

[6450-01-P]

DEPARTMENT OF ENERGY

Proposed Procedures for Liquefied Natural Gas Export Decisions

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of proposed procedures.

SUMMARY: The U.S. Department of Energy (DOE or the Department) proposes to act on applications to export liquefied natural gas (LNG) only after the review required by the National Environmental Policy Act (NEPA) has been completed, suspending its practice of issuing conditional decisions prior to final authorization decisions.

DATES: Comments are to be filed using procedures detailed in the Submission of Comments section no later than 4:30 p.m., Eastern Time, July 21, 2014.

ADDRESSES: Interested persons may submit comments by any of the following methods:

Electronic Filing Using Online Form:

<http://energy.gov/fe/Procedures>

Regular Mail:

U.S. Department of Energy (FE-34),
Attn: Proposed Procedures
Office of Oil and Gas Global Security and Supply,
Office of Fossil Energy,
P.O. Box 44375,
Washington, DC 20026-4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.):

U.S. Department of Energy (FE-34),
Attn: Proposed Procedures
Office of Oil and Gas Global Security and Supply,
Office of Fossil Energy
Forrestal Building, Room 3E-042,
1000 Independence Avenue, SW,
Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

John Anderson
U.S. Department of Energy (FE-34)
Office of Oil and Gas Global Security and Supply,
Office of Fossil Energy,
Forrestal Building, Room 3E-042,
1000 Independence Avenue, SW,
Washington, DC 20585,
(202) 586-5600.

Samuel Walsh
U.S. Department of Energy (GC-1)
Office of the General Counsel,
Forrestal Building,
1000 Independence Avenue. SW,
Washington, DC 20585,
(202) 586-6732.

SUPPLEMENTARY INFORMATION:

I. Background

a. Roles of the Agencies with Respect to Natural Gas Exports and Related Facilities

Section 3(a) of the Natural Gas Act (NGA), 15 U.S.C. § 717b(a), gives the Department of Energy¹ responsibility for authorizing exports of natural gas to foreign nations. The nature of the Department's review of applications for export authorization depends on the country to

¹ The Department of Energy Organization Act transferred jurisdiction over import and export authorizations from the Federal Power Commission to the Secretary of Energy. 42 U.S.C. § 7151.

which the natural gas is proposed to be exported. Exports to countries with which the United States has a free trade agreement (FTA) requiring national treatment for trade in natural gas (FTA countries) are deemed in the public interest by statute and must be authorized “without modification or delay.” 15 U.S.C. § 717b(c). This notice does not concern applications to export natural gas to FTA countries. For exports to countries with which the United States does not have a such an agreement (non-FTA countries), the Department must conduct an informal adjudication and then grant the application unless the Department finds that the proposed export will not be consistent with the public interest.

In addition to an authorization from the Department under Section 3(a) of the NGA, an applicant intending to export natural gas from a new or modified LNG terminal must also obtain approval to site, construct, and operate the terminal. For LNG terminals located onshore or in state waters, the applicant must obtain approval from the Federal Energy Regulatory Commission (FERC) pursuant to Section 3(e) of the NGA. 15 U.S.C. § 717b(e). For LNG terminals located offshore beyond state waters, the applicant must obtain approval from the Maritime Administration within the Department of Transportation (MARAD) pursuant to Section 3(9) of the Deepwater Ports Act, as amended by Section 312 of the Coast Guard and Maritime Transportation Act of 2012 (Pub. L. 112-213). To date, all but two of the 26 large-scale non-FTA LNG export applications to DOE have proposed exports from LNG terminals located onshore or in state waters and therefore have fallen within FERC’s jurisdiction. In most cases, these applicants have applied to DOE and FERC in parallel, which has enabled the two agencies to conduct concurrent reviews under the NGA.

An application to export natural gas to non-FTA countries also requires review of potential environmental impacts under the National Environmental Policy Act (NEPA), 42

U.S.C. § 4321 *et seq.*, as does an application to site, construct, and operate an LNG terminal. Therefore, both DOE and FERC (or MARAD) must satisfy the applicable requirements of NEPA, which typically result in the preparation or adoption of an Environmental Impact Statement (EIS) or an Environmental Assessment (EA) describing the potential environmental impacts associated with the proposed authorization before taking final action. Nearly all of the non-FTA export proposals currently pending before DOE that have begun the NEPA review process are seeking parallel authorizations from FERC. In those cases, FERC is serving as the lead agency for purposes of preparing the environmental review documents and DOE is serving as a cooperating agency. *See* 40 CFR §§ 1501.4, 1504.5.

b. DOE Procedures for non-FTA Export Applications

DOE regulations at 10 CFR part 590 describe DOE's process for reviewing non-FTA export applications. This process begins with the submission of an application, the required contents of which are described at 10 CFR 590.202. Upon receipt, DOE reviews the application for completeness. If the application is complete, DOE publishes a notice in the Federal Register inviting public participation and comment. 10 CFR 590.205. Upon completing its review of all comments and protests received in response to the notice of application, all information generated in the NEPA review process, and any other information entered into the administrative record at DOE's initiative or otherwise, DOE issues an order deciding whether the proposed export is consistent with the public interest. Parties then have 30 days to seek rehearing or clarification of DOE's order. 15 U.S.C. § 717r(a); 10 CFR 590.501.

DOE regulations also contemplate the issuance of conditional decisions on a discretionary basis prior to the completion of DOE's review process. Section 590.402 of DOE's

regulations, entitled “Conditional orders,” states: “The Assistant Secretary may issue a conditional order at any time during a proceeding prior to issuance of a final opinion and order. The conditional order shall include the basis for not issuing a final opinion and order at that time and a statement of findings and conclusions. The findings and conclusions shall be based solely on the official record of the proceeding.”

In 1981, when DOE proposed this provision, it explained that a “conditional decision would be appropriate in cases where a need exists for an indication of [DOE’s] preliminary findings and conclusions, but additional information is needed before a final decision and order can be rendered.” *Dep’t of Energy, Import and Export of Natural Gas; New Administrative Procedures; Proposed Rule*, 46 FR 44696 (Sept. 4, 1981). The Department noted the interconnected regulatory authority possessed by DOE and FERC, and the benefit that conditional decisions may hold for FERC. The Department explained that “[s]ince decisions on such applications are usually major Federal actions significantly affecting the quality of the human environment within the meaning of [NEPA], an environmental impact statement (EIS) would usually be prepared to assess the impacts of and alternatives to the proposed project. The EIS would then be used by both FERC and [DOE] in making their respective decisions on the application. Since the terminal facilities potentially would involve the larger environmental impact, the FERC would generally be the lead agency for preparing an EIS. Before expending the time and resources needed to develop an EIS, the FERC would benefit from a preliminary indication from [DOE] regarding consistency of the importation with the public interest.” *Id.* at 44700.

In the years following, DOE issued conditional authorizations on numerous occasions.² DOE typically issued these conditional authorizations after completion of the notice and comment process, but before completion of NEPA review. DOE has also, in the past three years, issued seven conditional authorizations for exports of LNG to non-FTA countries.³ In these orders, DOE has assessed all factors relating to the public interest other than environmental factors and has explained that, when the environmental review is complete, DOE will reconsider the conditional authorization in light of the information gathered in the environmental review before taking final action.⁴

c. The Published Order of Precedence

On December 5, 2012, the Department published the order in which it intended to take up applications to export LNG to non-FTA countries. The order, which the Department has updated from time to time, grouped the pending applications into three categories. The group of applications placed first were those for which the applicant had received approval from FERC to use the FERC pre-filing process on or before December 5, 2012. Receiving this approval from FERC means that an applicant has initiated the NEPA review process, which, as explained above, is a predicate for final action by both FERC and DOE. The group of applications placed second were those that had not yet initiated NEPA review but had already applied to DOE. The group placed third consisted of all applicants that had yet to apply to DOE as of December 5,

² See, e.g., *Rochester Gas and Electric Corp.*, DOE/FE Order No. 503 (May 16, 1991); *Brooklyn Union Gas Company, et al.*, DOE/FE Order No. 368-A (1990); *Atlantic Richfield Company*, DOE/FE Order No. 301-B (1990); *Midland Cogeneration Venture Limited Partnership*, DOE/FE Order No. 305-A (1990); *Tennessee Gas Pipeline Company*, DOE Order No. 254-A (1989).

³ *Jordan Cove Energy Project, L.P.*, DOE/FE Order No. 3413 (March 24, 2014); *Cameron LNG, LLC*, DOE/FE Order No. 3391 (Feb. 11, 2014); *Freeport LNG Expansion, L.P. et al.*, DOE/FE Order No. 3357 (Nov. 15, 2013); *Dominion Cove Point LNG, LP*, DOE/Order No. 3331 (September 11, 2013); *Lake Charles Exports, LLC*, DOE/FE Order No. 3324 (Aug. 7, 2013); *Freeport LNG Expansion, L.P. et al.*, DOE/FE Order No. 3282 (May 17, 2013); *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961 (May 20, 2011).

⁴ See, e.g., *Jordan Cove Energy Project, L.P.*, DOE/FE Order No. 3413 (March 24, 2014) at 15.

2012, regardless of their status in the NEPA review process. Within each group, applications were and have continued to be placed in order of submission to DOE.

II. Discussion

a. Proposed Procedures

In this notice, the Department is proposing to suspend its practice of issuing conditional decisions on applications to export LNG from the lower-48 states⁵ to non-FTA countries prior to completion of NEPA review. However, DOE is not proposing to amend 10 CFR 590.402 and will retain its discretion to issue conditional decisions in the future should the reasoning set forth in this Notice no longer apply.

Under the proposed procedure, DOE would no longer proceed in the published order of precedence, but would act on applications in the order in which they become ready for final action. An application is ready for final action when DOE has completed the pertinent NEPA review process and when DOE has sufficient information on which to base a public interest determination. For purposes of determining this order, an application will be deemed to have completed the NEPA review process: (1) for those projects requiring an EIS, 30 days after publication of a Final EIS, (2) for projects for which an EA has been prepared, upon publication by DOE of a Finding of No Significant Impact, or (3) upon a determination by DOE that an application is eligible for a categorical exclusion pursuant to DOE's regulations implementing NEPA, 10 CFR §§ 1021.410, Appx. A & B. The test for whether an application has completed NEPA review will be applied as stated above and without regard for whether FERC, MARAD, or DOE has served as lead agency in preparation of the environmental review document.

⁵ The Department currently has no long-term applications before it to export LNG from Alaska. Lacking any such applications, the Department cannot say whether there may be unique features of Alaskan projects that would warrant exercise of the Department's discretionary authority to issue conditional decisions. Accordingly, this notice does not address the treatment of applications to export natural gas from Alaska.

This proposed procedure, if adopted, would not affect the continued validity of the conditional orders the Department has already issued. For those applications, the Department will proceed as explained in the conditional orders: when the NEPA review process for those projects is complete, the Department will reconsider the conditional authorization in light of the information gathered in the environmental review and take appropriate final action. Further, the Department will continue to act on requests for conditional authorizations during the period when the procedures proposed in this notice are under consideration.

b. Rationale

The Department is proposing the procedure described above for four reasons: first, because conditional decisions no longer appear necessary for FERC or the majority of applicants to devote resources to NEPA review; second, because doing so will prioritize acting upon applications that are otherwise ready to proceed; third, because doing so will facilitate decisionmaking informed by better and more complete information; and fourth, because doing so will better allocate agency resources.

The Department's original stated justification for issuing conditional authorizations – to provide greater certainty for FERC – no longer appears to apply. FERC has proceeded with the NEPA review process for many LNG terminals that have yet to receive conditional non-FTA authorizations from DOE. Similarly, the applicants themselves have, in general, been willing to devote time and resources to the NEPA review process without having received conditional authorizations. In addition to the seven applications comprising a total of 9.27 billion cubic feet per day (Bcf/d) in export authority to non-FTA countries that DOE has already approved either finally or conditionally, there are another 8 projects comprising 10.82 Bcf/d in requested non-

FTA export authority that are well into the NEPA review process without having received a conditional authorization.⁶

Further, the proposed procedure will ensure that applications otherwise ready to proceed will not be held back by their position in the order of precedence. While the first grouping of applications in the order of precedence was partially determined by the applicants' having initiated NEPA review, over time the order of precedence is likely to bear less of a direct relationship to the applicants' progress in NEPA review. Indeed, it is likely that if DOE were to continue on its current course in the published order of precedence, DOE would act on some applications that have yet to initiate NEPA review before acting on others that have already finished NEPA review. By removing the intermediate step of conditional decisions and setting the order of DOE decisionmaking based on readiness for final action, DOE will avoid the possibility of delayed action on applications that are otherwise ready to proceed.

The proposed procedure is also likely to improve the quality of information on which DOE bases its decisions for three reasons. First, by considering economic issues closer in time to when the project is ready to commence construction, DOE will be able to base its decision on more current data than when it issues a conditional decision, which could potentially occur years before NEPA review for the application is complete. Second, by acting only on applications for which NEPA review has been completed, DOE will be in a better position to judge the cumulative market impacts of its authorizations in its public interest review. Completion of the NEPA review process requires, among other things, preparation of engineering and design plans

⁶ See *Oregon LNG*, FERC Docket No. CP09-6; *Corpus Christi Liquefaction, LLC*, FERC Docket No. CP12-507; *Excelsior Liquefaction Solutions (Port Lavaca I), LLC et al.*, FERC Docket Nos. CP14-71, 72 & 73; *Southern LNG Co. LLC*, FERC Docket No. CP14-103; *CE FLNG*, FERC Docket No. PF13-11, *Golden Pass Products LLC*, FERC Docket No. PF13-14; *Sabine Pass Liquefaction, LLC and Sabine Pass LNG, L.P.*, FERC Docket No. CP14-12; *Magnolia LNG, LLC*, FERC Docket No. PF13-9.

at considerable expense to the applicant.⁷ An applicant's willingness and capability to make such expenditures is indicative of the applicant's willingness and capability to complete the proposed project. Therefore, while it is surely not the case that all projects for which NEPA review is completed will be financed and constructed, projects that have undertaken the expense to complete NEPA review are, as a group, more likely to proceed than those that have not. Third, DOE believes that, while it may be warranted in some circumstances to bifurcate the consideration of environmental factors and all other factors affecting the public interest in two separate orders, it is generally preferable to integrate the consideration of all public interest factors in a single order.

Declining to issue conditional decisions will also better allocate departmental resources. Applying for an export authorization from DOE is relatively inexpensive; it requires a small application fee and modest informational requirements. For that reason, some companies may view it as advantageous to file an application with DOE even if they foresee only a low probability that they will ultimately undergo NEPA review and complete the application process. By acting only on applications that are ready for final action, DOE will likely avoid devoting resources to applications that have little prospect of proceeding. These saved resources can be better deployed to providing timely action on applications that are furthest along in the regulatory review process.

III. Public Participation

A. Submission of Comments

⁷ See, FERC, Office of Energy Projects, Guidance Manual for Environmental Report Preparation (Aug. 2002), available at <http://www.ferc.gov/industries/gas/enviro/erpman.pdf> (describing required contents of Resource Report 13).

In response to this notice, any person may file comments. DOE prefers comments to be filed using the following online form (method 1). However, for those lacking access to the Internet, comments may be filed using method 2 or 3. The three methods are: (1) submission of comments using the on-line form at <http://energy.gov/fe/Procedures>; (2) mailing comments to the Office of Oil and Gas Global Security and Supply at the address listed in **ADDRESSES**; or (3) delivering comments (by hand or courier) to the Office of Oil and Gas Global Security and Supply at the address listed in **ADDRESSES**. All filings must include a reference to Notice of Change of Procedures. PLEASE NOTE: DOE/FE is not accepting any comments by email. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission in PDF format. Please do not include any active hyperlinks or password protection in any of the electronic documents related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. All comments filed in response to this Notice will be publicly available on the DOE/FE website (<http://energy.gov/fe/Procedures>) and on www.regulations.gov.

While this invitation to comment covers a specific issue, DOE may disregard comments that are not germane to the present inquiry. Commenters should be advised that filings with DOE shall be subject to public disclosure, so submissions should be free of any personally identifiable information (PII) or other information that the individual does not wish to be revealed in a public forum.

Any hardcopy filings are available for inspection and copying in the Division of Natural Gas Regulatory Activities docket room, Room 3E-042, 1000 Independence Avenue, S.W., Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m.,

Monday through Friday, except Federal holidays. All comments filed will also be available electronically by going to the following DOE/FE Web address: <http://energy.gov/fe/Procedures>.

DOE will accept comments no later than the date provided at the beginning of this notice. After the close of the comment period, DOE will review the comments received and decide whether to implement the proposed policy.

According to 10 CFR part 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: one copy of the document should have all the information believed to be confidential deleted. DOE will make its own determination as to the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) a description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known or available from public sources; (4) whether the information has previously been made available to others without obligations concerning its confidentiality; (5) an explanation of the competitive injury to the submitting persons which would result from public disclosure; (6) a date after which such information might no longer be considered confidential; and (7) why disclosure of the information would be contrary to the public interest.

B. Issues on Which DOE Seeks Comments

DOE welcomes comments on all aspects of the proposed procedures, including its likely impact on applicants and other stakeholders. The Department invites all interested parties to submit in writing by July 21, 2014 comments and information on matters addressed in this notice. After the expiration of the period for submitting written statements, the Department will

consider all comments and additional information that is obtained from interested parties or through further analyses, and it will prepare a final procedure statement.

Issued in Washington, DC, on May 29, 2014.

A handwritten signature in black ink, appearing to read "Chris Smith", written over a horizontal line.

Christopher A. Smith
Principal Deputy Assistant Secretary
Office of Fossil Energy