

DEPARTMENT OF ENERGY

10 CFR Part 590

Eliminating the End Use Reporting Provision in Authorizations for the Export of Liquefied Natural Gas

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Policy statement.

SUMMARY: The Department of Energy's Office of Fossil Energy (DOE/FE) is discontinuing its practice, adopted in 2016, of including an "end use" reporting provision in orders authorizing the export of domestically produced natural gas, including liquefied natural gas (LNG), issued under section 3 of the Natural Gas Act (NGA). Under this practice, many authorization holders are currently required to track and report the country (or countries) of destination into which their exported LNG or natural gas was "received for end use." Due to practical concerns about this reporting requirement and a reconsideration of the need for the requirement given those concerns, DOE/FE has determined that it is prudent to discontinue this requirement in export authorizations going forward. DOE/FE will revert to its prior practice of requiring authorization holders to report, in relevant part, the country (or countries) into which the exported LNG or natural gas "was actually delivered." DOE/FE believes this action will enhance the accuracy of information provided by authorization holders and will reduce administrative burdens for the U.S. LNG export market. This policy statement affects only future export authorizations issued by DOE/FE. However, concurrently with the issuance of this policy statement, DOE/FE is issuing a blanket order removing the end use provision from applicable existing export authorizations issued from February 2016 to present.

DATES: This policy statement is effective on December 19, 2018.

FOR FURTHER INFORMATION CONTACT:

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5359, email: cassandra.bernstein@hq.doe.gov or shawn.flynn@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

- I. Statutory Background
- II. Regulatory Background
- III. Policy Statement
- IV. Administrative Benefits
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I. Statutory Background

The Department of Energy is responsible for authorizing exports of natural gas to foreign nations pursuant to section 3 of the NGA, 15 U.S.C. 717b.¹ Under section 3(c) of the NGA, exports of natural gas to countries with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas and with which trade is not prohibited by U.S. law or policy (FTA countries) are "deemed to be consistent with the public interest." Therefore, applications authorizing natural gas and LNG exports to FTA countries must be granted "without modification or delay."² Section 3(a) of the NGA governs exports to any other country with which trade is not prohibited by U.S. law or policy (non-FTA countries). DOE has consistently interpreted section 3(a) of the NGA as creating a rebuttable presumption that a proposed export of natural gas to non-FTA countries is in the public interest.³ Accordingly, DOE conducts an informal adjudication and grants the application unless DOE finds that the proposed exportation to non-FTA countries will not be consistent with the public interest.⁴

II. Regulatory Background

DOE's regulations implementing section 3 of the NGA are codified at 10 CFR part 590. Under 10 CFR 590.404,

¹ The authority to regulate the imports and exports of natural gas, including liquefied natural gas, under section 3 of the NGA (15 U.S.C. 717b) has been delegated to the Assistant Secretary for Fossil Energy in Redelegation Order No. 00-006.02, issued on November 17, 2014.

² 15 U.S.C. 717b(c). The United States currently has FTAs requiring national treatment for trade in natural gas with Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea, and Singapore. FTAs with Israel and Costa Rica do not require national treatment for trade in natural gas.

³ See *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 203 (D.C. Cir. 2017) ("We have construed [NGA section 3(a)] as containing a 'general presumption favoring [export] authorization.'" (quoting *W. Va. Pub. Serv. Comm'n v. U.S. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982)).

⁴ See *id.* ("there must be 'an affirmative showing of inconsistency with the public interest' to deny the application" under NGA section 3(a)) (quoting *Panhandle Procedures & Royalty Owners Ass'n v. Econ Regulatory Admin.*, 822 F.2d 1105, 1111 (D.C. Cir. 1987)).

DOE/FE has broad authority to "issue a final opinion and order and *attach such conditions* thereto as may be required by the public interest after completion and review of the final record."⁵ In the long-term and short-term export authorizations issued by DOE/FE to date (both to FTA and non-FTA countries), DOE/FE imposes conditions on the authorization holder.⁶ These conditions include certain reporting requirements, including those described below.

A. Long-Term LNG Export Authorization Orders—2011 to January 2016

In 2011, DOE/FE issued its first long-term export authorization to a LNG export project to be located in the lower-48 states. From that time through January 2016, DOE included two reporting provisions in every long-term LNG export authorization order that are relevant here.

First, DOE/FE required the long-term LNG export authorization holder to include the following provision in any agreement or other contract for the sale of LNG exported pursuant to its authorization:

Customer or purchaser acknowledges and agrees that it will resell or transfer U.S.-sourced natural gas in the form of LNG purchased hereunder for delivery to the countries identified . . . , and/or to purchasers that have agreed in writing to limit their direct or indirect resale or transfer of such LNG to such countries. Customer or purchaser further commits to cause a report to be provided to [the long-term LNG export authorization holder] that *identifies the country of destination, upon delivery, into which the exported LNG or natural gas was actually delivered*, and to include in any resale contract for such LNG the necessary conditions to insure that [the long-term LNG export authorization holder] is made aware of all such actual destination countries.

Second, as part of the monthly reporting requirements imposed as a condition in these long-term LNG export authorization orders, DOE/FE required the authorization holder to report, for each LNG cargo, "the country (or countries) of destination into which the exported LNG *was actually delivered*."

Importantly, for all the orders issued during this timeframe, this language remains in effect. DOE/FE did not amend those orders to change these two reporting provisions and is not doing so through this policy statement. However, beginning in February 2016, DOE/FE incorporated different language for these two reporting provisions in long-term

⁵ 10 CFR 590.404 (emphasis added).

⁶ The terms "authorization" and "order" are used interchangeably for purposes of this policy statement.

(and some short-term) LNG export authorization orders, as explained below.

B. Long-Term LNG Export Authorization Orders—February 2016 to Present

On February 5, 2016, DOE/FE granted the applications of certain Canadian companies requesting authorization to export U.S.-sourced natural gas by pipeline to Canada, where the companies planned to export U.S. natural gas to Canada by pipeline, then liquefy the U.S. natural gas and export it in the form of LNG to other countries.⁷ These applications raised novel legal and policy considerations. In particular, DOE/FE was concerned about the potential for U.S.-sourced natural gas to be exported to a neighboring FTA country (Canada or Mexico), then re-exported as LNG from those countries to non-FTA countries without DOE/FE having knowledge of the final destination country. Such a situation could lead to a company attempting to circumvent the public interest review requirement of NGA section 3(a) by transiting U.S.-sourced natural gas through a FTA country to a non-FTA country. Additionally, as the U.S. LNG export market developed, DOE/FE sought greater transparency about where U.S.-sourced natural gas was being delivered and used around the world.

To address these issues, DOE/FE began adding an “end use” reporting requirement as a condition to all long-term (and some short-term) LNG export authorizations issued on or after February 5, 2016. At that time, DOE/FE did not find that the addition of this end use provision required notice in the **Federal Register**.

Under this provision, authorization holders are currently required to include the following provision in any agreement or other contract for the sale or transfer of LNG exported pursuant to its long-term LNG export authorization:

Customer or purchaser acknowledges and agrees that it will resell or transfer U.S.-sourced natural gas in the form of LNG purchased hereunder for delivery to the countries identified in . . . and/or to purchasers that have agreed in writing to

limit their direct or indirect resale or transfer of such LNG to such countries. Customer or purchaser further commits to cause a report to be provided to [the long-term LNG export authorization holder] that identifies the country of destination (or countries) into which the exported LNG or natural gas was actually delivered and/or received for end use, and to include in any resale contract for such LNG the necessary conditions to insure that [the long-term LNG export authorization holder] is made aware of all such actual destination countries.

Likewise, as part of the monthly reporting requirements, authorization holders are required to report, for each LNG cargo, “the country (or countries) of destination into which the exported LNG was actually delivered and/or received for end use.”

In its orders, DOE/FE has defined “end use” to mean “combustion or other chemical reaction conversion process (e.g., conversion to methanol).”⁸ To date, DOE/FE has included this end use provision in more than 40 export authorization orders.

III. Policy Statement

DOE/FE has become aware that it is impracticable, if not impossible, for authorization holders to comply with the end use reporting requirement. For example, a cargo of LNG could be offloaded and regasified in one country, and a portion of the U.S. natural gas could be re-exported by pipeline to another country or countries—without the direct knowledge or control of the parties to the initial export from the United States. As another example, an offloaded volume of U.S. LNG could be commingled with non-U.S. LNG before it is delivered to the end user. Some portion of this mixture could be reloaded and relocated to another country or countries before it is delivered to the end user, again without the direct knowledge or control of the parties to the initial U.S. export. In light of these possibilities, companies have expressed concern that the end use provision could put their export authorization(s) in jeopardy if they cannot strictly comply with it—*i.e.*, if they are unable to determine exactly where their exports were “received for end use.”

Most recently, on October 29, 2018, Sempra LNG & Midstream, LLC (Sempra) filed comments in a different DOE/FE proceeding but preemptively

raised the following concern about the end use reporting requirement:⁹

[A]uthorization holders and Registrants may have limited visibility into the final end use country once a cargo of LNG has been delivered[.] . . . The inherent fungibility of natural gas poses a particular challenge for authorization holders, Registrants, and their customers in tracking molecules of the commodity to their ultimate end use destination.”¹⁰

Upon review of this issue, DOE/FE has determined that it is prudent to revert to the original (*i.e.*, pre-February 2016) destination language, which requires authorization holders to report the country (or countries) into which the exported LNG or natural gas “was actually delivered”—not “received for end use.”

Based on its analysis of the LNG export market, DOE/FE believes this change is in the public interest. DOE has determined that, for the reasons described herein, there is currently insufficient concern about authorization holders attempting to circumvent the public interest review process for non-FTA exports to justify an end-use reporting requirement—particularly given the compliance difficulties encountered by authorization holders. Among other reasons, all U.S. LNG export terminals operating or currently under construction have long-term authorization to export to both FTA and non-FTA countries. Second, presently there is no LNG “hub” located in a FTA country. Although the development of a LNG hub that facilitates physical trades in a FTA country could present an opportunity to transit U.S.-sourced natural gas through a FTA country to a non-FTA country, DOE/FE believes this risk is small given the development and transparency of the LNG export market at this time. Finally, re-exports of all LNG cargoes represent a very small percentage of LNG trade.¹¹

For these reasons, DOE gives notice that DOE/FE is discontinuing its practice of including an end use provision in any export authorizations issued pursuant to section 3 of the NGA. In future long-term LNG export

⁹ Sempra LNG & Midstream, LLC, Info. Collection Extension, OMB Control No. 1901–0294, Form FE–746R Natural Gas Imports and Exports, at 4 (Oct. 29, 2018).

¹⁰ *Id.* at 5.

¹¹ See, e.g., Internat’l Gas Union, *2018 World LNG Report*, at 7, available at: https://www.igu.org/sites/default/files/node-document-field_file/IGU_LNG_2018_0.pdf (“Globally-traded LNG volumes increased by 35.2 [million tons] MT in 2017, setting a new annual record of 293.1 MT. . . . After remaining stable during 2016, global re-export activity dropped by 39% [year-on-year], with only 2.7 MT re-exported by 11 countries during the year . . .”).

⁷ See *Bear Head LNG Corp. and Bear Head LNG (USA)*, DOE/FE Order No. 3770, FE Docket No. 15–33–LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export U.S.-Sourced Natural Gas by Pipeline to Canada for Liquefaction and Re-Export in the Form of Liquefied Natural Gas to Non-Free Trade Agreement Countries (Feb. 5, 2016); *Pieridae Energy (USA) Ltd.*, DOE/FE Order No. 3768, FE Docket No. 14–179–LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export U.S.-Sourced Natural Gas Natural Gas by Pipeline to Canada for Liquefaction and Re-Export in the Form of Liquefied Natural Gas to Non-Free Trade Agreement Countries (Feb. 5, 2016).

⁸ See, e.g., *Pieridae Energy (USA) Ltd.*, DOE/FE Order No. 3639, FE Docket No. 14–179–LNG, Order Granting Long-Term, Multi-Contract Authorization to Export Natural Gas to Canada and to Other Free Trade Agreement Nations (May 22, 2015) at 3 n. 7.

authorization orders, DOE/FE will revert to its prior practice of requiring authorization holders to report, in relevant part, the country (or countries) into which the exported LNG or natural gas “was actually delivered.” In keeping with current practice, if a cargo of LNG exported from the United States makes multiple physical deliveries (a “split cargo”), each country receiving delivery of U.S. LNG must be reported as a destination.

This policy statement applies only to future orders. Concurrently with this policy statement, DOE/FE is issuing a blanket order to remove the end use provision from existing authorizations issued on or after February 5, 2016.¹² DOE/FE has included a list of the affected export authorizations in that blanket order.¹³

IV. Administrative Benefits

In this policy statement, DOE/FE is not proposing any new requirements for applicants or authorization holders under 10 CFR part 590. Rather, DOE/FE’s intent is twofold: To enhance the accuracy of LNG reporting information provided by authorization holders, and to minimize administrative burdens on authorization holders in the U.S. LNG export market and those who may purchase U.S. LNG.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this policy statement.

Signed in Washington, DC, on December 13, 2018.

Steven E. Winberg,

Assistant Secretary for Fossil Energy Office of Fossil Energy.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0486; Airspace Docket No. 18–ASO–11]

RIN 2120–AA66

Establishment of Class E Airspace; Hardinsburg, KY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

¹² See U.S. Dep’t of Energy, DOE/FE Order No. 4322, FE Docket Nos. 14–179–LNG, *et al.*, Order Removing End Use Reporting Provision from Existing Export Authorizations (Dec. 13, 2018).

¹³ *Id.* (Appendix).

SUMMARY: This action establishes Class E airspace extending upward from 700 feet above the surface at Breckinridge County Airport, Hardinsburg, KY, to accommodate new area navigation (RNAV) global positioning system (GPS) standard instrument approach procedures serving the airport. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations at this airport.

DATES: Effective 0901 UTC, February 28, 2019. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11C, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at http://www.faa.gov/air_traffic/publications/. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC, 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11C at NARA, call (202) 741–6030, or go to <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Ave, College Park, GA 30337; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency’s authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes

Class E airspace at Breckinridge County Airport, Hardinsburg, KY, to support IFR operations in standard instrument approach procedures at this airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (83 FR 45863, September 11, 2018) for Docket No. FAA–2018–0486 to establish Class E airspace extending upward from 700 feet above the surface at Breckinridge County Airport, Hardinsburg, KY. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11C dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018. FAA Order 7400.11C is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11C lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 establishes Class E airspace extending upward from 700 feet above the surface within a 7-mile radius of Breckinridge County Airport, Hardinsburg, KY, providing the controlled airspace required to support the new RNAV (GPS) standard instrument approach procedures. These changes are necessary for continued safety and management of IFR operations at this airport.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3)