

The Camel's Nose — EPA And LNG Export

Law360, New York (December 21, 2012, 5:04 PM ET) -- Natural gas prices in the United States have created strong incentives for U.S. producers to increase their ability to sell into international markets, where prices are considerably higher. On Dec. 5, 2012, the U.S. Department of Energy's Office of Fossil Energy published on its website a report assessing the potential macroeconomic impact of liquefied natural gas (LNG) exports.[1]

NERA Economic consulting, which prepared the report for the DOE, developed a range of market scenarios and concluded that "for every one of the market scenarios examined, net economic benefits increased as the level of LNG exports increased." [2] Proponents of domestic natural gas development hailed the report,[3] while opponents criticized the report's conclusions.[4] The DOE had withheld review of LNG export applications pending receipt of the NERA report and announced its intention to recommence the review process.[5]

Companies seeking to export LNG must obtain approval from the DOE for authorization to export LNG produced from domestic natural gas and the Federal Energy Regulatory Commission for approval to build new LNG export terminals and liquefaction facilities.[6] Unless such facilities would be "major" sources requiring an air permit or would require changes to permits for water discharges, it would not appear that the U.S. Environmental Protection Agency would have significant involvement.

Things are not always as they appear. FERC's review and approval process is a "major Federal action significantly affecting the quality of the human environment," requiring review of potential environmental impacts under the National Environmental Policy Act.[7] Therein lies the EPA's "hook" for involvement.

FERC has a "prefiling" process for natural gas projects that allows project developers to commence the FERC review procedures before filing a formal application.[8] In a number of prefiling dockets for LNG export projects, the EPA has submitted comments recommending that FERC significantly expand the scope of its environmental review. The EPA recommendations go beyond issues such as the potential for local impacts on air quality in the vicinity of the facility or on nearby watersheds.

Instead, the EPA urged FERC to consider purported "cumulative impacts" from not only the facility before it, but also from all planned LNG export facilities across the country. If such a "cumulative impact analysis" were to be required at each proposed LNG export facility, FERC's review of the potential impacts on human health and the environment would be significantly more complex and almost certainly introduce additional delays in construction.

Two projects seeking approval to construct LNG export facilities, one in which FERC already has authorized construction and operation and one in which the EPA has sought expanded environmental review, demonstrate the nature of the challenges now that the EPA is becoming more actively involved.

FERC Review Under NEPA of Sabine Pass Liquefaction

In April 2012, FERC authorized Sabine Pass Liquefaction to construct and operate a facility to liquefy domestically produced natural gas for export.[9] FERC consulted with the DOE, U.S. Army Corp of Engineers and the Department of Transportation, determined that the project would not have a significant impact on the quality of the human environment, and prepared an Environmental Assessment (EA). FERC determined that an Environmental Impact Statement (EIS) was unnecessary because all of the proposed facilities would be within the footprint of the existing LNG terminal, which was previously the subject of an EIS, and because the issues to be considered were small in number and well defined.

Project opponents urged FERC to consider purported “cumulative effects” from not only the Sabine Pass project, but also from other potential LNG export facilities. Opponents further argued that the export of domestically produced natural gas would raise costs for domestic consumers of gas, adversely affect domestic energy supplies and, thus, raise national security issues.

FERC rejected the cumulative effect arguments on the grounds that, at the time, it had not received any other Section 3 applications for authority to construct a liquefaction facility for export of LNG exports. Therefore, FERC concluded, any effects from such projects were speculative. FERC rejected the ancillary effects arguments on the grounds that such concerns related to the effects of exporting the commodity, and not the effects of the facilities used for such export. FERC reasoned that its statutory authority was limited to approving or disapproving the construction and operation of facilities and the site of their location. Issues arising from the implications of export or the resulting economic and public benefits were beyond the scope of its authority.

FERC Review Under NEPA of Cove Point Liquefaction

Dominion Cove Point LNG LP (DCP) is proposing to construct liquefaction facilities for exporting liquefied natural gas (LNG), at its existing LNG Terminal located on the Chesapeake Bay in Maryland. DCP applied for and received authorization from DOE to enter into contracts to export LNG to FTA countries on Oct. 7, 2011. DCP applied to the DOE for authority to export LNG to Non-FTA countries Oct. 3, 2011. Finally, DCP filed a request to initiate FERC’s prefilng process on June 1, 2012.

On Sept. 28, 2012, FERC published its Notice of Intent to prepare an EA analyzing the environmental impacts of the DCP proposal.[10] In accordance with its standard review process, FERC announced it would use information obtained to determine the issues to be evaluated in the EA and whether preparation of an EIS is more appropriate based upon the potential significance of the anticipated levels of impact. FERC staff also identified a preliminary list of issues to be considered that focused on local impacts only.

On Nov. 15, 2012, the EPA’s regional office in Philadelphia submitted comments to FERC, recommending that FERC significantly expand the scope of its environmental review.[11] The EPA observed that the DCP facility is “one of sixteen (16) applications currently pending before [DOE].” The EPA further noted that while the DOE is studying “cumulative economic impacts of allowing natural gas exports,” it urged that “FERC and DOE ... jointly and thoroughly consider the indirect and cumulative environmental impacts of exporting LNG from Cove Point.”[12]

The EPA continued, “[t]he environmental study of the Cove Point Project should be a comprehensive and robust evaluation of potential impacts, which may require a higher level analysis particularly in consideration of the potential for significant cumulative impacts and the level of community interest.”[13]

Practical Effect of EPA Recommendation

In essence, the EPA wants FERC and the DOE — in the context of reviewing a proposal to construct a single liquefaction facility — to assess nationwide “cumulative” environmental effects that could result from approval of the DCP project, along with other past, present and reasonably foreseeable future actions. The EPA argues that FERC and the DOE should not limit their review to whether these actions are energy related, or whether FERC has jurisdiction over them.

The EPA additionally urged FERC to analyze “indirect effects related to gas drilling and combustion,” explaining that consideration should be given to such matters as the potential for increased demand for natural gas extraction, increased production from shale resources, demand for construction of new gas pipelines, and increase in domestic natural gas prices. The EPA Region 3 letter to FERC in the context of the Cove point project serves notice that the natural gas industry needs to monitor closely and participate meaningfully in the government review process for LNG export projects.

--By Paul Gutermann, Akin Gump Strauss Hauer & Feld LLP

Paul Gutermann is a partner in the Washington, D.C., office at Akin Gump.

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[1] http://www.fossil.energy.gov/programs/gasregulation/reports/nera_lng_report.pdf

[2] *Id.* Executive Summary at 1.

[3] <http://theenergycollective.com/node/152886>; <http://marcellusdrilling.com/2012/12/doe-study-lng-exports-under-all-scenarios-are-a-good-thing/>

[4] http://action.sierraclub.org/site/MessageViewer?em_id=267705.0

[5] DOE posted the final NERA report into the fifteen pending export application dockets, and will accept comments on the report for forty-five days after official notice of the study appears in the Federal Register. DOE will accept reply comments for an additional thirty days after the conclusion of the initial comment period. Following the closing of the reply comment period, DOE will begin to act on the pending applications on a case-by-case basis.

[6] Section 3(c) of the Natural Gas Act (NGA) provides that applications to export to most Free-Trade-Agreement (FTA) countries are deemed to be in the public interest and such applications are authorized without modification or delay. 15 U.S.C. § 717b(c). Section 3(a) of the NGA provides a rebuttable presumption that proposed exports of natural gas to non-FTA countries are in the “public interest.” *Id.* § 717b(a). Section 3(e) of the NGA provides FERC jurisdiction to authorize construction and operation of a liquefaction facility. *Id.* § 717b(e) (“The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal”).

[7] National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321 et seq.

[8] <http://www.ferc.gov/EventCalendar/Files/20051007163557-RM05-31-000.pdf>

[9] To date, the Sabine Pass Liquefaction facility is the only facility approved by both DOE and FERC to export to both FTA and non-FTA countries.

[10] 77 Fed. Reg. 59601 (Sept. 28, 2012).

[11] <http://articles.law360.s3.amazonaws.com/0394000/394840/covepoint.pdf>.

[12] EPA Letter at 3.

[13] Id.

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