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DOE Proposes to Alter Its Review Process for LNG Export Applications

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The United States Department of Energy (DOE) recently announced that it proposes to revamp the order in which it will process applications to export liquefied natural gas (LNG). The DOE also stated that it will conduct a further economic study of potential US LNG exports. Under the proposal, the DOE would not review an application to export LNG to countries that do not have a free trade agreement (FTA) with the United States until after the Federal Energy Regulatory Commission (FERC) concludes its environmental assessment of the associated export facility. Thus, if the proposal is adopted, the DOE will review non-FTA export applications on a first-ready basis, instead of its current first-in-queue basis. The DOE stated that this change will allow it to "prioritize resources on the more commercially advanced projects." The Notice of Proposed Procedures for LNG Export Decisions is now subject to a 45-day public review and comment period.

Under the Natural Gas Act (NGA), the DOE authorizes the export of natural gas unless it determines that the proposed export is "not consistent with the public interest." Exports to countries that are party to a free trade agreement with the United States are statutorily deemed in the "public interest" and are allowed to sidestep DOE review. However, many major LNG importers, such as Japan, are not presently parties to a free trade agreement with the United States.

Applications to export LNG volumes to non-FTA countries still benefit from the NGA's rebuttable presumption that such exports are in the public interest, but nonetheless must undergo a rigorous review by the DOE's Office of Fossil Energy. The DOE's review has mostly focused on economic public interest factors, including: US natural gas supply; domestic prices; and the macroeconomic impact of LNG exports.

While the DOE has jurisdiction over the export of the actual commodity, FERC is responsible, under the NGA, for approving the siting and construction of LNG export facilities and is the lead federal agency for the environmental assessment of proposed LNG projects. The DOE's current practice is to condition its approval of the export on the project's completion of FERC's review of the associated LNG terminal under the National Environmental Policy Act (NEPA).

The DOE's current "Order of Precedence" for reviewing applications to export LNG to non-FTA countries is based on the order in which the applications were received. Each of the DOE's authorizations to date has been granted on a conditional basis, subject to completion of FERC's review. The DOE now proposes to abandon its practice of issuing conditional authorizations, and instead only grant final authorizations after the applicant completes the extensive and expensive FERC environmental review. Costs incurred by the project

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developer throughout the NEPA review process can reach US$100 million, while a DOE export application is estimated to cost US$20,000 to file. This disparity has already been used both to champion and criticize the proposed procedural change.

Because of the financial commitment involved, Christopher A. Smith, Principal Deputy Assistant Secretary for Fossil Energy stated that "projects that have completed the NEPA review are, generally speaking, more likely to proceed than those that have not." Thus, the proposal may expedite the DOE's review of the most commercially viable projects and allow the DOE to focus its limited resources on projects most likely to be financed and become operational. Smith further posited that "[b]y considering for approval those projects that are more likely to actually be constructed, the DOE will be able to base its decision on a more accurate evaluation of the project's impact on the public interest."

However, the proposal would also impact the risk analysis for LNG export projects. The FERC review is costly and sometimes prolonged, but most developers find it to be predictable. On the other hand, critics argue that the DOE approval process is politicized, and its public interest factors are subjective. A DOE approval in hand reassures potential investors and customers. Under the proposed review procedures, developers may have to front costs of completing the FERC review despite the uncertainty of a final DOE "public interest" determination.

Some applicants may benefit from the new priority given to FERC-approved projects to the disadvantage of others in the DOE queue, but the proposal itself raises issues of regulatory certainty for all project developers. The proposed change represents a midstream change in the DOE's rules for processing of non-FTA export applications, and developers may wonder if the DOE will reverse course again in the future.

The DOE has already granted conditional authorization for seven projects to export LNG to non-FTA countries. Only one project, however, Sabine Pass Liquefaction LNG, has thus far completed FERC's NEPA review and now has final DOE authorization. Jordan Cove Energy Project, L.P. was the latest to receive conditional authorization to export LNG to non-FTA countries. Jordan Cove was conditionally approved on March 24, 2014 to export 0.8 billion standard cubic feet per day (Bcf/d) of natural gas for a period of 20 years. The DOE has yet to reject any application once it has conducted its "public interest" review, but its orders have limited authorized exports to the liquefaction capacity of the facilities described in a project's FERC application. While the proposal should not impact conditional authorizations already granted, 24 applications for non-FTA export authorization are still pending DOE approval.

The proposal may allow some projects to "leapfrog" others in the DOE's current order of processing. For example, Oregon LNG, being developed by Leucadia National Corp., is next in line on the DOE's Order of Precedence and may still obtain conditional approval before the proposed changes take effect. Cheniere's Corpus Christi project immediately follows Oregon LNG in the DOE's queue. FERC has provided notice that its environmental analysis of the project will be complete in January 2015, but has not provided such notice regarding its review of the Oregon LNG project. However, during the 45-day public review period, the DOE will "continue to act on requests for conditional authorization currently under review during the period in which the proposed changes are under consideration."

Comments on the proposed changes to the DOE's review queue must be filed by July 21, 2014.

Upgraded Economic Impact Study May Signal Delays in Further DOE Export Approvals

At the same time the DOE announced its proposed procedures for reviewing LNG export applications, it also announced that it "plans to undertake an economic impact study in order to gain a better understanding of how potential US LNG exports between 12 and 20 Bcf/d could affect the public interest." The DOE pledges that "[w]hile these studies are underway," it will "continue to act on applications."

Two years lapsed between the DOE's first conditional export approval to Sabine Pass in May 2011 and its next authorization to Freeport LNG in May 2013, during which time the DOE undertook its initial study of the economic impact of LNG exports. The DOE has steadily approved projects since concluding this study, though the pace still has not been as swift as export proponents would prefer. The announcement of an updated study, combined with the proposed procedural change, could signal another prolonged delay in DOE approvals for non-FTA exports. The updated study will be sure to face stiff opposition from domestic manufacturers interested in keeping the price of natural gas low as well as environmental interests.

The DOE's initial LNG Export Study, issued in late 2012, assessed export cases of 6 and 12 Bcf/d and has been relied upon to justify a "public interest" determination in every subsequent DOE order conditionally authorizing LNG exports to non-FTA countries. With the Jordan Cove authorization, the DOE has now conditionally approved 9.27 Bcf/d for export to non-FTA countries, so there remains potential for additional authorizations before crossing the 12 Bcf/d threshold.

The DOE's updated economic impact study will also be made available for public comment.