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PRATT'S

ENERGY LAW REPORT



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DOE Fast Tracks Small Scale LNG Exports and Provides Assurance on Export Orders

*By Wilbur C. Earley**

The author of this article discusses two Department of Energy orders that help to clear the path for small volume exports of liquefied natural gas and allay concerns about the durability of its export authorizations.

The Department of Energy (“DOE”) recently acted in two separate orders to clear the path for small volume exports of liquefied natural gas (“LNG”) and allay concerns about the durability of its export authorizations. The DOE adopted a rule to streamline its standards and process for approving small-scale LNG exports. In a separate policy statement, DOE put to rest industry concerns that it may rescind LNG export authorizations, stating firmly that it “does not foresee a scenario” under which it would rescind an authorization to export LNG. For current and future investors in LNG export projects and their customers, these two developments appear to underscore DOE’s commitment to removing unnecessary barriers to LNG exports.

BACKGROUND

Under the Natural Gas Act (“NGA”), DOE authorizes proposed exports of natural gas that are consistent with the public interest. Exports to countries with which the United States has a free trade agreement (“FTA”) are deemed in the public interest by the NGA and must be authorized “without modification or delay.” However, for exports to countries without an FTA (non-FTA countries), DOE conducts an informal adjudication and authorizes a proposed export unless it is shown to not be consistent with the public interest. The adjudication can be lengthy and contentious, with issues often raised about the environmental and economic impacts of exporting the gas. With the growing business potential for increasing LNG exports, there is significant political pressure for DOE to speed up its review and provide regulatory certainty.

THE SMALL-SCALE EXPORT RULE

Under the new rule,¹ DOE will expedite the approval process for “small-scale” exports of natural gas to non-FTA countries. According to DOE, there

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¹ <https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15903.pdf>.

is an emerging market for the sale of small volumes of natural gas to countries primarily in the Caribbean, and Central and South America. Small-scale sales are a solution to practical and economic constraints that limit large-scale exports to those regions. Small-scale exports typically originate from existing facilities in the U.S. and are transported relatively short distances on container ships and barges. DOE believes facilitating small-scale exports will allow for greater diversity and competition in the natural gas market, consistent with the public interest.

Any non-FTA export application that meets the criteria for a “small-scale natural gas export” will be deemed consistent with the public interest and DOE will issue an authorization on an expedited basis. There are two criteria for a “small-scale natural gas export”:

The Proposed Export is for Volumes up to 51.75 Bcf/Year

DOE says this volume criterion is consistent with industry practice for the emerging small-scale export market and is based on industry standards for defining “small-scale LNG.”²

The Application Does Not Require an Environmental Impact Statement or Environmental Assessment

The application must be eligible for a categorical exclusion under DOE’s National Environmental Protection Act (“NEPA”) regulations. The categorical exclusion most commonly used in this context applies to natural gas import or export activities requiring minor operational changes to existing projects but no new construction. The small-scale export rule became effective August 24, 2018.

THE POLICY STATEMENT

According to DOE, it has issued 29 long-term authorizations to export LNG and compressed natural gas to non-FTA countries. Each authorization order included a statement acknowledging DOE’s authority to “make, amend, and rescind such [export] orders . . . as it may find necessary or appropriate” to satisfy its statutory responsibilities. The authorizations also stated that DOE “cannot precisely identify all the circumstances under which such action would be taken” and maintained that “[i]n the event of any unforeseen developments of such significant consequence as to put the public interest at risk, DOE/FE is fully authorized to take action as necessary to protect the public interest.”

Potential importers of U.S. LNG and investors in LNG export projects have expressed concern with this language and have asked DOE what developments

² The annual limit of 51.75 Bcf would be about 17 shipments in a typical LNG tanker ship.

would be of such significance that DOE would unilaterally rescind a non-FTA export authorization. In response, DOE issued a policy statement³ to provide some reassurance.

The policy statement notes that each existing export authorization is based on a substantial administrative record upon which DOE concluded that exports of U.S. LNG will, among other things, generate net economic benefits to the U.S. economy and that DOE “stands firmly behind these factual findings and legal conclusions.” In addition, authorization holders and stakeholders, “should have the utmost confidence in the validity of DOE/FE’s LNG export authorizations for the full term of each non-FTA order.”

The policy statement notes that DOE must preserve its authority to carry out its duties under the NGA, but makes the following assurances:

However, DOE does not foresee a scenario where it would rescind one or more non-FTA authorizations. The United States government takes very seriously the investment-backed expectations of private parties subject to its regulatory jurisdiction. In particular, DOE understands the far-ranging economic investments and natural gas supply commitments associated with these authorizations over their full term—affecting both U.S. and global interests. DOE emphasizes that it remains committed to the durability and stability of the export authorizations it has granted under the NGA, as well as to supporting the approved export of U.S. natural gas around the world.

³ <https://www.energy.gov/sites/prod/files/2018/06/f53/2018-13427.pdf>.