

LNG Behemoth Hints at Legal Action if Strict Smog Rules Are Applied

Billiton Attorney Says Local Agency Is Attempting to Usurp More Favorable Federal Oversight

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The Australian company that wants to float a large energy terminal 13.8 miles off Malibu's coast is hinting at court action should it lose a pending, crucial clean air decision. BHP Billiton says its due process rights will be violated if it is denied use of a disputed smog rule loophole, a ruling that might make it impossible to build Cabrillo Port.

In a letter last week to Environmental Protection Agency officials obtained by the Malibu Surfside News, the company's attorney blasted local smog regulators for reaching "particularly disingenuous" and illegal conclusions.

On Nov. 14, and by a 9-0 vote, the Ventura County Air Pollution Control Board held its onshore smog rules indeed cover the proposed liquefied natural gas terminal, which the company contends is exempt.

That \$800 million LNG import terminal, dubbed Cabrillo Port, would discharge 484 tons per year

of various smog-causing chemicals into the air upwind of the Malibu coast beginning in 2010.

Coastal residents are generally opposed to the prospect of an aircraft-carrier-sized ship, topped by three round domes, on the sunset horizon west of Point Dume.

BHPB attorney Thomas Wood says the Ventura County decision "is the result of a politically-charged local decision-making process rather than reasoned analysis." The company said local officials have no right to tell federal officials how to interpret local smog rules, and even if they did, acted too late because last month's vote came after the public comment period had ended.

"That's just ridiculous," said attorney Karen Kraus at the Environmental Defense Center, which is partly funded by the City of Malibu, California Coastal Protection Network and donations from local residents. "That disregards the entire meaning of the public hearing process.

"The EPA put out a proposed decision and then held a public comment period, and if those public comments raise issues, EPA is certainly entitled to ask further follow-up questions," she said.

At issue is the EPA's proposed interpretation of a local law that may block construction of the LNG terminal, which is worth at least \$5 billion in LNG exports to the world's largest mining company.

The Deepwater Ports Act requires the federal EPA to use state smog rules as it decides, among other issues, whether to give Cabrillo Port approval to produce smog without buying "offset" air pollution credits in Ventura County.

Although those offsets would be required if the LNG terminal were proposed on land, BHP Billiton wants to take advantage of what it says is a local offshore exemption rule. The county says it intended only to exempt small Navy power generators on San Nicolas Island, an outpost of Ventura County 60 miles offshore, from strictest smog requirements.

Complicating the matter is the EPA and Ventura County record on the proposed offset rule. In 2003 and 2004, EPA officials strongly argued that the local rules require the offset, but Australian government officials and BHP Billiton lobbied the White House and EPA officials in Washington to overturn that preliminary decision.

In 2005, EPA regional officials said they would "exercise our discretion" and reverse themselves, exempting Cabrillo Port from offsets.

Ventura County smog officials at first went along with that proposed federal reversal, but after newspaper revelations of the flip-flop, EPA held public hearings, and got 1200 statements of opposition, as well as evidence that the reversal was illegal.

The offset issue is critical: smog officials said last month there probably are not enough offset credits available for sale at any price in Ventura County to allow Cabrillo Port to be built. "Air pollution," said one local attorney, "is Cabrillo Port's Achilles' heel."

In the new letter, Wood said "BHP is understandably concerned that Ventura County APCD has changed its original position agreeing with EPA's application of the Clean Air Act based on the comments of a third party opponent." But Wood said, "BHP is more concerned that the Ventura County APCD seems to be arguing that it has independent authority to interpret the Clean Air Act."

The company's attorney went on

to accuse Ventura County of attempting "to tell EPA how the Deepwater Ports Act and the federal Clean Air Act should be interpreted. This is an interesting attempt to usurp EPA's exclusive jurisdiction to interpret those statutes and to determine how they apply to Cabrillo Port."

Wood said BHPB relied on the EPA's 2005 reversal for 15 months, but Kraus said the company has no

right to rely on a tentative rulemaking that had not been subject to its mandatory public hearing or formal adoption.

EDC's Kraus said the Ventura smog board has every right to let the feds know how its smog rules are supposed to work. "The county is simply standing up for itself and telling the EPA how it wants its own rules to be applied."

The company's spokesperson,

Patrick Cassidy, did not respond to emailed questions about his company attorney's letter.

Final EPA decision on the matter is expected this winter, and likely will end up before the Ninth Circuit Court of Appeals.

A parallel application to actually operate the LNG terminal in public waters is beset by other challenges and is nearly two years behind schedule, as officials seek answers

to some 1200 technical, safety and operational issues brought up by EDC and Malibu residents last spring.

State and federal agencies might decide on the operating license next spring, with Gov. Arnold Schwarzenegger having the final veto power.