

Center for Liquefied Natural Gas's Response to Department of Energy's Request for Information

July 14, 2017

Acting Assistant Secretary Daniel R. Simmons
Chair, Department of Energy Regulatory Reform Task Force
U.S. Department of Energy
1000 Independence Avenue, NW
Washington, DC 20585

RE: Response to Request for Information Regarding Reducing Regulation and Controlling Regulatory Costs

Dear Mr. Simmons:

Thank you for the opportunity to participate in the U.S. Department of Energy's (DOE) review of its regulatory requirements with the complementary goals of reducing regulation and controlling regulatory costs.¹ It is clear the United States is in an enviable position in the global gas market and it is important we seize this opportunity for our nation. To achieve that objective, we feel there are five key areas to address:

- Improving regulatory certainty to facilitate increased investment in domestic LNG export capability;
- Streamlining public interest determination by standardizing the review process using existing information and defined comment periods;
- Creating a more certain regulatory timeline;
- Modernizing reporting requirements to account for the shift from LNG imports to LNG exports; and
- Limiting downstream reporting requirements.

To that end, the Natural Gas Supply Association (NGSA) and the Center for Liquefied Natural Gas (CLNG) offer the following recommendations to streamline DOE's review of applications to import or export natural gas. NGSA and CLNG believe implementing these recommendations will create administrative efficiencies for the DOE, further regulatory certainty for applicants, establish a more transparent regulatory review process for all interested stakeholders, and ultimately result in a stronger U.S. position in the rapidly globalizing natural gas markets.

¹ Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 24,582 (May 30, 2017) (hereinafter RFI).

CLNG advocates for public policies that advance the use of liquefied natural gas (LNG) in the United States, and its export internationally. A committee of the Natural Gas Supply Association, CLNG represents the full LNG value chain, including LNG producers, shippers, terminal operators and developers, providing it with unique insight into the ways in which the vast potential of this abundant and versatile fuel can be fully realized. On January 19, 2016, CLNG and the NGSA announced the completion of the merger of the two organizations.

CLNG and NGSA look forward to working with the DOE to streamline its regulatory reviews to help ensure all the benefits of the global natural gas trade -- economic growth, increased domestic employment, and furthering U.S. geopolitical objectives -- accrue to the United States and its citizens.

Background

The U.S. shale gas revolution has created a major shift in the global energy market. Domestic natural gas production has increased dramatically in recent years, leading to growth of exports of natural gas as liquefied natural gas (LNG) from the Lower 48 states to countries around the world. These exports have and will continue to bolster the domestic U.S. economy, support thousands of jobs, encourage trade with America's allies and trading partners, and support U.S. geopolitical goals.

The Natural Gas Act (NGA) requires that natural gas exporters receive authorization to export the natural gas commodity, including natural gas converted to LNG, from DOE. The NGA further bifurcates DOE's review of natural gas exports between exports to nations that have free trade agreements in force that require national treatment for trade in natural gas (FTA nations) and exports to those nations that do not (NFTA nations). Under Section 3(a) of the NGA, DOE must approve a proposal to import or export natural gas unless the proposed import or export will be inconsistent with the public interest.² Congress also included a provision in Section 3(c) of the NGA that affirms natural gas imports or exports to FTA nations are to be deemed consistent with the public interest and mandates the DOE to grant applications to import or export natural gas to FTA nations without modification or delay.³

CLNG recognizes that DOE has worked diligently to implement Congress's mandates as the natural gas industry has evolved rapidly in recent years. CLNG offers the following recommendations, however, to further streamline DOE's regulatory processes and promote regulatory certainty for all stakeholders across the entire natural gas value chain.

Recommendations to Reduce Regulation and Control Regulatory Costs

In response to the RFI's specific questions, CLNG encourages DOE to use regulatory certainty as the key factor in considering which rules or reporting requirements the agency should prioritize for reform. CLNG and its members have enjoyed a productive relationship with DOE as the U.S. natural gas industry has evolved from anticipating significant LNG import volumes to now planning for significant LNG export volumes. However, as DOE has attempted to keep pace with shifts in the national and

² Natural Gas Act, § 3(a), 15 U.S.C. § 717b(a).

³ 15 U.S.C. § 717b(c).

international gas markets, some of the agency's practices have created uncertainty in permitting processes for LNG export applications.

Given the substantial investments necessary to develop, construct, and operate an import or export LNG project, CLNG's members will be better able to compete for financing and LNG offtake customers on the global market if DOE adjusts its regulations and policies to provide increased regulatory certainty. In light of the length of the NFTA permitting process and the fact that LNG export project developers and their financing partners often make final investment decisions on project development only after DOE approves FTA and NFTA exports for a project (if both are requested), further regulatory certainty is particularly crucial in the NFTA context. And as the U.S. LNG industry attracts more capital and customers, the United States will continue to receive the numerous benefits that LNG exports provide to the nation: Net economic benefits, job growth, improved balance of trade, providing allies and trading partners with a stable supply of natural gas, and help advance America's geopolitical objectives around the world.

To create the regulatory certainty needed to access all the benefits of a robust LNG trade, CLNG offers the following common sense suggestions to streamline DOE's LNG permitting process under 10 C.F.R. Chapter II, Part 590. However, CLNG does not intend that any of its suggestions should be construed so as to create new regulations or impose additional incremental costs associated with new regulations. Instead, CLNG proposes to clarify and adjust existing regulations to improve transparency and regulatory certainty.

Streamlining the "Public Interest" Determination

CLNG believes that DOE's current approach to the public interest analysis can be streamlined to create efficiencies and allow DOE to better allocate resources. As a starting point, the NGA provides a rebuttable presumption that NFTA exports are in the public interest.⁴ This presumption under Section 3(a) places the burden on the party opposing the export to demonstrate that the proposal is inconsistent with the public interest. The NGA itself does not define the factors that DOE must consider or the method DOE must use in making a determination that a proposed export is not inconsistent with the public interest and it has long been recognized that DOE has discretion in this area.⁵

In evaluating the public interest, DOE historically has reviewed and applied several factors on a case-by-case basis. This practice compels DOE to issue lengthy NFTA orders. Because the factors that DOE considers relate to issues of national scope, such as U.S. natural gas supply⁶ and demand, national security, and international policy, CLNG believes DOE's process can be streamlined at the drafting phase

⁴ 15 U.S.C. § 717b(a).

⁵ DOE has recognized that the NGA does not mandate the factors that the agency must consider when evaluating natural gas export applications. *Lake Charles Exports, LLC*, DOE/FE Order No. 4011 at 14 (June 29, 2017).

⁶ The U.S. interstate natural gas pipeline system is highly interconnected and transports fungible natural gas molecules from a multitude of sources. As a result, the natural gas received at any LNG export facility could have been produced anywhere in the United States and even may be previously imported natural gas. Consequently, this public interest factor relates far more strongly to national interest issues than to any individual application.

while meeting the NGA's requirements, thus allowing for shorter orders that facilitate critical LNG infrastructure development more quickly.

In its orders on individual NFTA LNG export applications, DOE already uses studies like Energy Information Administration's (EIA) reports to support DOE's conclusions on broad public interest factors that do not require case-specific analysis. CLNG proposes that DOE build on this practice by undertaking a general public interest analysis outside of individual NFTA LNG export application dockets. More specifically, CLNG recommends that this review examine any public interest factors of national scope that do not vary from project to project⁷ and that it include a robust discussion of and conclusion on each such broad scoped public interest factor. Similar to other documents that evaluate broad-based aspects of the public interest, this document could be placed into each NFTA LNG export docket so that DOE could simply refer back to it to support its conclusions on these public interest factors when issuing an order on an individual NFTA application. Through this process, DOE could avoid the need to draft lengthy public interest sections in each and every NFTA order, while still satisfying its obligations under the NGA.⁸

CLNG believes this process will result in more streamlined DOE NFTA orders, reduce DOE staff drafting time, and allow DOE to operate more efficiently.

Creating a More Certain Regulatory Timeline

Several aspects of DOE's review process for NFTA LNG export applications are not standardized and allow significant uncertainty. CLNG believes that the regulatory modifications proposed below would remove this uncertainty, which in turn would improve U.S. competitiveness in the global LNG market.

(1) Streamline the Public Comment Period for NFTA LNG Export Applications

DOE's regulations require that the agency must issue notice of a NFTA application in the *Federal Register* and provide a comment period, but the regulations do not establish a deadline for such publication nor do they specify the comment period length.⁹ Without a clear schedule for processing these NFTA applications, neither applicants nor the LNG market as a whole can accurately predict when DOE's review of an NFTA application might start or finish.

To address this, CLNG proposes the following adjustments to DOE's regulations. First, CLNG proposes that DOE revise 10 C.F.R. § 590.205(a) to state that DOE's Office of Fossil Energy will publish notice of receipt of an application within 30 days of receipt of a complete NFTA application. CLNG proposes further that DOE revise 10 C.F.R. § 590.203 such that, in the event that the DOE deems an

⁷ CLNG recognizes DOE's obligations under the National Environmental Policy Act and does not propose that DOE modify its current case-specific environmental analysis in coordination with the relevant lead environmental review agency.

⁸ CLNG only proposes a general framework in these comments and recognizes that additional details regarding this analysis would need to be worked out.

⁹ 10 C.F.R. § 590.205(a).

NFTA application incomplete, that DOE will notify the applicant of such deficiency within 30 days of receipt of an NFTA application and absent such notification the application is presumed complete.

CLNG also proposes that DOE adjust 10 C.F.R. § 590.205(a) to expressly limit the time period to 30 days for protests, comments, motions to intervene, or notices of intervention. By clearly setting the beginning and end of the public comment period, DOE will further clarify the regulatory process while providing ample opportunity for all interested stakeholders to participate in DOE's review of the NFTA application.

(2) Set a Decision Deadline for 45-Days After Completion of Environmental Review for All LNG Export Applications to NFTA Nations

Next, CLNG also recommends the DOE revise its rules at 10 C.F.R. § 590.404 to state the DOE will render a decision on an NFTA LNG export application within 45 days following the issuance of the final environmental review document: A final environmental impact statement; an environmental assessment; or a determination that a categorical exclusion applies to the application. Legislation to amend the NGA to make this change currently is pending on Capitol Hill,¹⁰ but nothing prohibits DOE from proactively adopting this timeline as a policy in the interim.¹¹ Establishing a date certain by which DOE will render a final opinion and order on an NFTA will provide much needed clarity and regulatory certainty for applicants and free up market capital to invest in LNG infrastructure.

(3) Establish a 30-Day Deadline for Approving LNG Export Applications for FTA Nations

CLNG recommends that DOE establish a deadline by which it will approve LNG export applications to FTA nations. As noted above, Section 3(c) of the NGA requires that DOE deem natural gas exports to FTA nations as consistent with the public interest and DOE must approve those applications "without modification or delay." DOE has recognized that the NGA has removed the requirement for public interest reviews for applications to export LNG to FTA nations.¹²

Despite this legislative requirement and the minimal review that the NGA permits, FTA applicants since 2015 have waited between 87 and 283 days between application submission and the DOE's approval. These delays slow investment decisions and create uncertainty for the market. CLNG recommends the DOE establish a decision deadline of 30 days after submission of a natural gas export application to FTA nations.

¹⁰ Energy and Natural Resources Act of 2017, S. 1460, 155th Congress § 2201(a) (2017).

¹¹ For example, the Federal Energy Regulatory Commission (FERC) eliminated the requirement that LNG terminals meet traditional open access standards, allowing proprietary LNG terminals. *Hackberry LNG Terminal, L.L.C.*, 101 FERC ¶ 61,294 at P 22 (2002). Congress later codified FERC's policy in the Energy Policy Act of 2005. 15 U.S.C. § 717b(e)(3)(B)(ii).

¹² See, e.g., *Driftwood LNG LLC*, DOE/FE Order No. 3968 at 6 (Feb. 28, 2017).

Modernizing Agency Export Reporting Requirements

CLNG also recommends that DOE take steps to modernize its reporting requirements for LNG exports. CLNG recognizes that DOE's reporting requirements for LNG activities developed over the course of years based on the LNG import paradigm. But because the market has shifted to an export focus, CLNG recommends that DOE update its reporting requirements for LNG export activities to account for these changes in the market.

More specifically, CLNG recommends that DOE eliminate the price reporting requirements for LNG export activities. Price reporting is a vestige from DOE's past LNG import focus when the government regulated the price of natural gas but the government no longer plays this role. Furthermore, the price an LNG offtaker pays at the point of export does not bear on the public interest because it is domestic wholesale gas prices, not the price at a particular LNG export site, that affects the economic interests of domestic natural gas consumers. In addition, the variation across offtake arrangements among various LNG exporters and their offtake customers renders any price comparison meaningless.

Another holdover from the LNG import era is the requirement to report the supplier of the natural gas to be exported. CLNG recommends this requirement be eliminated as well. In the import context, the natural gas was sourced from foreign supplies and, as highlighted in DOE's 1984 Policy Guidelines, the supplier's identity bore on aspects of DOE's public interest conclusions. There, in the context of consideration of security of supply in the public interest analysis, DOE explained that "[s]ecurity of a proposed import supply can be demonstrated by reference to the historical reliability of the supplier to provide a dependable source of gas the United States and other countries."¹³ However, in an export scenario, any natural gas that is liquefied and exported from the United States necessarily must have been domestically produced or previously imported into the country (and thus subject to the reporting requirement). Consequently, concerns regarding the identity of the feed gas suppliers as it relates to security of supply are not implicated in the export context.

Moreover, the supplier of an LNG import cargo generally is clear. By contrast, the feed gas supplying a single LNG export cargo may be derived from multiple sources and likely will have been transported on the interconnected U.S. interstate gas pipeline grid where fungible molecules are comingled. Furthermore, the vast majority of U.S. LNG export projects utilize a tolling model, under which the project developer, which is the entity that typically holds the DOE export license, is not the entity securing upstream supply. Thus, requiring reporting of the identity of a feed gas supplier places an unnecessary regulatory burden on LNG export project developers and increases the commercial risk.

Limit Downstream Reporting

Finally, CLNG recommends that DOE reconsider requiring that LNG exporters monitor and report the ultimate destination where U.S.-produced natural gas is received for end use. Through its LNG

¹³ New Policy Guidelines and Delegations Order Relating to Regulation of Imported Natural Gas, 49 Fed. Reg. 6684 (Feb. 22, 1984).

export orders, DOE has created a reporting requirement mandating that LNG exporters monitor where the LNG they export is “actually delivered and/or received for end use.”¹⁴ The exporter must then report this data to DOE on a monthly basis.¹⁵ DOE further imposes these reporting requirements on LNG authorization holders’ counterparties by directing private contracting parties to include specific language establishing this reporting obligation.¹⁶

CLNG is concerned that this policy is unworkable and creates an unnecessary regulatory burden on LNG exporters and their offtake counterparties. In turn, this burden makes U.S. LNG export projects less attractive when compared with other global LNG exporters. As noted above, natural gas is a fungible commodity and it is therefore impossible to trace the source of a particular natural gas molecule once it has been mixed into an integrated natural gas stream. If LNG export customers mix U.S.-sourced natural gas with LNG from other sources, e.g., in a common LNG storage tank at a transshipment facility, it will be impossible to know where particular natural gas molecules originated or were consumed. Furthermore, existing U.S. export laws already prohibit direct exports of U.S. natural gas and the knowing transshipment of U.S. natural gas to sanctioned countries and would remain in place regardless of any change DOE makes to its reporting requirements.

In addition to the direct monetary cost of complying with this reporting requirement, the requirement imposes additional commercial constraints on LNG offtake customers that may harm U.S. LNG exporters’ relative attractiveness in the global LNG market. Limiting the downstream reach of this requirement will make U.S. LNG supplies more competitive and support the nation’s goals of economic growth, increased employment, improved balance of trade, and environmentally responsible development of domestic energy resources.

DOE could reduce the burden of this reporting requirement by limiting the downstream tracking to the first point of unloading. Ending the reporting requirement at the first unloading point will meet DOE’s goals of ensuring that authorized LNG exporters are complying with any destination restrictions in DOE’s orders. This approach would also recognize the reality of the global gas market, which increasingly treats natural gas as a fungible commodity making the tracking of individual gas molecules that have been comingled with other sources of supply impractical.

The regulatory changes and updates that CLNG offers above will provide necessary regulatory certainty for all stakeholders along the LNG export value chain. Streamlining the public interest review, firming the regulatory timeline, modernizing reporting requirements, and limiting downstream reporting requirements all will provide additional regulatory certainty necessary to encourage LNG export development, domestic economic benefits and job growth. CLNG is grateful for the opportunity to provide input as DOE seeks to reduce the regulations and regulatory cost for LNG export proceedings and compliance reporting. CLNG and NGSA look forward to working with DOE to implement these changes and ensure that the U.S. LNG export sector remains competitive on the global market and delivers the numerous benefits LNG exports offer.

¹⁴ See, e.g., *Golden Pass Products LLC*, DOE/FE Order No. 3978 at 175 (Apr. 25, 2017).

¹⁵ *Id.* at 177-78.

¹⁶ *Id.* at 175.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Riedl".

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