May 20, 2013

DOE Ends LNG Export Approval Moratorium

The Office of Fossil Energy of the Department of Energy (DOE/FE) ended a nearly two-year moratorium on liquefied natural gas (LNG) export approvals on Friday when it conditionally approved the export of LNG to countries that do not have a free trade agreement with the United States (non-FTA countries). The approval Order,[1] which specifically addresses the export application of Freeport LNG Expansion L.P. and FLNG Liquefaction, LLC (together, FLEX), is the first non-FTA long-term LNG export authorization granted by the DOE/FE since 2011, when all pending non-FTA export applications were put on hold while the DOE/FE commissioned a study to examine the cumulative effects of such exports. Although the Order provides important insight into how the DOE/FE will consider pending and future non-FTA export applications, it raises many questions, and clearly indicates that the DOE/FE will not be backing down from its controversial position that it has the authority to revoke such authorizations in the future.

Background

Historically, the U.S. has been an importer of natural gas. With the dramatically increased production of natural gas through fracking and the decrease in domestic natural gas prices in recent years, however, interest in LNG exports has increased. Importers and exporters of natural gas require authorization of the DOE/FE, which must approve import or export applications unless doing so "will not be consistent with the public interest." By statute, exports to FTA countries are deemed to be within the public interest and must be approved by the DOE/FE without delay. Although there is a statutory presumption that exports to non-FTA countries are in the public interest as well, that presumption is rebuttable. When considering such non-FTA export applications, the DOE/FE performs a public interest analysis that considers a number of factors, including domestic need for the gas to be exported and whether the proposed exports pose a threat to the security of domestic natural gas supplies.

In 2011, after conditionally granting the Sabine Pass non-FTA export authorization,[2] the DOE/FE commissioned a two-part study (LNG Study) of the economic impacts of LNG exports to "better inform its public interest review" of further export applications. Pending applications were put on hold while the DOE/FE awaited the outcome of the LNG Study, which was performed by the U.S. Energy Information Administration (EIA) and NERA Economic Consulting (NERA). Once the LNG Study was published in December 2012, the DOE/FE solicited public comments. The comment period ended on February 25, and since that time the industry has awaited this first post-Sabine Pass non-FTA export order.

The FLEX application, which was filed December 17, 2010, requested authorization to export LNG equivalent to up to 1.4 billion cubic feet per day of natural gas to non-FTA countries for a period of 25 years. FLEX requested the authority to export such LNG on its own behalf and as an agent for other parties.

The Order

The portion of the 127-page Order that will receive the most industry attention is found on page 112, and footnote 126, where the DOE/FE indicates that it will not be backing away from its statement, originally made in the Sabine Pass Order, that "in 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." The DOE/FE further clarifies that such "action" could include revocation, in whole or part, of previously granted export authorizations. This portion of the Order will not be received well by the LNG industry, which argued vigorously that the DOE/FE does not have such revocation power, or in the alternative requested that the DOE/FE at least clarify under what circumstances such revocation might occur. In this respect the Order does little to provide additional certainty to applicants.

The remainder of the Order, though specifically addressing the FLEX application, devotes significant attention to a general discussion of the LNG Study, defending its conclusions against the attacks made by some commenters. Very broadly speaking, the LNG Study concluded that LNG exports would result in higher domestic natural gas prices but net economic benefit to the U.S.

With respect to the FLEX application in particular, the DOE/FE determined that the LNG Study "supports the proposition that the proposed authorization would not be inconsistent with the public interest." The DOE/FE also cited to the National Export Initiative, which sets an administration goal to promote exports, in support of its finding that granting the FLEX application was not inconsistent with the public interest, and reiterated its general policy that "under most circumstances, the market is the most efficient means of allocating natural gas supplies." The DOE/FE found that the sole protestor to the FLEX application, the American Public Gas Association (APGA), failed to support its protest with significant analysis, did not identify meaningful errors or omissions in the studies submitted by FLEX, and did not provide a basis for rejecting FLEX's claims that benefits would result from granting the application. Accordingly, the DOE/FE concluded that APGA failed to rebut the statutory presumption that granting the application was in the public interest.

Also of interest to those with pending or yet-to-be-filed applications, the DOE/FE acknowledged that neither the EIA nor NERA studies examined regional impacts of LNG exports, and indicated that it will review such regional impacts on a case-by-case basis. In addition, while concluding that there are adequate natural gas resources to meet demand associated with the FLEX application, the DOE/FE acknowledged that such supply estimates change over time, and indicated that it will "continue to monitor [supply estimates] to inform future decisions."

The DOE/FE "hasten[ed] to add" that it will take a "measured approach" in reviewing pending export applications. While declining to set a definitive cap on total volume of LNG that may be exported, the DOE/FE noted that it "will assess the cumulative impacts of each succeeding request for export authorization on the public interest with due regard to the effect on domestic natural gas supply and demand fundamentals." In an apparent attempt to guard against companies attempting to obtain authorizations without the immediate ability to utilize them, the DOE/FE indicated that it will attach terms and conditions to such authorizations to make sure they are used in a timely manner, and will not issue authorizations unless the applicant can demonstrate "that there are or will be facilities capable of handling the proposed export volumes and existing and forecasted supplies that support that action."

Some additional aspects of the Order that signal DOE/FE treatment of pending and future export applications include its decision to limit FLEX's conditional authorization to 20 years rather than the 25 years requested in FLEX's application. It appears likely this cap will be imposed on other applicants. In addition, as a condition of the authorization, FLEX is required to commence LNG export operations no later than seven years from the date of issuance of the Order. As it did in Sabine Pass, the DOE/FE will require prior approval for any change in control of the authorization holder.

The approval is conditioned on completion of review under the National Environmental Policy Act (NEPA), which the DOE/FE intends to complete in tandem with FERC review of the FLEX liquefaction project.

Our attorneys have significant experience advising clients on a variety of natural gas matters, and filed the first FTA and non-FTA applications for small-scale LNG exports. If you have any questions concerning the Order specifically or LNG or other natural gas issues generally, please contact any of the attorneys listed in this alert.

[1] *Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC*, DOE/FE Order No. 3282, Order Conditionally Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from The Freeport LNG Terminal on Quintana Island, Texas, to Non-Free Trade Agreement Nations (May 17, 2013) (the Order).

[2] *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations (May 20, 2011) (*Sabine Pass* Order).

Authors

Joseph H. Fagan

Partner

Washington, D.C. | (202) 218-3901

jfagan@daypitney.com