Delaware River Gas Terminal Decision Pits Law Against Politics

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Daniel B. Markind

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Daniel B. Markind is a Forbes.com energy column contributor. The views expressed in this article are not to be associated with the views of Flaster Greenberg PC.

Later this year, it is likely that the Delaware River Basin Commission (DRBC) will vote on whether to approve a new natural gas export terminal to be located on the Delaware River in Gibbstown, New Jersey, just southeast of Philadelphia. The DRBC was scheduled to decide on the project in September, but postponed the vote for further study. Ostensibly, the vote to delay was based on the claim that the DRBC commissioners needed more time to review the record before making a final decision, but one cannot help but to believe that unspoken political pressures were the real cause for the delay.

The Gibbstown terminal would bring liquefied natural gas (LNG) from Wyalusing, Pennsylvania, about sixty miles west of Scranton in northeastern Pennsylvania, to the Delaware River where it could be loaded onto ships and exported. To access the proposed Gibbstown facility, the gas would travel by both trucks and rail cars utilizing the nations first LNG-by-rail permit.

Specifically, a special permit authorizing the use of rail cars for LNG transport was previously issued for the Gibbstown project back in December 2019 by a federal agency called the Pipeline and Hazardous Materials Safety Administration (PHMSA), which found such transport safe when conditioned upon following certain safety criteria specified in the permit. Meanwhile, in response to a separate petition for rulemaking by an industry group, PHMSA also adopted a new regulation this past July, which became effective August 24, 2020, generally allowing the bulk transport of LNG by rail cars on a nationwide basis subject, again, to certain prescribed safety requirements. The new regulation has been challenged in at least two appeals currently pending in federal court brought by, respectively, 14 individual states and a group of environmental organizations. Interestingly, but perhaps not unexpectedly, the states of Delaware, New Jersey, New York and Pennsylvania are all among the 14 states objecting to the new regulation.

Despite unceasing political opposition, the Gibbstown terminal has, in fact, already received its requisite permits, including initial approval by the DRBC itself in June 2019. That decision was immediately appealed by the Delaware Riverkeeper Network (DRN) and was reviewed in May 2020. The review included a public comment period and an adjudicatory hearing. At the hearing, overseeing officer John D. Kelly recommended that the DRBC uphold its earlier, and still existing, approval. Kellys decision was then appealed by the DRN to the full DRBC, which had been scheduled to vote on approving Kellys recommendation at the meeting this past September.

The DRBC is an interstate agency established in 1961 by a compact among the United States and the individual states through which the Delaware River flows (Delaware, New Jersey, New York, and Pennsylvania). Each state, and the federal government, has one vote. By grant of its founding compact, the DRBC has jurisdiction over Projects within the area of drainage of the Delaware River that would impact the river.

In recent years, the DRBC has attempted to expand its jurisdiction by interpreting the term Project very broadly. In September 2017, the DRBC announced that it would promulgate regulations that would ban hydraulic fracturing within the river basin itself. That move sparked a lawsuit by a northeastern Pennsylvania resident challenging the proposed regulation as allowing the DRBC to regulate anything within the basin under the guise of it being a Project, regardless of whether it actually relates to the river or not. In effect, the DRBC now claims jurisdiction over any activity within the Basin, justifying that untrammeled jurisdictional claim on the grounds that any such activity might impact drainage into the Delaware River.

Despite the political opposition, the Gibbstown terminal project has moved forward, receiving approvals both from the United States Army Corps of Engineers and the New Jersey Department of Environmental Protection (NJDEP), in addition to the special permit from the PHMSA described above. The NJDEP permit is especially instructive because the administration of New Jersey Governor Phil Murphy has been deeply hostile to natural gas development and its transportation elsewhere. For example, that attitude manifested itself earlier this year when the NJDEP refused to grant permits to build the Northeast Supply Enhancement Pipeline in Raritan Bay, that would have provided much needed natural gas to New York City.

Nonetheless, at its quarterly business meeting on September 10, the DRBC backtracked, voting 3-1-1 to delay the final permitting. New York, New Jersey, and Delaware all voted to delay, while the United States voted to move forward and Pennsylvania abstained. The next commission business meeting is scheduled for December 9. It is anyones guess if the outcome of the November presidential election will affect the Gibbstown vote, or even if it does not whether issues potentially beyond the DRBCs jurisdiction, like the national safety of rail transport of LNG generally, affect its decision. However, the implications of the latest delay are both ominous and troubling.

The Gibbstown terminal delay raises a key national question that deserves to be answered. That question is whether this country maintains sufficient political will to follow its regulatory processes properly, or whether the public pressure that accompanies any energy project will cause complete national paralysis, especially in the energy field.

The pressure opposing any fossil fuel infrastructure project was recently illustrated in an editorial against the Gibbstown project published in *The Philadelphia Inquirer* on September 28. The *Inquirer* editorial is a classic example of arguing for continued poor decision making due to past poor decision making caused by prior political pressure. To quote from the editorial:

The facility most likely would be fed by 100-car trains critics call them bomb trains originating northwest of Scranton, laden with supercooled LNG, and snaking through densely populated Philadelphia and South Jersey communities.

However, the use of railroads to transport LNG is related to the past refusal of Pennsylvania, and indeed much of the United States, to build much safer natural gas pipelines that are needed to transport gas from the locations where it is produced, like the Marcellus Shale region in Pennsylvania and elsewhere, to the areas where it is needed for energy consumption. Therefore, any current objection to the use of rail cars for LNG transport comes from a self-imposed situation created by the people and groups whose prior objections to pipelines make it necessary to consider LNG transport by rail in the first place. Stated differently, having successfully stalled construction of the safest alternative possible for fossil fuel transport pipelines opponents now use that very fact to argue against any further development of natural gas infrastructure.

While environmentalists rejoice at the current delay, the long term implications are dire. One need only look at Germany and its ever increasing dependence on Russian natural gas to see the failure of policies that dont responsibly develop available and still abundant natural gas resources at least while the green energy revolution is still in its infancy and cannot hope to supply the countrys full energy needs for decades still to come.

The Russians care little about environmental safeguards. Ironically, the result of Germanys increasing concern for the environment, when put into effect through its refusal to approve any new fossil fuel projects since 2010, is an increased demand for environmentally unsound Russian gas drilling in the Arctic. The same situation can predictably occur in the United States if we continue down the same path in this country.

During a period of both upcoming Presidential and Legislative elections, not to mention a Supreme Court Justice nomination, all three branches of our government are in enormous flux. It may be, however, that the unofficial fourth branch of government that of the administrative agency also needs to be examined. With the agencies taking an ever-expanding role in controlling our daily lives, it will be up to the American people to insist that the public good be manifest through proper following of the administrative process, and not through pressure tactics by groups of well-funded, well-organized and vocal interests who insist on following agendas that may not prove to be sound for the greater good of the nation.