9, 2006) (updating technical standards referenced in regulations).

[55] Pipeline Safety: Incorporation of Standard NFPA 59A in the Liquefied Natural Gas Regulations, 63 Fed. Reg. 70,735 (proposed Dec. 22, 1998) (to be codified at 49 C.F.R. pt. 193).

[56] *Id.* at 70,735.

[57] *Id.* at 70,736.

> Because ANSI/NFPA 59A [was] revised on a regular basis, and because that revision process [included] input from a wide variety of experts and a broad representation of interests, the 1996 edition of the ANSI/NFPA 59A [included] the latest developments in LNG facility design and safety. Many of [those] developments [had] not been incorporated into Part 193, and therefore, Part 193 [lagged] behind the ANSI/NFPA 59A (1996 edition). The format and language of the ANSI/NFPA 59A [had] also changed significantly, over the years, to facilitate enforcement.[58]

The NPRM also observed that the Department "[had] been very active in incorporating by reference voluntary consensus standards in its regulations," and that it "[participated] on various voluntary committees to jointly develop consensus standards, including the ANSI/NFPA 59A technical committee for many years."[59] Finally, and most importantly, the NPRM stated that "[adoption] of ANSI/NFPA 59A in Part 193 will maintain current levels of safety and allow industry flexibility in applying latest technology."[60]

In a March 2000 Final Rule, the Department incorporated the 1996 edition of the NFPA 59A by reference.[61] The regulations in Part 193 still covered subjects that were not addressed or adequately covered in the 1996 NFPA 59A.[62] The Department eliminated the regulations that required operators to consider the potential effects of flooding, other severe and natural conditions, and adjacent activities in siting an LNG plant, because the:

> NFPA standard requires evaluation of potential incidents and the inclusion of safety measures in the design or operation of the facility in lieu of specifying natural disasters. Also, the NFPA standard requires consideration of factors

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[58] *Id.*

[59] *Id.* at 70,737

[60] *Id.*

[61] 65 Fed. Reg. at 10,950.

[62] *Id.* at 10,951-52.

> applicable to the specific site that may have a bearing on the safety of plant personnel and the public. We believe this performance language meets the intent of our regulation.[63]

Finally, in a March 2004 Final Rule, the Department amended some of the requirements in Part 193 and incorporated the 2001 edition of the NFPA 59A by reference.[64] The Department believes those clarifications and changes improve the clarity and effectiveness of its regulations and did not significantly modify any of the relevant location standards.

IV. ANALYSIS

Petitioners attempt to challenge regulatory provisions that, while subject to spirited debate when issued, were considered settled for over twenty years.[65] This decision reaches two conclusions: (1) the rulemaking that resulted shortly after the PSA was enacted complied with the statutory mandate; and (2) the Department's current regulations comply with the mandates of the PSA. As such, no further rulemaking is warranted at this time.

A. The Department Complied with Section 152 of the PSA when it Issued its 1980 Final Rule.

Petitioners maintain that the Acting Associate Administrator erred in finding that the Department complied with Section 152 of the PSA when it issued its 1980 Final Rule.[66] Petitioners contend that the Department only established minimum federal safety standards for the design of LNG facilities, not standards for determining the location of those facilities.

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[63] *Id.* at 10,954.

[64] Research and Special Programs Administration, Pipeline Safety: Liquefied Natural Gas Facilities; Clarifying and Updating Safety Standards, 69 Fed. Reg. 11,330, 11,331-32 (Mar. 10, 2004).

[65] Joint Appeal at 4. (Nov. 13, 2006).

[66] *Id.*

Petitioners cite the PSA, the regulations, and the legislative history of the PSA, in light of the contemporaneous actions of the agency, to support this contention. The plain language of the statute, the regulations, and the legislative history along with the contemporaneous actions of the agency, however, all support a finding that the Department complied with, and continues to comply with, Section 152 of the PSA.

1. Congress Gave the Department Broad Discretion to Prescribe Standards for Determining the Location of Any New LNG Facilities, as Long as It Considered Certain Factors.

The plain language of the statute is clear: Congress gave the Department broad discretion to prescribe standards for determining the location of any new LNG facilities as long as it considered certain factors. Section 152(a) of the PSA required the Secretary to "establish, by regulation[,] minimum safety standards for determining the location of any new LNG facility." Sections 152(d)(1)(A-F)[67] further required the Secretary in prescribing general safety standards to "take into consideration" certain factors "with respect to the location of any new LNG facility."[68] Petitioners aim to re-write the plain language of the statute to require the Department to "prohibit certain locations from suitability of certain kinds of LNG facilities, taking into account the statutory criteria."[69] That interpretation of the statute fails in light of the broad discretion given to the Department in the PSA.

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[67] Pub. L. No 96-129, § 152(a), 93 Stat. 989 (1979) (originally codified at 49 U.S.C. § 1674a and currently codified at 49 U.S.C. § 60103(a)).

[68] *Id.* at § 152(d).

[69] Joint Appeal at 14.

When Congress empowers an agency to prescribe regulations, it also has the power to restrict or limit how an agency discharges that duty.[70] Thus, the agency has broad discretion to interpret and implement the statutory charge unless Congress imposes a specific restriction.[71] Further, great deference is given to the Department's interpretation of its own statutes.[72] The Department's interpretation "governs if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts."[73] This is particularly the case "when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new."[74] The plain language of the PSA does not suggest that Congress prohibited the performance-based standards such as those adopted by the agency or that prescriptive standards are required. Moreover, the Department's interpretation of what the statute required is clearly a reasonable interpretation of the statutory language, even if there are other possible interpretations.

The Department decided to adopt performance-based regulations that limit the location of LNG facilities based on whether an operator or governmental authority controls enough surrounding property to protect the public and the environment. A performance-based standard focuses on obtaining specific objectives, such as mitigating a particular hazard, without dictating

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[70] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

[71] *Id.*

[72] *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[73] *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1505 (2009).

[74] *Udall*, 380 U.S. at 16. *See also Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978).

the method used to accomplish that objective. A purely prescriptive standard typically prescribes specific measures to be taken to prevent or mitigate a specific set of hazards without regard to other, site-specific issues or developments in technology. Under the Department's standards for siting new LNG facilities, the location of the facility is restricted based on the facility's ability to prevent certain safety risks to the public and the environment. The Department's performance-based standards for the location of new LNG facilities are flexible enough to incorporate new technology, provide incentives to encourage innovations in safety, increase transparency by requiring each new facility to provide evidence that it is safely located, reduce the necessity to update the standards, and tailor safety restrictions to the size and kind of LNG facilities.[75] Further, these standards maintain consistency with the Department's longstanding policy of prescribing performance-based regulations, rather than prescriptive ones.[76]

Nothing in the statute requires the Department to issue defined limitations, to establish location standards that are separate and apart from design standards, or to prioritize any of the listed factors. If Congress had meant to create those limitations, it would have done so, either at the time it enacted the PSA or in the more than two decades since the Final Rule was implemented. The PSA's only relevant limitation is that the Department consider certain factors when issuing regulations for the location of new LNG facilities.[77]

Petitioners read "take into consideration" to mean that the Department must establish a "distinct preference" for encouraging the remote siting of these facilities.[78] The use of the phrase

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[75] 44 Fed. Reg. at 8146; *see* Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978).

[76] 44 Fed. Reg. at 8146; *see* Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978).

[77] Pub. L. No. 96-129, § 152(a), (d).

[78] Joint Appeal at 14.

"take into consideration" in a statute vests the agency with the authority to determine "what weight each should be given, or whether in a particular situation all [of the] . . . factors must play a quantitative share" in rendering a decision.[79] If Congress wanted the Department to maintain a "distinct preference" for certain factors, it would have used those words in the PSA. But it did not.[80] The language it did use confirms that "the choice among permissive plans is necessarily the [agency's,] . . . [as] the agency [is] entrusted by Congress to make the choice and "the balance....struck [by the agency]...on consideration of all the factors "cannot be rejected" unless...[its] judgment, is not one that a fair-minded tribunal with specialized knowledge could have reached."[81] Accordingly, to prove it discharged its duties when regulating, the Department need only show that it contemporaneously considered each of the listed factors.

2. The Department Met Its Statutory Obligation to Issue Regulations for the Minimum Safety Standards for Locating New LNG Facilities, Taking into Consideration Six Statutory Factors.

As the rulemaking process and final regulation make clear, the Department met its statutory obligation to issue siting regulations when taking into consideration the six statutory factors. The Department's three-year rulemaking, which occurred simultaneously with the

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[79] *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 611 (1950). In that case, a statute required the Secretary of Agriculture to allocate quotas for the importation of sugar to the continental U.S. from, among other places, Puerto Rico, "by taking into consideration" three difference factors. However, in rendering his decision, the Secretary determined that one of those factors could not be applied to Puerto Rican sugar refineries. Therefore, he afforded that factor no weight. The U.S. Supreme Court later affirmed the Secretary's action, holding that "it was within his province to exclude from his determination" that particular factor. *Id. at 611-614; see Brehmer v. FAA*, 294 F.3d 1344, 1348-1349 (Fed. Cir. 2002) (upholding termination of air traffic controller under *Cent. Roig Ref. Co.*, where FAA considered, and rejected, the possibility of retraining as required by collective bargaining agreement).

[80] *See e.g., Cent. Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994) (rejecting private plaintiffs attempt to assert such a cause of action and stating that "[i]f . . . Congress intended to impose aiding and abetting liability [under § 10(b) of the Securities Exchange Act of 1934], we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not.").

[81] 338 U.S. 604, 614. (1950).

legislative process, was informed by the predicted and clear statutory mandates to issue location standards. Both the Department's NPRM and Final Rule explicitly reference and address the PSA's mandate to issue regulations that provide minimum safety standards for the location of new LNG facilities. Contrary to the allegations of the Petitioners, the record confirms that the Department weighed each of the six statutory factors, struck a proper balance between the available permissive plans and approaches, and prescribed safety standards governing site selection of new LNG facilities.

The Nature and Use of the Facility. The rules and regulatory history confirm that the Department considered the "nature and use of the facility" in developing the 1980 Final Rule. The Department asked the public to submit data on the potential impact that the initial draft regulations might have on a number of facility-specific factors, including "[s]tandards requiring additions to or modifications of present requirements related to siting (e.g., exclusion zones, etc.)."[82] The NPRM noted that the Department had analyzed the need for two separate standards—one for peak-shaving facilities and one for large import terminals.[83] The Department rejected such a bifurcated regime and instead recognized the need to establish "appropriate regulations which [] take into consideration the wide difference in size, type and characteristics of LNG facilities."[84] To address the nature and use of the facility, the 1980 regulations required that:

- an LNG facility "be located at a site of suitable size, topography, and configuration;"[85]

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[82] 42 Fed. Reg. at 20,779-80.

[83] 44 Fed. Reg. at 8145.

[84] 45 Fed. Reg. at 9188.

[85] 49 C.F.R. § 193.2055 (1980).

- "all site-related characteristics which could jeopardize the integrity and security of the facility" be considered in site selection and design;[86]
- the site provide ease of access for personnel, equipment, and materials;[87]
- the site have appropriate vapor gas dispersion and thermal radiation exclusion zones, based on the individual characteristics of a facility;[88]
- the site be capable of maintaining a facility's functional and structural integrity, based on soil composition;[89] and
- the site be large enough to afford a safe separation distance for each part of a facility.[90]

Existing and Projected Population and Demographic Characteristics Associated with the Location Involved, and Existing and Projected Land Use. The rules and regulatory history confirm that the Department took into consideration both the "existing and projected population and demographic characteristics" and the "existing and proposed land use" of the proposed location. In the NPRM, the Department stated:

> Since there is a threat of ignition once LNG is released, [the proposed regulations] also would provide a final level of safety through safe distances around a facility . . . [that] would protect persons who live or work near the facility site by providing enough room for flammable gas to dissipate or enough separation from the heat of burning LNG at the site.[91]

The Department also noted that section 193.2071 of the proposed regulations was based on "[t]he need for taking into consideration man-made activities adjacent to an LNG facility," an

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[86] *Id.*

[87] *Id.*

[88] 49 C.F.R. §§ 193.2057-59 (1980).

[89] 49 C.F.R. § 193.2065 (1980).

[90] 49 C.F.R. § 193.2073 (1980).

[91] 44 Fed. Reg. at 8142.

"important subject not covered in the present NFPA standards."[92]

To ensure that the existing and proposed populations and land use were not adversely affected, the 1980 regulations required an operator to examine the present and reasonably foreseeable activities adjacent to a proposed site, and prohibited locating a facility "where present or projected offsite activities would be reasonably expected to" adversely impact the operation or safety of a facility or result in a regulatory violation.[93] In addition, the 1980 regulations contained three different sets of acceptable thermal radiation flux values for exclusion zone purposes.[94] Those values varied with the use and type of structures on any adjacent properties, and an LNG facility could not be located at a site if those offsite targets and populations could be exposed to an unsafe level of radiant heat.

The Department otherwise rejected prescriptive siting standards that varied with population density and land use because: (1) the thermal radiation and vapor gas dispersion exclusion zones around an LNG facility minimized the risk of any potential hazards to the surrounding public; (2) locating facilities in low-population areas might jeopardize facility personnel by reducing the effectiveness of the first responder community; (3) imposing special requirements for areas with existing facilities that experienced unexpected population growth might prove economically impracticable; (4) the likelihood of a failure at an LNG facility did not vary with population density; and (5) insufficient information existed to justify a population-dependent regime.[95]

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[92] *Id.* at 8153.

[93] 49 C.F.R. § 193.2071 (1980).

[94] 49 C.F.R. § 193.2057(d).

[95] 42 Fed. Reg. at 20,778.

Meteorological, Geological, Topographical, Seismic, and Other Natural Physical Aspects of the Location. The rules and regulatory history confirm that the Department took into consideration the natural and physical aspects of the location, and specifically supplemented the NFPA Standard 59A to ensure safety. The earthquake design requirement in the 1980 regulations accounted for a number of factors not mentioned in the NFPA Standard 59A, including "surface faulting, motion amplification, soil liquefaction, land slide, foundation and dike design in areas of high seismic activity, and reaction of contained liquid."[96] Similarly, the regulation for protection against other natural occurrences provided a higher margin of safety than the comparable NFPA 59A standard, and those regulations accounted for a number of specific incidents, including flooding, wind forces, and other severe weather and natural conditions.[97] These provisions effectively prevented an operator from locating a new LNG facility where it could not be designed to ensure the safety of the public and environment.

Medical, Law Enforcement, and Fire Prevention Capabilities Near the Location. The rules and regulatory history confirm that the Department took into consideration the "medical, law enforcement, and fire prevention capabilities existing near such location to cope with a risk created by such a facility." The regulation on separation of components was designed "to provide for the movement of personnel and equipment during normal operations and in an emergency and to minimize hazards to persons and property on and off the facility site."[98] The regulations also included "provisions to assure that the site [would] have accessibility and

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[96] 44 Fed. Reg. at 8151.

[97] *Id.* at 8152-53.

[98] *Id.* at 8153.

sufficient size for mobility around components in the event of an emergency."[99] Specifically, "[a] site must provide ease of access so that personnel, equipment, and materials from offsite locations can reach the site for fire fighting [sic] or controlling spill associated hazards or for evacuation of personnel."[100] In other words, the 1980 regulations required that the proponent of an LNG facility consider whether a site would permit the first responder community to take prompt and effective action in the event of an emergency.

Need to Encourage Remote Siting. The rules and regulatory history confirm that the Department took into consideration "the need to encourage remote siting." In rejecting prescriptive standards, the Department explained:

> A rule prohibiting the construction of LNG tanks in any densely populated area was not proposed because the safety objectives of such a ban can be achieved more reasonably and appropriately through the "exclusion zone" . . . approach . . ., which would provide protection in both high and low population areas. . . . . As compared to an outright ban on construction in heavily populated areas, [this] approach also would allow the use of sites in areas of high population that are desirable from other important safety and economic standpoints not related to population, including the land use, geological conditions, navigational considerations, and proximity to existing pipeline facilities.
>
> The election not to propose an absolute ban on the construction of tanks in heavily populated areas was also made in recognition that such action would adversely affect the continued supply of natural gas to household consumers by arbitrarily preventing replacement or enlargement of many existing facilities. Under these circumstances, storage tanks needed to meet peak demands for natural gas would have to be built elsewhere at increased costs. This would have the added side effect of exposing additional areas to the risks of LNG.
>
> The "exclusion zone" requirements in the proposed rules can be expected to provide an economic incentive for locating LNG facilities in areas of lowest possible land costs (i.e., rural and other lightly populated areas). At the same time, the approach is flexible enough so that construction in heavily populated areas is not foreclosed when on balance, all relevant factors favor such construction.[101]

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[99] 45 Fed. Reg. at 9189.

[100] *Id.* at 9206.

[101] *To Improve the Protections Afforded the Public Against Risks Associated with the Transportation of*

The Department also considered the effect of remote siting in analyzing the costs and benefits of its proposed regulations. Specifically, the 1979 NPRM noted that the Draft Evaluation had analyzed "the benefit of avoiding a 10 cubic meter spill of LNG at a remotely located satellite facility," and that the "reduced accident costs" from complying with the Department's proposed regulations were "$1.5 million."[102] In comparison, "[a]t the upper end the benefit of avoiding maximum spill and ignition at a large peak-shaving facility in a densely populated area [wa]s estimated to be $29 billion."[103]

Finally, the Department specifically addressed how the need to encourage remote siting was taken into consideration in adopting the 1980 rules, stating:

> For example, remote siting is an option available to operators in complying with the exclusion zones required by sections 193.2057 and 193.2059. Also, in this regard, the preamble to the April 21, 1977, [ANPRM] discussed the need for safety standards based on different population densities, and the Evaluation analyzes the remote siting alternative. The safety advantages of "remote siting" are essentially obtained by compliance with the exclusion zone provisions, without incurring such potential drawbacks as poor positioning relative to existing pipelines, gas markets, or navigational needs.[104]

The Department intended to, and did, comply with Congress' mandates in Section 152 of the PSA by considering the six statutory factors before establishing minimum safety standards for the location of new LNG facilities.

Hazardous Commodities by Pipeline: Hearings Before the Comm. on Commerce, Science, and Transportation, S. 411, 96th Cong. 24 (1979).

[102] 44 Fed. Reg. at 8144.

[103] *Id.*

[104] 45 Fed. Reg. at 57,404.

3. Nothing in the Legislative or Regulatory History Contradicts a Finding that the Department Has Complied with the PSA.

Petitioners' argument that the legislative history supports their petitions is premised on the belief that the PSA is an "express[ed] rejection of DOT's 1977 and 1979 rulemaking progress as it related to the adoption of location standards."[105] Petitioners allege that the legislative history shows that Congress intended the PSA as: (1) a requirement that the Department adopt minimum safety standards for location standards separate and distinct from design standards; and (2) a rejection of the policy underlying the Department's rulemaking in progress.[106] To support their propositions, Petitioners cite a portion of the Report prepared by the House Committee on Interstate and Foreign Commerce, criticism by the former General Accounting Office (GAO) during a congressional hearing, and a statement made on the floor of the House of Representatives.[107] Petitioners' premise is unpersuasive, especially in light of the full legislative history.

The Department finds that the PSA was not a rejection of its plan to meet the impending statutory mandates. The legislative history makes clear that in 1979 Congress was concerned about the protracted rulemaking that had begun in 1972. The legislative history also makes clear that, contrary to Petitioners' assertion, Congress did not take issue with the Department's indicated direction for regulating the location of LNG facilities using performance-based standards.

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[105] Joint Appeal at 7.

[106] *Id.* at 5.

[107] *Id.* at 8-10.

The full legislative history supports a finding that Congress included Section 152 in the PSA to ensure that the Department completed its effort to replace its interim requirements with permanent regulations, including those prescribing minimum safety standards for determining the location of any new LNG facility. [108] The Report of the House Committee on Interstate and Foreign Commerce, which Petitioners cited, acknowledged concern regarding how long it had taken to adopt comprehensive standards regarding the siting, design, operation, and maintenance of LNG facilities.[109] Yet, in the next few paragraphs, it also stated that "*the committee does not intend to express approval or disapproval of any particular siting standards, and expects DOT to finalize its proposed regulations as scheduled.*"[110] Further, the Report stated that in regard to the siting standards:

> [T]he committee views as very important the [DOT's] present rulemaking proceeding, pursuant to section 3(a) of [the NGPSA], regarding LNG safety. The primary effect of this rulemaking, which has been pending since April 1977, would be to govern the siting, construction, and operation of LNG facilities . . .[111]

Read as a whole, the Report contradicts, rather than supports, Petitioners' contention.

The House Committee on Public Works and Transportation also made note of DOT's rulemaking in its report:

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[108] *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969) in noting that committee reports are regarded as "the authoritative source for finding the Legislature's intent.").

[109] The Report by the House Committee on Interstate and Foreign Commerce provided a clear explanation for the provisions in Section 152 of the PSA. The Report noted that the Department lacked effective leadership to carry out the Congressional mandate under the NGPSA, including setting Federal standards for the siting, design, operation and maintenance of LNG facilities. H.R. REP. NO. 96-201, Part I, at 20. The Report acknowledged that the Department had, even before passage of the PSA, resolved its leadership issues and was "showing evidence of a more active and aggressive approach to safety regulation." H.R. REP. NO. 96-201, Part I, at 20H.R. REP. NO. 96-201, Part I, at 9.

[110] H.R. REP. No. 96-201, Part I, at 22 (emphasis added).

[111] H.R. REP. No. 96-201, Part I, at 22-23.

> In 1978, the [DOT] made significant progress in developing regulations to assure the safe construction and operation of LNG facilities associated with the pipeline transportation of natural gas.[112]

Congress knew about the Department's existing rulemaking pertinent to LNG safety standards[113] and chose not to expressly reject or disapprove of the proposed standards. Indeed, the 180-day statutory rulemaking deadline implies that Congress intended the Department to finish what it had already started.[114] Starting from scratch, the Department could not have effectively drafted, provided sufficient notice and comment, and finalized prescriptive standards within six months.

Testimony from the GAO is not accorded sufficient weight to contradict clear legislative language and Congressional reports. Petitioners cite the GAO testimony that was critical of the Department's failure to adopt two major recommendations: (1) to require remote siting of new large LNG storage facilities; and (2) to preclude expansion of existing facilities, unless they are currently located in remote areas.[115] However, the lack of conforming statutory language reflects Congressional rejection of these recommendations. Further, Petitioners do not provide any basis for giving such testimony any weight in statutory interpretation. Petitioners also do not provide any basis for giving this testimony more weight than contemporaneous testimony supporting the Department's proposed standards.

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[112] H.R. REP. No. 96-201, Part II, at 4-5.

[113] *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (It is "generally presume[d] that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *see also In re Rivera Torres*, 432 F.3d 20 (1st Cir. 2005).

[114] 49 U.S.C. § 1674a(a)(1) (1980).

[115] Joint Appeal at 8-9.

Similarly, as to the floor statement of Representative Markey, cited by the Petitioners, that this "legislation . . . would require remote siting to the maximum extent possible,"[116] the record demonstrates that the Department considered and addressed the congressional concerns in its rulemaking.[117] In any event, such a statement does not change the statutory language in the PSA from "take into consideration . . . the need to encourage remote siting" to requiring remote siting "to the maximum extent possible."[118]

Finally, Congress has never invalidated the Department's original interpretation of section 152 of the PSA.[119] In the 1994 re-codification of Title 49 of the U.S. Code,[120] Congress characterized that statutory mandate "as executed".[121] Indeed, Congress has never asked this

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[116] *Id.* at 9-10 (quoting 125 Cong. Rec. 24,901 (1979) (statement of Representative Edward Markey).

[117] In the February 1980 Final Rule, the Department acknowledged "[t]he extent of congressional concern regarding the inadequacy of the present standards and the need for the government to issue expeditiously federally developed LNG regulations." 45 Fed. Reg. at 9184. For the reasons provided in the Decision, and after due consideration of concern expressed by Representative Markey in 1979, the Department believes that the regulations subsequently issued responded to criticism that the 1980 initial rules were defective and then adequately addressed those concerns, including the need for remote siting. The Department responded that "[t]he final rules contain numerous specific provisions relation to the section 6(d) factors [i.e., the six factors enumerated at 49 U.S.C. § 60103(a).]" 45 Fed. Reg. at 57,404.

[118] *Bryan v. US*, 524 U.S. 184, (1998) (internal citation omitted) (When construing legislative history, statements by individual legislators are not controlling and should not be used to obscure the plain meaning of the statute); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394, (1951); *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964).

[119] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (stating that Congress' "failure to revise or repeal [an] agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."); *see also U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (noting that "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it").

[120] Pub. L. No. 103-272, § 60103, 108 Stat. 1307 (1994) (deleting the original 180-day rulemaking deadline imposed in Section 152 of the PSA and renumbering 49 U.S.C. § 1674a as 49 U.S.C. §§ 60103(a)).

[121] H.R. REP. NO. 103-180 at 441 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 1258. In the PSA, Congress had deleted a similar deadline imposed in the NGPSA, stating "that the Secretary [of DOT] ha[d] long since complied with th[ose] mandates by publication of such standards in 49 CFR Parts 191 and 192." 93 Stat. 996; 1979 U.S.C.C.A.N. 1979. The fact that Congress undertook the same action in the 1994 re-codification of Section 151 of the PSA warrants an analogous interpretation.

agency to reconsider its siting regulations in any of its subsequent reauthorizations of the nation's pipeline safety laws.[122] Finally, in the Energy Policy Act of 2005, Congress established a new process for the Federal Energy Regulatory Commission's consideration of the factors listed in Section 152 of the PSA but did not mandate that the Department reconsider the regulations it had issued in 2000 and 2004 to comply with that provision.[123] Contrary to Petitioners' assertions, the actions of Congress show that the Department complied with section 152 of the PSA, not that the agency ignored that mandate.

B. The Department's current standards for siting LNG facilities comply with 49 U.S.C. § 60103(a).

The Petitioners also maintain that the Department has not complied with the continuing obligations of Section 152, now codified at 49 U.S.C. § 60103(a). In particular, Petitioners contend that the Department's recent rulemakings on the siting of new LNG facilities "do not satisfy the required minimum locations standards any more than the original 1980 version did."[124] They cite the regulatory history and the adoption of the later versions of the NFPA 59A in support of their contentions;[125] however, none of these arguments is persuasive.

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[122] Pipeline Safety Act of 1992, Pub. L. 102-508, 106 Stat. 3289, Tit. I, §§ 101-118; Accountable Pipeline Safety and Partnership Act of 1996, Pub. L. 104-304, 110 Stat. 3793; Pipeline Safety Improvement Act of 2002, Pub. L. 107-355, 116 Stat. 2985; Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, Pub. L. 109-468, 120 Stat. 3486.

[123] Pub. L. No. 109-58, § 311, 119 Stat. 94, 685 (2005) (currently codified at 15 U.S.C. § 717b-1(b)); *see AES Sparrow Point LNG, LLC v. Smith*, 470 F.Supp. 2d 586, 596-598 (D. Md. 2007) (discussing legislative history of EPAct).

[124] Joint Appeal at 17.

[125] *Id.* at 6-7.

1. The Department's 2000 and 2004 Rulemakings Do Not Evidence a Disregard for the Statutory Standards.

Contrary to Petitioners' argument, the regulatory history shows that the Department's recent rulemakings complied with the requirements of Section 152 of the PSA.[126] The Department considered the applicable statutory requirements, the history and purpose of the 1980 regulations, and the need to ensure that its siting requirements reflect modern practices and recent technological advances in those proceedings. Its actions were consistent with, and not a dismissal of, its statutory obligations.

Moreover, the Department's increased reliance on the NFPA 59A in its regulations is consistent with the PSA. That standard is widely used in the LNG industry, and Petitioners have not introduced any scientific or technical evidence demonstrating that it is wholly or partially inadequate.[127] The Department's preemptive siting regulations and the incorporated provisions of the 2001 NFPA 59A still require that certain factors be considered in locating an LNG plant.[128]

The Department's recent rulemakings are also consistent with The National Technology Transfer and Advancement Act (NTTAA) of 1995.[129] NTTAA encourages "the use by Federal agencies of private sector standards, emphasizing where possible the use of standards developed by private, consensus organizations,"[130] and the Office of Management and Budget (OMB) memorandum that implements the NTTAA "directs agencies to use voluntary consensus

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[126] 65 Fed. Reg. 10,950; 69 Fed. Reg. 11,330.

[127] *See* 49 C.F.R. § 190.331(b) (2009) (requiring rulemaking petitions to " [p]rovide information and arguments that support the proposed action, including relevant technical, scientific or other data as available to the petitioner, and any specific known cases that illustrate the need for the proposed action.")

[128] 2001 NFPA § 2.1.1.

[129] Pub. L. No. 104-113, 110 Stat. 775 (1996) (codified in scattered sections of 15 U.S.C.).

[130] *Id.* at § 12(a)(3), 110 Stat. 775, 782 (currently codified at 15 U.S.C. § 272(b)(3)).

standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical."[131] Petitioners have not provided any basis for the Department to ignore OMB's clear directive to implement the NTTAA.

2. The Adoption of the 1996 and 2001 NFPA 59A, Along with the Department's Preemptive Regulations, Maintain the Department's Location Standards.

In a March 2000 Final Rule, the Department formally adopted the 1996 edition of the NFPA 59A and replaced, modified, or maintained the appropriate provisions in its siting regulations.[132] That included, among other things:

- maintaining the current regulations for wind speed and ambient temperatures in performing a thermal radiation exclusion zone analysis,[133]
- maintaining the current regulation for the lower flammability limit used in calculating the vapor gas dispersion exclusion zone,[134]
- replacing the regulations for flooding, wind forces, and other severe weather and natural conditions with the NFPA 59A's general plant site consideration provision,[135]
- adopting LNGFIRE III, a newer version of the Department's thermal radiation model, and FEM3A, another vapor gas dispersion model,[136] and
- replacing the outdated seismic investigation regulation with the NFPA 59A's more current provision.[137]

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[131] OMB Circular No. A-119; Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546, 8553 (Feb. 19, 1998).

[132] 65 Fed. Reg. 10,958-59.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

Despite Petitioners' assertions, the Department's preemptive siting regulations and the incorporated provisions of the 2001 NFPA 59A comply with the statutory requirements in the PSA.

Kind and Use of the Facility. The current regulations confirm that the Department has taken the kind and use of the facility into consideration. The 2001 NFPA requires that a site afford minimum clearances for LNG containers, flammable refrigerant storage tanks, flammable liquid storage tanks, structures and plant equipment,"[138] and that steps be taken to retain "spilled LNG, flammable refrigerants, and flammable liquids within the limits of plant property" during site preparation.[139]

Existing and Projected Population and Demographic Characteristics of the Location, Existing and Proposed Land Use Near the Location, and Need to Encourage Remote Siting. The current regulations show that the Department has taken the existing and projected population and demographic characteristics, the existing and proposed land uses, and the need to encourage remote siting into consideration. An operator or governmental authority must control enough property around an LNG plant to protect the public from the adverse effects of thermal radiation and flammable vapor gas dispersion in the event of an incident.[140] All other site-specific factors "that have a bearing on the safety of plant personnel and the surrounding public" must be considered, and the review of those factors must "include an evaluation of potential incidents and safety measures incorporated in the design or operation of the facility."[141]

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[138] 2001 NFPA 59A § 2.1.1(a).

[139] 2001 NFPA 59A § 2.1.2.

[140] 49 C.F.R. §§ 193.2057-2059.

[141] 2001 NFPA 59A § 2.1.1(d).

Natural Physical Aspects of the Location. The current regulations demonstrate that the Department has taken the natural physical aspects of the location into consideration. "Soil and general investigations of the site [must] be made to determine the design basis for the facility."[142] Consideration must also be afforded to "[t]he degree that the plant can, within limits of practicality, be protected against the forces of nature" at a proposed location.[143] The effect of wind forces must also be considered.[144]

Medical, Law Enforcement, and Fire Prevention Capabilities Near the Location that Can Cope with a Risk Caused by the Facility. The current regulations make clear that the Department has taken the medical, law enforcement, and fire prevention capabilities near the location into consideration. A location should provide "[a]ll-weather accessibility to the plant for personnel safety and fire protection," unless those needs are properly addressed by onsite equipment, procedures, and personnel.[145]

Accordingly, the Department's regulations for determining the location of new LNG facilities still comply with Congress' mandates in Section 152 of the PSA.

V. CONCLUSION

As explained in Part IV of this Order, the Department has complied with its statutory obligations, including the need to encourage remote siting of LNG facilities. The Department considered all factors in Section 152 of the PSA in promulgating its 1980 siting regulations.

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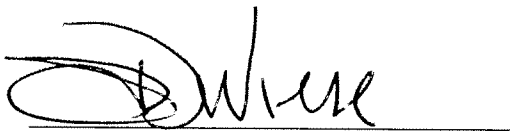
[142] 2001 NFPA 59A § 2.1.4.

[143] 2001 NFPA 59A § 2.1.1(c).

[144] 49 C.F.R. § 193.2067.

[145] 2001 NFPA 59A § 2.1.1(b).

The Department's current standards for determining the location of LNG facilities satisfy the requirements in 49 U.S.C. § 60103(a). Therefore, there is no need to issue new or interim standards for use in siting those facilities. These Petitions are denied. This is the final administrative action in this proceeding.



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Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of February, 2012, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below.

Steven Torres, Corporation Counsel Law Department City of Fall River One Government Center Fall River, Massachusetts 02722	Original Order Certified Mail Return Receipt
Carol Iancu, Assistant Attorney General Office of the Attorney General Commonwealth of Massachusetts One Ashburton Place Boston, Massachusetts 02108	Original Order Certified Mail Return Receipt
Michael Rubin, Assistant Attorney General Christian F. Capizzo, Special Assistant Attorney General Rhode Island Department of the Attorney General 150 South Main Street Providence, Rhode Island 02903	Original Order Certified Mail Return Receipt
Vanessa Allen Sutherland, Chief Counsel USDOT/PHMSA 1200 New Jersey Avenue, S.E., Room E26-320 Washington, DC 20590	One Copy Personal Delivery
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Anitra Brown