

[6450-01-P]

DEPARTMENT OF ENERGY

Procedures for Liquefied Natural Gas Export Decisions

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Final revised procedures.

SUMMARY: The U.S. Department of Energy (DOE or the Department) will act on applications to export liquefied natural gas (LNG) from the lower-48 states to countries with which the United States does not have a free trade agreement requiring national treatment for natural gas only after completing the review required by the National Environmental Policy Act (NEPA), suspending its practice of issuing conditional decisions prior to final authorization decisions.

EFFECTIVE DATE: August 15, 2014.

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SUPPLEMENTARY INFORMATION:

I. Proposed Procedural Change

The Department of Energy is responsible for authorizing exports of natural gas to foreign nations pursuant to section 3 of the Natural Gas Act, 15 U.S.C. § 717b. For proposed exports to countries with which the United States lacks a free trade agreement requiring national treatment for trade in natural gas (non-FTA countries), the Department conducts an informal adjudication and grants the application unless the Department finds that the proposed exportation will not be consistent with the public interest. 15 U.S.C. § 717b(a). Before reaching a final decision on a non-FTA application, the Department must also comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* Typically, the agency responsible for permitting the export facility serves as the lead agency in the NEPA review process and DOE serves as a cooperating agency within the meaning of the Council on Environmental Quality's (CEQ) regulations. 40 CFR 1501.4, 1501.5. For LNG terminals located onshore or in state waters, the agency responsible for permitting the export facilities is the Federal Energy Regulatory Commission (FERC) pursuant to Section 3(e) of the Natural Gas Act. 15 U.S.C. § 717b(e). For LNG terminals located offshore beyond state waters, the responsible agency is the Maritime Administration (MARAD) within the Department of Transportation 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. No. 112-213).

For more than 30 years, DOE's regulations governing natural gas imports and exports have allowed for conditional decisions, on a discretionary basis, before DOE completes its

review process.¹ DOE's regulations at 10 CFR 590.402, entitled "Conditional orders," state that DOE may issue a conditional order at any time during a proceeding prior to issuance of a final opinion and order. In the past three years, DOE has issued eight conditional authorizations for exports of LNG to non-FTA countries.² In each of these proceedings, DOE has made preliminary findings on all factors relating to the public interest other than environmental issues. The conditional authorization orders have explained that, before taking final action, DOE will reconsider its public interest analysis in light of the information gathered in the environmental review.³

DOE has acted on non-FTA LNG export applications according to the order of precedence posted on DOE's website on December 5, 2012. On June 4, 2014, however, DOE published a notice in the **Federal Register** proposing to suspend its practice of issuing conditional decisions prior to completion of the NEPA review process for LNG export applications from the lower-48 states. *Dep't of Energy, Proposed Procedures for Liquefied Natural Gas Export Decisions; Notice of Proposed Procedures*, 79 FR 32261 (Proposed Procedures Notice). DOE did not propose to amend 10 CFR 590.402 and, therefore, under the proposal would retain discretion to issue conditional decisions in the future.

DOE explained that, under the newly proposed procedures, DOE would cease to act on non-FTA LNG export applications according to the published order of precedence. Instead, DOE would act on applications in the order they become ready for final action. The Proposed

¹ *Dep't of Energy, Import and Export of Natural Gas; New Administrative Procedures; Proposed Rule*, 46 FR 44696 (Sept. 4, 1981).

² *LNG Develop. Co., LLC (d/b/a Oregon LNG)*, DOE/FE Order No. 3465 (July 31, 2014) [hereinafter *Oregon LNG*]; *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).

³ *See, e.g., Oregon LNG*, DOE/FE Order No. 3465, at 138.

Procedures Notice stated that an application is ready for final action when DOE has sufficient information on which to base a public interest determination and when DOE has completed its NEPA review. The Proposed Procedures Notice further explained that, for purposes of setting the order in which DOE will act, an application would be deemed to have completed the pertinent NEPA review process as follows: (1) for those projects requiring an Environmental Impact Statement (EIS), 30 days after publication of a Final EIS; (2) for projects for which an Environmental Assessment (EA) has been prepared, upon publication by DOE of a Finding of No Significant Impact (FONSI); 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. DOE explained that this test would apply in the same fashion regardless of whether FERC, MARAD, or DOE has served as the lead agency for preparation of the environmental review document.

The Proposed Procedures Notice also made clear that the proposed procedures would not affect the continued validity of the conditional authorizations DOE had already issued. For those applications, DOE stated it would proceed as explained in the orders: by reconsidering the conditional authorization in light of the information gathered in the environmental review once that review is complete and taking appropriate final action.

The Department offered four reasons for the proposed procedural change. *See* Proposed Procedures Notice at 79 FR 32263–32264. First, the Department explained that conditional authorizations no longer appear necessary for FERC or the majority of applicants to commit resources to the NEPA review process. Second, the Department explained that by suspending its practice of issuing conditional decisions and ceasing to follow the order of precedence published on December 5, 2012, DOE would better be able to ensure prompt action on applications that are

otherwise ready to proceed. Third, the Department explained that the proposed procedures would improve the quality of information on which DOE bases its decisions. Finally, the Department noted that suspending its practice of issuing conditional decisions would better allocate departmental resources by reducing the likelihood that the Department would be forced to act on applications with little prospect of proceeding.

II. Public Comments

The Department received 74 comments in response to the Proposed Procedures Notice.⁴ Many of the comments expressed general support for or opposition to LNG exports or otherwise urged substantive changes to DOE's public interest analysis. DOE officials have read and considered these comments carefully, but consider them outside the scope of the Proposed Procedures Notice, which addressed only whether DOE should suspend its current practice of issuing conditional decisions prior to completion of NEPA review.

The remaining relevant comments generally fall into three groups: comments on the rationale DOE provided for the proposed procedures, comments on the test proposed for when an application is ready for final decision, and comments on the timing of final decisionmaking once an application is ready for final action.

A. Comments on the Rationale for the Proposed Procedures

Public Comments: DOE's first rationale advanced in support of the proposed procedural change was that conditional decisions no longer appear necessary for FERC or the majority of applicants to commit resources to the NEPA review process. Many commenters supported this claim. Several other commenters questioned it, however, observing that conditional decisions may have value for applicants even if they have already initiated NEPA review. Likewise, they

⁴ The comments are available at: <http://energy.gov/fe/proposed-procedures-liquefied-natural-gas-export-decisions> (Comments).

asserted that conditional decisions may be of value to other stakeholders, such as financial parties, LNG purchasers, or foreign governments.

DOE Response: DOE acknowledges that conditional decisions may hold value for some applicants and may supply useful information to third parties. Nevertheless, the justification for issuing conditional decisions before completing NEPA review is much weaker in an environment where applicants are willing to commit resources to NEPA review even without a conditional decision. In the approximately 18 months since we established the existing order of precedence, we have had an opportunity to observe industry developments, as well as the progress of numerous individual projects in the FERC-led NEPA review processes. We have seen numerous instances where applicants have proven willing to commit resources to NEPA review before having received a conditional authorization. As noted above, to date DOE has issued eight conditional authorizations (including one, *Sabine Pass*, which is now final) cumulatively authorizing non-FTA exports in a combined total of 10.52 billion cubic feet per day of natural gas (Bcf/d). Many of these applicants had made substantial progress in preparing resource reports for the NEPA review process before receiving their conditional authorizations. Likewise, among applicants that have not yet received a conditional decision, at least seven projects constituting 9.51 Bcf/d in requested export capacity have made considerable progress in the NEPA review process.⁵ These examples demonstrate that, broadly speaking, conditional decisions are no longer necessary for applicants to commit substantial resources to the NEPA review process.

⁵ See *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. In addition to these projects that have made substantial progress, two others have recently been accepted for pre-filing at FERC. See *Gulf LNG Liquefaction Company, L.L.C.*, FERC Docket No. PF 13-4, *Louisiana Energy, LLC*, FERC Docket No. PF14-17.

Public Comments: The second rationale advanced in support of the proposed procedural change was that it would ensure that applications otherwise ready for DOE action will not be held back by their position in the order of precedence. Many commenters voiced support for the proposed procedures for this reason. One commenter, however, asserted that under the proposed procedures, DOE will no longer concurrently evaluate whether applications are in the public interest while these applications are undergoing NEPA review. This commenter, therefore, concluded that the proposed procedures would lengthen DOE's review time. This commenter also asserted that it is arbitrary for DOE to require the completion of NEPA review before DOE completes its public interest review.

DOE Response: DOE wishes to clarify that applicants can and should apply concurrently to DOE and to FERC or MARAD. DOE will begin the process of evaluating whether an application is in the public interest prior to completion of NEPA review, but will not issue a final decision before the NEPA review is complete. The requirement that NEPA review be completed prior to a final public interest determination is not arbitrary, but rather flows from the most fundamental requirement in NEPA: that agencies consider environmental impacts prior to deciding to undertake a major federal action. *See* 10 CFR 1021.210(b) ("DOE shall complete its NEPA review for each DOE proposal before making a decision on the proposal."); *see also* *Silentman v. Federal Power Commission*, 566 F.2d 237 (D.C. Cir. 1977) (a cooperating agency must await the lead agency's completion of its impact statement before taking final action).

Public Comments: The third rationale advanced in support of the proposed procedural change was that it would improve the quality of information on which DOE bases its decisions. One reason provided for why the proposed procedures would improve the quality of information is that, by restricting its decisions to applicants that have undertaken the considerable expense of

providing the engineering and design information necessary to complete NEPA review, DOE would make its decisions on a cohort of projects that are, on average, more likely to be financed and built than those that have not completed NEPA review. By focusing on projects that are more likely to proceed, DOE reasoned that it would be better positioned to evaluate the cumulative impacts of its decisions on natural gas markets. One commenter rejected this reasoning, stating that applicants with the wherewithal to build LNG export facilities also have the wherewithal to complete the permitting process.

DOE Response: The commenter's observation that applicants with the wherewithal to build LNG export facilities also have the wherewithal to complete the permitting process supports rather than undermines DOE's reasoning. DOE's view is that LNG projects for which NEPA review is complete have already shown themselves more likely to advance to commercial operation than projects that have not yet commenced the NEPA process (or have stalled at that stage) for whatever reason. By eliminating the possibility that DOE will issue conditional decisions on applications that never complete the NEPA review process, the proposed procedures will help to focus DOE's decisionmaking on projects that are more likely to proceed and, therefore, will benefit DOE's ability to assess cumulative market impacts.

Public Comments: DOE noted that it generally would be preferable to integrate the consideration of all public interest factors in a single, final order. Under existing procedures, DOE has focused on economic and international factors at the conditional decision stage and considered environmental factors at the final stage, once NEPA review is complete. Under the proposed procedures, DOE would evaluate all such public interest factors in one order. One commenter asserted that DOE failed to explain why it is generally preferable to integrate analysis of all public interest factors in a single order.

DOE Response: DOE's public interest determinations involve consideration of a wide range of factors. These public interest factors include economic, international, and environmental considerations that, under current practice, have been bifurcated between DOE's conditional and final authorizations. In some instances, the bifurcation is not problematic because the issues are largely distinct. In other instances, however, there may be overlap between environmental and non-environmental issues that would be more efficiently and thoroughly resolved in a single order. For these reasons, DOE believes that it is generally preferable to consider these factors concurrently and to present them in a single analysis. Further, doing so demonstrates that each factor is given full consideration and allows DOE to communicate its decision to the public in a simpler, more comprehensible way.

B. Comments on the Test for When an Application is Ready for Final Decision

Public Comments: As explained above, DOE proposed that it would act on applications in the order they become ready for final decision. DOE specified that an application is ready for final decision when DOE has completed the NEPA review and when DOE has sufficient information on which to base a public interest determination. One commenter recommended that the requirement that DOE has sufficient information on which to base a public interest determination be removed. This commenter asserted that, because the Natural Gas Act creates a rebuttable presumption in favor of authorizing imports and exports, DOE lacks the power to ensure that the record in a proceeding is complete before taking final action.

DOE Response: In the revised procedures, DOE will retain the requirement that it have sufficient information on which to base a public interest determination as a predicate to final action. The commenter is correct that the Natural Gas Act creates a rebuttable presumption in favor of authorizing imports and exports. But that presumption does not remove DOE's power

to impose informational requirements on applicants or to decide when it has a complete record on which to base its decision. *See, e.g.*, 10 CFR 590.202, 590.203.

Public Comments: DOE proposed that it would act on applications in the order they become ready for final decision and that an application is ready for final decision when DOE has completed the pertinent NEPA review. DOE further specified that the application will be deemed to have completed the pertinent NEPA review (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 (FONSI), 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.

Commenters urged DOE to clarify that the pertinent NEPA review may be one in which DOE serves as a cooperating agency and either FERC or MARAD serves as lead agency. Relatedly, one commenter sought clarification as to whether DOE intends to issue a FONSI in cases where it adopts an EA prepared by another agency, and whether DOE may accept a categorical exclusion determination made by another agency.

DOE Response: The pertinent NEPA review referred to in the Proposed Procedures Notice may be one for which another agency is the lead agency and DOE is a cooperating agency, provided that DOE ultimately elects to adopt the EA or EIS produced by the lead agency. As a cooperating agency, DOE may adopt an EIS or EA prepared by another agency and need not re-publish those documents for additional comment. 40 CFR 1506.3(c). Nevertheless, even when it is participating as a cooperating agency, DOE is ultimately responsible for its own NEPA compliance. Therefore, where another agency has prepared an EA or EIS that DOE has chosen to adopt, DOE must conduct its own independent analysis and issue

its own FONSI or Record of Decision, respectively. Similarly, DOE must issue its own categorical exclusion determination. A categorical exclusion determination issued by another agency may inform DOE's decisionmaking, but DOE may only determine that a proposed action is categorically excluded from NEPA review in accordance with its own regulations. 10 CFR 1021.410, Appx. A & B. We note that DOE's list of categorical exclusions applicable to specific agency actions includes: "approvals or disapprovals of new authorizations or amendments of existing authorizations to import or export natural gas under section 3 of the Natural Gas Act that involve minor operational changes (such as changes in natural gas throughput, transportation, and storage operations) but not new construction." *Id.* Appx. B at B5.7.

Public Comments: One commenter questioned why, for projects requiring an EIS, completion of the NEPA review process occurs 30 days after publication of the EIS rather than upon publication of the EIS.

DOE Response: The CEQ regulations implementing NEPA generally prohibit agencies from making a final decision in reliance on an EIS until 30 days after publication by the Environmental Protection Agency of the notice of availability for the final EIS. 40 CFR 1506.10(b)(2). In cases where DOE is a cooperating agency in the preparation of an EIS, DOE must also adopt the final EIS before it can issue a Record of Decision.

C. Comments Related to the Timing of Final Decisions

Public Comments: Numerous commenters urged DOE to establish a uniform deadline by which DOE will issue final decisions after an application's NEPA review is complete. These commenters contend that a deadline would provide greater regulatory certainty enabling better planning and investment decisions.

DOE Response: DOE is sympathetic to this concern. Indeed, one of the overriding purposes of the procedural changes announced in this notice is to enable prompt action on applications that are ready for final decision. However, DOE has several concerns with creating a uniform deadline. First, each application contains novel issues such that a deadline that is reasonable for the majority of cases may be unreasonable in an individual case. Second, DOE lacks control over when the NEPA review for applications is complete. Were the final EIS for several applications to be completed at or around the same time, compliance with a fixed deadline may be unworkable. For these reasons, DOE declines to create a deadline for final decisions in this notice.

III. Revised Procedures

For the reasons provided in the Proposed Procedures Notice and in this notice, DOE will implement the procedural changes substantially as proposed. Specifically, DOE will suspend its practice of issuing conditional decisions on applications to export LNG to non-FTA countries from the lower-48 states.⁶

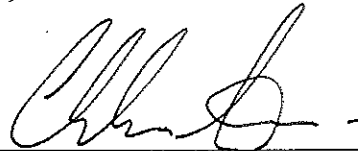
DOE will no longer act in the published order of precedence, but will act on applications in the order they become ready for final action. An application is ready for final action when DOE has completed the pertinent NEPA review process and when DOE has sufficient information on which to base a public interest determination. For purposes of determining the order in which DOE will act on applications before it, DOE will use the following criteria: (1)

⁶ The revised procedures will apply only to exports from the lower-48 states. In the Proposed Procedures Notice, DOE stated that no long-term applications to export LNG from Alaska were currently pending and, therefore, DOE could not say whether there may be unique features of Alaskan projects that would warrant exercise of the DOE's discretionary authority to issue conditional decisions. After publishing the Proposed Procedures Notice, DOE received one application to export LNG from Alaska. *See Alaska LNG Project LLC, Application for Long-Term Authorization to Export Liquefied Natural Gas, Docket No. 14-96-LNG (July 18, 2014)*. DOE will consider whether to issue a conditional decision on that application, or any future application to export from Alaska, in the context of those proceedings.

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.

These revised procedures will 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.

Issued in Washington, DC, on August 11, 2014.



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