

Waiting for DOE Action on LNG Exports, Again

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Two years after conditionally approving the Sabine Pass Liquefaction, LLC (“Sabine Pass”) application to export domestic natural gas as liquefied natural gas (“LNG”) to countries with which the United States does not have a free trade agreement requiring the national treatment of natural gas (so called “non-FTA nations”), DOE ended its long pause in processing non-FTA LNG export applications. On May 17, 2013, the U.S. Department of Energy’s Office of Fossil Energy (“DOE”) [conditionally approved](#) an application by Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC (together “Freeport LNG”) to export domestic natural gas as LNG non-FTA countries. During the two-year pause, DOE commissioned a two-part study on the potential effect of a significant volume of LNG exports on the domestic economy, reviewed hundreds of public comments and considered the study results.

The Freeport LNG Order, which followed one day after the Senate confirmed Dr. Ernie Moniz in a 97-0 vote as the new Secretary of Energy, signals a victory for proponents of LNG exports, but without further action on other pending applications the Administration could backslide into another “pause” period. At this stage, it is unclear at what pace the DOE will process the remaining applications. DOE has emphasized that it will make license decisions on a case-by-case basis. In addition, Secretary Moniz committed to Senate Energy and Natural Resources Committee Chairman Ron Wyden (D-OR) that he would review the data used in the two major studies before acting on the next applications. According to various press reports, Secretary Moniz said that currently there is no plan to commission new economic studies and that he hoped to make decisions on pending applications as quickly as possible.

Focusing on DOE’s Freeport LNG Order, it is important to note that:

- it indicates the implicit approval of the Obama Administration for this significant trade, energy and foreign policy initiative;
- it paves the way for other export authorizations;
- its adherence to known and familiar standards signals that pending applications should be able to proceed without substantial revision; and
- the workmanlike job done on drafting the order should go a long way to assuring its ultimate sustainability in the event judicial review is sought.

DOE AUTHORITY TO APPROVE LNG EXPORTS

Under the Natural Gas Act, DOE is responsible for authorizing the import and export of natural gas. Exports of LNG to Free Trade Agreement nations are deemed to be in the public interest and must be approved “without modification or delay.” Exports to non-FTA nations are presumed to be in the public interest and must be



granted, unless opponents of the application overcome that presumption by making an affirmative showing of inconsistency with the public interest. Additional background information regarding DOE's authority can be found [here](#). DOE approval of the export of LNG, the *commodity*, is not the only required federal authorization. Applicants also must obtain approval from the Federal Energy Regulatory Commission ("FERC") to construct, operate, and maintain the *facilities* necessary for liquefaction and export.

BACKGROUND

On December 17, 2010, Freeport LNG submitted its application to DOE to export LNG to non-FTA countries. Freeport LNG proposed to export 1.4 billion cubic feet of domestically-sourced natural gas per day ("Bcf/d") over a term of 25 years from its existing LNG import facility on Quintana Island, Texas.

On May 20, 2011, DOE conditionally authorized Sabine Pass to export up to 2.2 Bcf/d of LNG to non-FTA nations. In the Sabine Pass order ("*Sabine Pass*"), DOE stated that because of its duty to protect the public interest, it would monitor natural gas supply and demand conditions in the U.S. and the world to ensure that the cumulative impacts of exports that it has authorized would not reduce the supply of natural gas needed to meet essential domestic needs. DOE stated that it would take action in the future, including amending or rescinding its orders, as may be necessary to protect the public interest.

After issuing *Sabine Pass*, DOE suspended its evaluation of all pending non-FTA LNG export applications, to permit further study. DOE then commissioned a two-part study (the "LNG Export Study"). The first part of the LNG Export Study was completed in January 2012 by the U.S. Energy Information Administration ("EIA Study"). The EIA Study evaluated the potential effects of natural gas exports on domestic gas supply, demand, and market prices across sixteen natural gas demand and supply scenarios.

DOE released the second component of the LNG Export Study, conducted by NERA Economic Consulting (the "NERA Study"), on December 5, 2012. The NERA Study used the 16 demand and supply scenarios studied by EIA to evaluate a wide range of global market conditions and domestic gas transportation and production costs. NERA concluded that across all the scenarios studied, the U.S. was projected to gain net economic benefits from allowing LNG exports, although the NERA Study also observed that some energy intensive manufacturing sectors could be adversely affected due to increases in the domestic price of natural gas over time.

DOE solicited public comment regarding the LNG Export Study in December 2012 and also announced its order for processing the pending non-FTA LNG export applications, which gave a preference to projects that had received FERC approval to begin the pre-filing process as of December 5, 2012 ("[LNG Export Queue](#)").

DOE received more than 188,000 initial comments and 2,700 reply comments on the LNG Export Study from interested parties; all but a few hundred comments consisted of form letters. DOE placed all comments in the administrative record in each of the pending export application dockets and, consistent with the LNG Export Queue listed order, granted its first post-Sabine Pass authorization to Freeport LNG.



FREEMPORT LNG ORDER

The *Freeport LNG* order contains the first in-depth analysis of the LNG Export Study, and contains similarities and differences to *Sabine Pass*. DOE highlights NERA’s key finding that LNG exports create a net economic benefit across all export scenarios, and that even in scenarios with unlimited LNG exports, there likely will be a net benefit to the U.S. economy. DOE considered the positions of Dow Chemical and other natural gas consuming manufacturing sector participants, but DOE states in the order that it was “guided by the principle that the public interest requires us to look to the impacts to the U.S. economy as a whole, without privileging the commercial interests of any industry over another.” DOE finds that the LNG Export Study is “fundamentally sound and supports the proposition that the proposed authorization would not be inconsistent with the public interest.”

DOE imposes conditions similar to those in *Sabine Pass* on Freeport LNG (including, *e.g.*, destination restrictions, a requirement to commence operations within seven years, an ongoing requirement to provide monthly activity reports to DOE, and mandatory registration of all parties utilizing the authorization as “agent”). There are, however, certain notable clarifications in the Freeport LNG order, as follows:

- A “change in control” (for which Freeport must seek prior DOE-approval) will mean a “change, directly or indirectly, of the power to direct the management or policies of an entity . . . [and a] rebuttable presumption that control exists will arise from the ownership or the power to vote . . . ten percent or more of the voting securities of such entity.”
- DOE requires more transparency regarding export-related contracts, requiring the filing of a public version of long-term export and supply contracts, or description of the “major provisions” in those contracts, for public posting.

DOE restates that it has ample authority under the Natural Gas Act to protect the public interest as markets evolve and to assess the cumulative impacts of each succeeding export request. DOE did not announce any change in its plans to continue processing pending applications on a case-by-case basis, in the LNG Export Queue order established in December 2012.

DOE declined to undertake a programmatic environmental review or to initiate a rulemaking proceeding to establish new rules and regulations specifically tailored to LNG exports. Rather, and consistent with its approach in *Sabine Pass*, DOE states that it will complete its environmental review in coordination with FERC – which is the lead agency to conduct environmental review pursuant to the Natural Gas Act – and condition the order on satisfactory completion of the FERC environmental review process.

Finally, DOE asserts that questions regarding the scope or substance of the environmental review of the Freeport LNG export project must be brought to FERC’s attention, but it “reserves the right” to review concerns not adequately addressed by FERC. This reservation by DOE is consistent with its approach in *Sabine Pass*, in which



DOE conducted an independent review of the FERC environmental document after issuance of the FERC authorization pursuant to NGA Section 3, and issued a separate “Finding of No Significant Impact” before issuing its final order in August 2012.

IMPLICATIONS

The Freeport LNG order signals DOE’s resumption of processing pending applications to export domestically-sourced LNG from the lower-48 states, removing some uncertainty for investors and project proponents. However, key questions remain as follows:

- How quickly will DOE process pending applications and how will DOE’s pace affect investment decision dates and benchmarks for pending projects?
- Will DOE refine its LNG Export Queue order to focus on those projects that are further along in the FERC review process?
- What is the shelf-life of DOE’s evaluation of the current LNG Export Study and additional studies submitted by applicants? Will new studies be needed if the pending applications face another prolonged pause?
- How will DOE conduct cumulative analysis on pending and future applications?
- To what extent (if at all), will DOE supplement FERC environmental review after issuance of a FERC authorization to construct project facilities based on the “right” it has reserved to address impacts raised by protestors but not addressed by FERC?
- Under what circumstance might DOE exercise its claimed authority to amend, rescind, or take necessary action under Section 16 of the Natural Gas Act, when the permit holder remains in full compliance with the conditions in the order?

CONCLUSION

The Freeport LNG Order signals the implicit approval of the Obama Administration to support the transformation of the United States from an importer of natural gas to a world-class producer and active participant in global energy markets, and as a supplier to our allies and trading partners. This reversal of fortunes that the nation’s abundant natural gas resources has created represents a fundamental change in America’s role in the world energy markets.

On a more narrow level, the issuance of this well-crafted order signals that DOE can now turn to an orderly consideration of other pending export applications. It is likely that DOE will continue to be pressed to accelerate processing of the remaining applications, particularly in light of the fact that DOE relied on familiar standards already embedded in most of the pending applications. On the other hand, existing vocal opponents to LNG exports will continue to oppose and litigate key federal, state, and local permits.



FOR MORE INFORMATION

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