



**Erik Milito**  
Group Director  
Upstream and Industry Operations

1220 L Street, NW  
Washington, DC 20005-4070 USA  
Telephone 202-682-8273  
Fax 202-682-8033  
Email [militoe@api.org](mailto:militoe@api.org)

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U.S. Department of Energy (FE-34)  
Attn: Proposed Procedures  
Office of Oil and Gas Global Security and Supply  
Office of Fossil Energy  
P.O. Box 44375  
Washington, DC 20026-4375

**SUBJECT: Proposed Procedures for Liquefied Natural Gas Export Decisions**

The American Petroleum Institute (“API”) respectfully submits the following comments on the Department of Energy’s (“DOE” or “Department”) June 4, 2014 Notice of Proposed Procedures for Liquefied Natural Gas Export Decisions, 79 Fed. Reg. 32,261 (“Notice”). While API welcomes continued DOE engagement on the vital issue of increasing LNG exports from the United States, including exports to nations with which the United States does not have a Free Trade Agreement (“non-FTA nations”), we are concerned that the proposed changes in the Notice will actually exacerbate delays in the current review process for LNG export authorizations, create regulatory uncertainty, and eliminate an important signaling mechanism that has played a key role in the rapidly evolving U.S. LNG export industry to date.

The United States has been an LNG exporting nation since 1969. With domestic natural gas production at all-time highs thanks to advances in directional drilling and hydraulic fracturing, we are now the largest natural gas producer in the world. The United States is on the brink of becoming an energy superpower, capable of delivering critical supplies of energy to our allies overseas to calm unpredictable markets and stem the geopolitical influence of unstable suppliers. Moreover, as detailed in the most recent National Climate Assessment, natural gas, when combusted for power generation, emits significantly fewer pollutants like carbon dioxide, black carbon, and mercury as compared to coal, and is directly responsible for declining carbon dioxide emissions in the U.S since 2008.<sup>1</sup> Similarly, President Obama’s National Export Initiative, proposed over four years ago, is seeking to double exports by 2015 by removing obstacles to new markets, including markets for our abundant and clean-burning natural gas. Last, it bears repeating that the window of opportunity for the U.S. to harness its natural gas

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<sup>1</sup> See U.S. Global Change Research Program, “Climate Change Impacts in the United States: The Third National Climate Assessment,” available at <http://nca2014.globalchange.gov/downloads>, at 269, 652 (2014).

resources to improve global energy and climate security is rapidly closing, as proposed U.S. LNG export projects that languish in multiple regulatory reviews become less competitive with foreign export projects with each passing day. Thus, it is imperative at this juncture that DOE not stand in the way of increasing our exports by abruptly changing the rules of the game in ways that have unintended consequences for all players involved.

Separately, API is also submitting today comments on DOE's "Draft Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States" and "Life Cycle Greenhouse Gas Perspective on Exporting LNG from the United States," released by the Department concurrently with the proposed procedures.

## **I. Interest of the American Petroleum Institute**

API is a national trade association that represents over 600 companies involved in all aspects of the oil and natural gas industry. API's members include owners and operators of LNG import and export facilities in the United States and around the world, as well as owners and operators of LNG vessels, global LNG traders, and manufacturers of essential technology and equipment used all along the LNG value chain. Our members also have extensive experience with the drilling and completion techniques used in shale gas development and in producing America's natural gas resources in a safe and environmentally responsible manner.

## **II. The Proposed Procedures Will Cause Further Delays and Uncertainty**

On December 5, 2012, DOE announced a series of changes to its review of applications to export LNG to non-FTA nations under Section 3 of the Natural Gas Act. Among other changes, DOE's announcement established an "Order of Precedence" that DOE would adhere to in its review of applications. In moving through its Order of Precedence to date, DOE has issued six conditional export authorizations and one final export authorization, while another 26 applications are currently pending. Put another way, DOE has managed to review non-FTA applications at an anemic rate of about one per quarter since the Order of Precedence was established, and has reviewed only about one-fifth of the total applications submitted. At this rate, and assuming no additional applications were submitted, DOE would have completed its reviews sometime after 2020 – an unjustifiable and absurd result. Congress has very recently taken note of this pace, writing that "[t]o date, applications for export to non-[FTA] countries have been prone to lengthy delays, with only seven of 33 applications approved to date and multiple applications pending at the Department for more than two years."<sup>2</sup> For this and other reasons, API has repeatedly urged

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<sup>2</sup> Committee on Appropriations, U.S. House of Representatives, Report to accompany Energy and Water Development Appropriations Bill, 2015, *available at* <http://appropriations.house.gov/uploadedfiles/hrpt-113-hr-fy2015-energywater.pdf>, at 106 (113th Cong., 2d Session). *See also id.* at 156 ("The Committee remains concerned about the backlog of liquefied natural gas export applications at [FERC]").

DOE to approve all pending applications as expeditiously as possible, including via the use of a blanket authorization.<sup>3</sup>

Perhaps in recognition of its unsustainably slow rate of review, nearly 18 months to the day since its last set of procedural changes, DOE issued the Notice announcing yet another series of significant changes to its review process. One of the rationales advanced by DOE for the proposed changes is to “prioritize acting upon applications that are otherwise ready to proceed[.]”<sup>4</sup> DOE has probably done just the opposite, adding months of additional delays to the final export authorizations that were expected for the two most mature export projects: the Cameron LNG and Freeport LNG export facilities.

While Cameron LNG has now completed its National Environmental Policy Act (“NEPA”) review process at the Federal Energy Regulatory Commission (“FERC”) since the issuance of the Notice,<sup>5</sup> API is concerned about the timing of the comment period on the Notice and the fact that DOE will have to respond to comments on the Notice that will be filed in the Cameron LNG non-FTA proceeding before DOE. The very issuance of the Notice and proposing procedural changes in this fashion appears likely to delay the issuance of a final order on Cameron LNG’s non-FTA application by several months at least. Even though DOE pledged in the Notice to “proceed as explained in the conditional orders,” *i.e.*, to issue final orders once the NEPA process is complete, it so far has not done so for the Cameron LNG export facility. Similarly, the Freeport LNG facility, which was also expected to complete its NEPA review in the third quarter of 2014,<sup>6</sup> will likely also face delays of several months at least with respect to a final order on its non-FTA application as DOE waits for the comment period on the Notice to close and begins the task of responding to thousands – and perhaps hundreds of thousands – of public comments.

Ironically, these probable delays will impact the very facilities DOE is allegedly trying to prioritize – those “otherwise ready to proceed.” Perhaps more troubling, they may be emblematic of additional future delays and uncertainty that DOE has caused merely by issuing the Notice, regardless of whether the proposed procedure changes are actually adopted (and if they are, API expects still further delays and uncertainty as DOE, FERC, and other state and federal agencies adapt to the new process). Congress has also very recently echoed this concern in response to the Notice:

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<sup>3</sup> See, e.g., Letter of Jack Gerard to Secretary Moniz, *available at* [http://www.fossil.energy.gov/programs/gasregulation/authorizations/2013\\_applications/Ex\\_Parte07\\_03\\_13.pdf](http://www.fossil.energy.gov/programs/gasregulation/authorizations/2013_applications/Ex_Parte07_03_13.pdf) (June 26, 2013).

<sup>4</sup> 79 Fed. Reg. 32,263.

<sup>5</sup> *Cameron LNG, LLC*, 147 FERC ¶ 61,230 (June 19, 2014).

<sup>6</sup> *Freeport LNG Development, LLC*, Notice of Revised Schedule for Environmental Review of the Liquefaction and Phase II Amendment Projects, FERC Docket No. CP12-29-000 (Jan. 6, 2014) (90-day federal authorization decision deadline of September 14, 2014).

[T]he Department [has] proposed to discontinue conditional approvals of applications of export to non-FTA countries and instead make final public interest determinations only after [FERC] conducts environmental reviews under [NEPA]. It is unclear whether these proposed changes would accelerate the Department's adjudication of applications or make them susceptible to further bureaucratic delays.<sup>7</sup>

It is hard to square these immediate impacts and the concerns of Congressional appropriators with DOE's stated rationale in the Notice, to say nothing of the National Climate Assessment, the National Export Initiative, and our commitments to overseas trading partners and allies.

### **III. The Proposed Procedures Will Eliminate an Important Signaling Mechanism to Markets and to U.S. Allies**

The proposed procedure changes in the Notice essentially boil down to two items: suspending the Department's current practice of issuing conditional orders on non-FTA export applications; and moving the Department's review of such applications to the end of the applicable NEPA review process, as opposed to conducting the review concurrently with or before the NEPA process. API is concerned that by ending the practice of issuing conditional orders for most applications, the Department is arbitrarily eliminating an important signaling mechanism to markets (both for U.S. project financing and for natural gas commodities globally) and to our strategic allies. In support of this proposed change, DOE asserts, without support, that "conditional decisions no longer appear necessary for FERC or the majority of applicants to devote resources to NEPA review[.]"<sup>8</sup> API disagrees, and it is unclear whether this conclusion was reached with or without input from relevant stakeholders, including project developers and financiers, LNG buyers, and foreign governments. In fact, recent public statements by a bipartisan group of lawmakers seem to contradict this putative rationale:

"Given the situation in Ukraine, this [the Jordan Cove LNG conditional order granting authorization to export LNG to non-FTA nations] sends a positive signal to our allies and to energy markets that the United States is ready to join the growing global gas trade." – Sen. Lisa Murkowski, March 24, 2014.<sup>9</sup>

"Our allies have emphasized that a strong market signal from the United States that it is a willing future supplier of LNG, even if those supplies are not

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<sup>7</sup> Committee on Appropriations, U.S. House of Representatives, Report to accompany Energy and Water Development Appropriations Bill, 2015, *available at* <http://appropriations.house.gov/uploadedfiles/hrpt-113-hr-fy2015-energywater.pdf>, at 106 (113th Cong., 2d Session).

<sup>8</sup> 79 Fed. Reg. 32,263.

<sup>9</sup> U.S. Senate Committee on Energy & Natural Resources, "Sen. Murkowski Welcomes DOE's Approval of Jordan Cove LNG Export License," *available at* <http://www.energy.senate.gov/public/index.cfm/2014/3/sen-murkowski-welcomes-doe-s-approval-of-jordan-cove-lng-export-license>.

immediately available, would have profound, positive and immediate strategic implications.” – Sens. Mark Udall, Mary Landrieu, Mark Begich, Heidi Heitkamp, and Tom Udall, May 2, 2014.<sup>10</sup>

DOE’s rationale seems to be limited to the idea that signals to FERC and project developers are no longer necessary for these parties to prosecute the FERC NEPA review process. Even accepted as true, DOE’s reasoning on this point is far too narrow. It ignores the key roles played by other stakeholders in spurring project developers through the long and expensive FERC NEPA review process. These stakeholders include project financiers (*e.g.*, oil and gas companies, banks, investors, shareholders, etc.); LNG buyers (*e.g.*, overseas utilities and their ultimate customers); and foreign governments (including but not limited to governments of countries dependent on Russian LNG and Russian natural gas transported via pipeline through Ukraine). API believes that all of these diverse stakeholders continue to place significant value on conditional authorizations when making future long-term investment decisions and, in the case of foreign governments, when making critical national security related decisions.

DOE provides two additional rationales for ending its issuance of conditional orders. First, DOE asserts that ending the practice will “better allocate departmental resources.”<sup>11</sup> However, moving the role of DOE from the beginning of the NEPA process to the end says nothing about “better” allocation, merely different allocation in time. DOE seems to suggest that it is currently processing applications with “little prospect of proceeding”<sup>12</sup> through a full NEPA review. Yet DOE cites no examples of such applications, and a cursory review of the few conditional authorizations that DOE has granted reveals that all of the projects reviewed had previously been proposed many years earlier to FERC as import facilities (including facilities that are fully constructed and operational, some of them for several decades), suggesting, if anything, a very high prospect of proceeding through NEPA review. If DOE has expended resources on less meritorious projects, it has failed to identify them in the Notice, and failed to provide even a single criterion by which a project is judged to be more meritorious than another. More to the point, as API has repeatedly urged, DOE should not be in the business of determining winners and losers based on unspecified notions of which projects have “little prospect” of coming online. Markets will and should determine a project’s prospects, and DOE should not stand in the way, especially if its reasons for doing so lack a sound basis in fact or law.

Second, DOE states that suspending the use of conditional orders “is also likely to improve the quality of information on which DOE bases its decisions[.]”<sup>13</sup> While API does not necessarily disagree with this reasoning, API believes DOE can achieve this same goal by coordinating more closely with FERC or the U.S. Maritime Administration (“MARAD”) at some point during the

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<sup>10</sup> Letter to President Obama, *available at* [http://www.markudall.senate.gov/?p=press\\_release&id=4214](http://www.markudall.senate.gov/?p=press_release&id=4214).

<sup>11</sup> 79 Fed. Reg. 32,264.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 32,263.

NEPA review process, but before it is complete, to ensure both expeditious review of export applications as well as a high quality record for decision-making. DOE does not explain in the Notice why the end of the NEPA process would yield the best information for DOE's purposes as opposed to any other point in an 18 to 30 month or longer process. Indeed, some of the information considered by FERC or MARAD during the NEPA process would be irrelevant to DOE's review, or if considered by DOE, would simply be redundant (and therefore defeat DOE's stated desire to better allocate Department resources); thus, waiting until a review is complete will not necessarily yield the best "quality of information." Finally, API believes that the conditional orders issued by DOE to date – all of them issued before the end of a particular project's NEPA review – are fully supported by the information considered, and DOE agrees.<sup>14</sup> If DOE believes the conditional orders issued under its current practices are valid, it seems unnecessary to change these practices, particularly where such changes will cause delays and disrupt markets.

In sum, by eliminating its practice of issuing conditional orders, DOE would eliminate a potent signaling mechanism to markets, our overseas allies, and the various stakeholders therein. Moreover, DOE has failed to justify this change in the Notice. API respectfully requests that DOE reconsider eliminating the practice before finalizing any procedure changes.

#### **IV. DOE Should Consider Alternative Procedure Changes**

As noted, API welcomes the Department's continued engagement on these issues and its proactive evaluation of its processes, which in our view have been lacking to date. For the reasons above, API has significant concerns with the proposed procedure changes in the Notice. However, if DOE is committed to reducing regulatory delays, it should also consider the following alternative procedure changes before announcing any final changes:

**Approve all non-FTA applications pending before DOE.** As API has previously argued, because no party in the pending non-FTA proceedings has demonstrated a negative cumulative impact on the public interest due to increased LNG exports, DOE would be justified in approving all pending non-FTA applicants without delay.<sup>15</sup>

**Issue final public interest determinations within 30 days of formal FERC filing.** Accelerating the review process and requiring assessment of projects that have formally filed with FERC will allow the Department to evaluate the most viable applicants. An applicant's commitment to proceed through the FERC process demonstrates a commitment to invest time, resources, and funding into the project. The revised process

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<sup>14</sup> *Id.* ("This proposed procedure, if adopted, would not affect the continued validity of the conditional orders the Department has already issued.")

<sup>15</sup> *See supra* n.3.

would also provide regulatory certainty by rendering a final public interest determination early in the project's development. This would enable U.S. to secure long-term agreements with non-FTA LNG customers more efficiently.

**Issue final orders within 10 days of the completion of the NEPA process.** By imposing a strict deadline at the end of the NEPA process, DOE could send a signal of its own that (1) it intends to review export applications with minimal delay; and (2) it intends to work with lead NEPA review agencies throughout the NEPA process to ensure that a DOE decision on export authorization issues as soon as possible. The robust cooperation that would be required by such an ambitious deadline could also improve the quality of the NEPA review process by encouraging constant expert input and analysis by DOE. However, there are still risks involved in issuing a final order this late in the development of an LNG facility. Projects require regulatory assurances before proceeding to the construction phase. A regulatory delay in issuing an export application could increase construction costs, which would harm the U.S. projects' ability to compete in the global marketplace.

API would be pleased to discuss these and other potential alternative procedure changes further with the Department.

## V. Additional Comments

API continues to have significant concerns that the discretionary licensing process for LNG exports to non-FTA nations, as currently implemented by DOE, is inconsistent with World Trade Organization ("WTO") rules on export restrictions, as reflected in Article XI:1 of the General Agreement on Tariffs and Trade ("GATT").<sup>16</sup> This conclusion would be unchanged if the proposed procedures were adopted by DOE. In fact, if the proposed changes have the effect of further delaying LNG exports to non-FTA nations (as API believes they will), a violation of WTO rules would only become more stark and subject the United States to a greater risk of challenge in the WTO dispute settlement system by WTO-member nations. API strongly

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<sup>16</sup> API's analysis on this point is bolstered by the recent WTO case regarding Chinese restrictions on exports of rare earth minerals. There, a WTO panel concluded that China's policy of managing supplies of rare earths and imposing export quotas violated the GATT and did not fall into any exception under Article XX of the GATT because the policy "seems designed to reserve amounts of rare earth products for domestic consumption." See Panel Report, *China – Rare Earths*, WTO Doc. WT/DS431/R (March 26, 2014), ¶¶ 7.601, 7.614. API is concerned that DOE's stated desire to "be in a better position to judge the cumulative market impacts of its authorizations in its public interest review" could be viewed as tantamount to an export quota and/or an attempt to reserve natural gas for domestic consumption. 79 Fed. Reg. 32,263-64.

If a WTO panel were to examine the current licensing system or a system as amended by the proposed changes, it would also likely examine the additional question of whether DOE fully explored and justifiably rejected alternative policies that are less restrictive. See Panel Report, *China – Rare Earths*, ¶¶ 7.354, 7.675-78 & n.549; see also *supra* Section IV.

encourages DOE to consider the implications on our WTO obligations of any procedure changes it adopts.

API also believes that the proposed first prong of DOE's test to determine when a NEPA review is complete – 30 days after publication of a final Environmental Impact Statement ("EIS") – should be shortened to simply "upon publication of a final EIS" if this proposed change is adopted. DOE has provided no justification for an additional 30 days of delay. In fact, the second prong of the proposed test, "upon publication by DOE of a Finding of No Significant Impact," imposes no such additional delay, and revising the first prong to eliminate the additional 30 days requirement will make DOE's test internally consistent as well as more workable and understandable for applicants.

Finally, API appreciates that the Notice "does not address the treatment of applications to export natural gas from Alaska."<sup>17</sup> Because API believes that the host of potential issues related to future additional exports of Alaskan LNG is likely to be substantially different from the issues currently considered by DOE in its review of applications to export LNG from the lower 48 states, API urges the Department to affirmatively state that it will issue conditional orders on any proposed Alaskan LNG exports, regardless of any applicable NEPA review process.

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API and many others agree that our allies overseas are increasingly looking to the U.S. for leadership on energy, just as American workers are looking for leadership on job creation. As the world's top producer of natural gas, we should be tearing down regulatory barriers to access foreign markets, which would in turn boost economic growth here at home, create thousands of jobs, and cement our status as a global energy superpower. With bipartisan support for policies to speed LNG exports, we hope that the Department will amend its processes, if at all, in ways that unlock the economic and strategic potential of America's energy revolution, not shut it down.

Should you have any questions on these comments, please feel free to contact me.

Best regards,



Erik Milito

Group Director, Upstream and  
Industry Operations

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<sup>17</sup> 79 Fed. Reg. 32,263 n.5.