

FINAL DESTINATION: ISSUES OF LIABILITY FOR EXPORTERS OF U.S. LNG IMPLICATED BY RECENT DOE/FE DECISIONS

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Synopsis: The historic growth of natural gas production in the United States during the past decade has led to many new proposals to export the commodity in the form of liquefied natural gas (LNG). Approvals for such exports must be obtained from the Department of Energy's Assistant Secretary for Fossil Energy acting through the Office of Fossil Energy (DOE/FE) pursuant to the Natural Gas Act (NGA). The regulatory framework administered under the NGA by the DOE/FE favors exports of natural gas to certain nations that have signed free trade agreements with the United States and prohibits altogether exports to certain countries subject to sanctions under U.S. law and policy, making the ultimate destination to which U.S. LNG is exported a critical question for determining compliance with DOE/FE regulations and orders. Among the lingering questions that the DOE/FE has yet to answer is whether exporters of U.S. natural gas will be held liable in enforcement proceedings brought by the DOE/FE if LNG destined for a specific country is diverted by downstream purchasers to another destination not authorized by the DOE/FE or is commingled with non-U.S. gas such that it cannot be determined where U.S. gas is ultimately consumed. The uncertainty associated with this potentially open-ended liability poses serious concerns to developers, financers, off-takers, and downstream purchasers associated with U.S. LNG export projects, who may stand to forfeit substantial capital investments due to the loss of export authorizations or other sanctions imposed by the DOE/FE. This article discusses the potential liabilities of exporters due to the actions of downstream LNG purchasers and the commingling of U.S. LNG with other supplies and suggests steps—based upon the practices of other regulatory agencies—that exporters, LNG customers, and the DOE/FE can take to address those liabilities.

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I. EXPORT APPROVALS UNDER THE NATURAL GAS ACT

Persons seeking to export natural gas, including LNG, from the United States must receive prior federal authorization under section 3 of the NGA. Specifically, section 3(a) of the NGA prohibits any person from "export[ing] any natural gas [including LNG] from the United States to a foreign country . . . without first having secured an order of the [DOE/FE] authorizing it to do so."[1] Once an application to export LNG is filed with the DOE/FE for review under NGA section 3(a), the DOE/FE will publish notice of the filing of the application in the Federal Register and provide at least thirty days for interested parties, including members of the public, to file motions to intervene, protests, and comments in the proceeding.[2]

The DOE/FE must issue an order authorizing a requested LNG export "unless, after opportunity for hearing, it finds that the proposed exportation . . . will not be consistent with the public interest."[3] The DOE/FE and the courts have

1. 15 U.S.C. § 717b(a) (2015). The text of the NGA section 3 assigns regulatory authority to the "Commission," which initially referred to the Federal Power Commission (FPC). 15 U.S.C. § 717a(9) ("'Commission' . . . means the Federal Power Commission . . . ."). However, the Department of Energy Organization Act (DOE Org Act) abolished the FPC and created the Department of Energy and the Federal Energy Regulatory Commission (FERC). Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified as amended at 42 U.S.C. §§ 7101-7386 (2015)). The authority to regulate imports and exports of natural gas was transferred to the Secretary of Energy pursuant to section 301(b) and 402(f) of the DOE Org Act. 42 U.S.C. §§ 7151(b), 7172(f). The authority to regulate the imports and exports of natural gas commodities, including LNG, under section 3 of the NGA has been delegated to the Assistant Secretary for Fossil Energy. Delegation Order No. 00-006.00C § 1.27(A) (Nov. 17, 2014); Redelegation Order No. 00-006.02 § 1.3(A) (Nov. 17, 2014). Delegation orders issued by the officials of the Department of Energy can be found at https://www.directives.doe.gov/delegations-documents.

2. 10 C.F.R. § 590.205 (2015).

3. 15 U.S.C. § 717b(a).

found that the "public interest" standard of review under NGA section 3(a) creates a statutory presumption in favor of approval of exports.[4] Thus, opponents of a proposed export must present affirmative evidence to rebut the presumption that the export is in the public interest to support a denial of an application under NGA section 3(a). In assessing the public interest, the DOE/FE considers: (i) the domestic need for natural gas proposed to be exported; (ii) whether the proposed exports pose a threat to the security of domestic natural gas supplies; (iii) whether the arrangement is consistent with the DOE/FE's policy of promoting market competition; and (iv) any other factors bearing on the public interest.[5] Further, the DOE/FE must comply with the requirements of the National Environmental Policy Act of 1969 (NEPA) and incorporate an analysis of the environmental impacts of its actions into its decision-making process.[6]

When issuing an order approving an application to export LNG pursuant to NGA section 3(a), the DOE/FE may "grant such application, in whole or in part, with such modification and upon such terms and conditions as the [DOE/FE] may find necessary or appropriate."[7]

II. EXPORTS TO FTA COUNTRIES, NON-FTA COUNTRIES, AND SANCTIONED COUNTRIES

Not all export applications are treated the same and, consequently, not all export authorizations issued by the DOE/FE are the same. The scrutiny with which the DOE/FE will review an application to export LNG depends on the trade status of the country to which the LNG will be exported—i.e., whether the export will be to a nation that has in place a free trade agreement with the United States requiring national treatment for trade in natural gas (an "FTA Country") or to a nation that does not have such an agreement (a "Non-FTA Country"). NGA section 3(c), added to the NGA by the Energy Policy Act of 1992,[8] mandates that applications for authority to export LNG to an FTA Country be deemed consistent

4. Panhandle Prods and Royalty Owners Ass'n v. Econ. Regulatory Admin. (ERA), 822 F.2d 1105, 1111 (D.C. Cir. 1987) (finding that NGA section 3 "requires an affirmative showing of inconsistency with the public interest to deny an application" and that a "presumption favoring . . . authorization . . . is completely consistent with, if not mandated by, the statutory directive."); Indep. Petroleum Ass'n v. ERA, 870 F.2d 168, 172 (5th Cir. 1989) (confirming that the burden of proof falls on the party challenging a section 3 application as inconsistent with the public interest).

5. *See, e.g.*, Sabine Pass Liquefaction, LLC, DOE/FE Order No. 2961, at 29 (May 20, 2011); Cameron LNG, LLC, DOE/FE Order No. 3391-A, at 9-10 (Sep. 10, 2014); *see also* New Policy Guidelines and Delegation Orders Relating to the Regulation of Imported Natural Gas, 49 Fed. Reg. 6684 (Dep't of Energy Feb. 22, 1984) (applied to LNG exports in: Phillips Alaska Natural Gas Corp., DOE/FE Order No. 1473 (Apr. 2, 1999); Delegation Order No. 0204-111 (Dep't of Energy Feb. 22, 1982).

6. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370h; *see also* 40 C.F.R. pts. 1500-1508 (2005) (regulations of the Council on Environmental Quality implementing the procedural requirements of NEPA). The Department of Energy regulations governing the DOE/FE's compliance with NEPA are located at 10 C.F.R. part 1021. Pursuant to 10 C.F.R. part 1021, subpart D, appendix B5, approvals or disapprovals of authorizations to export natural gas under NGA section 3 that involve minor operational changes but not new construction are categorically excluded from the requirements of NEPA. American LNG Marketing LLC, DOE/FE Order No. 3690 (Aug. 7, 2015); *accord* Carib Energy (USA) LLC, DOE/FE Order No. 3487, at 9-10, 19 (Sep. 10, 2014).

7. 15 U.S.C. § 717b(a).

8. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

with the public interest and be granted without modification or delay.[9] There are currently eighteen countries with which the United States has free trade agreements that require national treatment for trade in natural gas.[10]

While the DOE/FE must conduct a full review of applications to export LNG to Non-FTA Countries to make the public interest determination pursuant to NGA section 3(a), no such review is required for exports to FTA Countries since that determination has already been made pursuant to NGA section 3(c).[11] Further, the DOE/FE has determined that the requirement for public notice of applications and other hearing-type procedures are applicable only to applications seeking to export natural gas, including LNG, to Non-FTA Countries.[12] Neither does the DOE/FE conduct environmental reviews under NEPA for proposals to export LNG to FTA Countries. The DOE/FE's policy with respect to applications to export to Non-FTA Countries has been to limit the quantity of LNG authorized for export to the capacity of the LNG export terminal from which the commodity is to be exported.[13] However, this policy has not applied to applications to export LNG to FTA Countries given DOE/FE's mandate under NGA section 3(c) to approve such applications "without modification or delay."[14] The DOE/FE has also imposed other conditions upon authorizations to export to Non-FTA Countries that have not applied to authorized exports to FTA Countries, including the imposition of a 20-year limit on the term of its export orders and an obligation to commence commercial export operations within seven years from the date of the DOE/FE's

9. 15 U.S.C. § 717b(c) ("For purposes of [NGA section 3(a)] . . . the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such . . . exportation shall be granted without modification or delay.").

10. These FTA Countries are Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea and Singapore. Not all countries that have an FTA with the United States require national treatment for trade in natural gas (e.g., Costa Rica and Israel). Those nations are not considered "FTA Countries" pursuant to NGA section 3(c). *Free Trade Agreements*, OFF. OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements (last visited Feb. 28, 2016). The U.S. has negotiated a pact with eleven other Pacific nations—the Trans-Pacific Partnership—which, if ratified, would grant national treatment for trade in natural gas for most of the signatories. This would expand the list of FTA Countries to include Brunei, Malaysia, New Zealand, Vietnam, and the world's largest LNG importer, Japan. Jenny Mandel, *Trade Deal Brings LNG Victory and Further Questions*, ENERGYWIRE (Nov. 10, 2015) *available at* http://www.eenews.net/energywire/stories/1060027740/feed; *see generally TPP Final Table of Contents*, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/TPP-Full-Text (last visited Feb. 28, 2016) (full text of Trans-Pacific Partnership).

11. *See, e.g.*, Statement of Paula Gant, Deputy Assistant Secretary for Oil and Natural Gas, DOE's Program Regulating Liquefied Natural Gas Export Applications, Before the House Subcommittee on Energy and Power, Committee on Energy and Commerce (Mar. 25, 2014) ("Because complete applications under section 3(c) must be granted without modification or delay and are deemed to be in the public interest, DOE does not conduct a public interest analysis of those applications.").

12. Cameron LNG, LLC, DOE/FE Order No. 3680, at 7 n.16 (Jul. 10, 2015).

13. *See, e.g.*, LNG Development Co., LLC, DOE/FE Order No. 3465, at 151 (July 31, 2014) (citing Freeport LNG Expansion, L.P., DOE/FE Order No. 3357, at 162 (Nov. 15, 2013)).

14. 15 U.S.C. § 717b(c). Accordingly, in some cases, the quantity of LNG that DOE/FE has authorized for export to FTA Countries has exceeded the capacity of the terminal facilities from which the LNG is proposed to be exported. *Compare* Dominion Cove Point LNG, LP, DOE/FE Order No. 3019 (Oct. 7, 2011) (authorizing exports of up to the equivalent of one billion cubic feet per day (Bcf/d) of natural gas to FTA Countries), *with* Dominion Cove Point LNG, LP, DOE/FE Order No. 3331-A (May 7, 2015) (authorizing exports of up to the equivalent of 0.77 Bcf/d of natural gas—the maximum capacity of the terminal—to Non-FTA Countries).

authorization order.[15] The DOE/FE has stated that its authority over proposals to export LNG to FTA Countries under NGA section 3(c) is limited to:

> [Ensuring] that applications are filed with sufficient information to confirm that the applicant is engaged in a meaningful (i.e., not frivolous) effort to undertake natural gas export . . . activities, and [providing] in any order granting a section 3(c) application [to export LNG to FTA Countries] that the applicant will report its export . . . activities in sufficient detail to enable DOE to monitor . . . export activities.[16]

Because applications to export LNG to FTA Countries are not subject to public comment or environmental review under NEPA and must be approved without modification or delay, applicants can reasonably expect an order from the DOE/FE issuing such an approval within several months of a submission of an application. On the other hand, applications to export LNG to Non-FTA Countries, which must be reviewed under the public interest standard of NGA section 3(a) and in many cases subject to environmental review under NEPA, can take years for the DOE/FE to process.[17]

In addition to the separate procedures for exports to FTA Countries and Non-FTA Countries, the DOE/FE has conditioned its orders on compliance with trade policies administered by other federal agencies. In recognition of U.S. laws and regulations prohibiting trade with certain nations and individuals, as part of its authority under NGA section 3(a) to impose "such terms and conditions [on exports] as the [DOE/FE] may find necessary or appropriate,"[18] the DOE/FE has excluded from the scope of all of its authorization orders exports to nations with which trade is prohibited by U.S. law (Sanctioned Countries), such as Sudan. The DOE/FE has also made compliance with U.S. trade law and policy prohibiting trade with Sanctioned Countries and certain identified individuals a specific requirement of orders approving exports of LNG. Persons that have received an authorization from the DOE/FE to export LNG from the U.S. (Authorization Holders) must "ensure that all transactions authorized by [DOE/FE orders] are permitted and lawful under U.S. laws and policies, including the rules, regulations, orders, policies, and other determinations of the Office of Foreign Assets Control of the United States Department of the Treasury" and the FERC.[19]

15. *See, e.g.*, Cheniere Marketing, LLC, DOE/FE Order No. 3638, at 208 (May 12, 2015) (rejecting an applicant's request for a 22-year term); *American LNG*, DOE/FE Order No. 3690, at 133 (Aug. 7, 2015) (imposing a requirement to commence commercial operations within seven years "to ensure that other entities that may seek similar authorizations are not frustrated in their efforts to obtain those authorizations by authorization holders that are not engaged in actual export operations.").

16. Jordan Cove Energy Project, LLC, DOE/FE Order No. 3041, at 8-9 (Dec. 7, 2011).

17. The DOE/FE has stated that it will not issue final orders for applications to export LNG to Non-FTA Countries until DOE/FE has determined that an application is "ready for final action"—i.e., when the DOE/FE "has completed the pertinent NEPA review process and . . . has sufficient information on which to base a public interest determination." Final Revised Procedures, Procedures for Liquefied Natural Gas Export Decisions, 79 Fed. Reg. 48,132, 48,135 (2014). The DOE/FE will generally consider an application "ready for final action" after it determines that a categorical exclusion from NEPA review is applicable to the proposed export, after a Finding of No Significant Impact is issued following the conduct of an environmental assessment for a proposed export, or thirty days after the publication of a final Environmental Impact Statement associated with a proposed export. *Id.*

18. 15 U.S.C. § 717b(a).

19. *See, e.g., Cameron*, DOE/FE Order No. 3680, at 12 (noting that "[f]ailure to comply with [the U.S. trade] requirement could result in rescission of [the DOE/FE export] authorization and/or other civil or criminal remedies.").

III. COMPLIANCE WITH DOE/FE DESTINATION RESTRICTIONS AND REPORTING REQUIREMENTS

The DOE/FE's policies and regulations regarding the export of LNG impose upon Authorization Holders two primary obligations with respect to the destination of LNG cargoes that are exported from the United States. First, Authorization Holders must ensure that natural gas is only exported to destinations that are authorized by a DOE/FE order. Second, Authorization Holders must ensure that the monthly reports submitted to the DOE/FE regarding LNG cargoes contain accurate information about the country or countries into which the exported LNG was delivered.

A. DOE/FE Destination Restrictions and Reporting Requirements

The authorizing orders that the DOE/FE issues impose destination restrictions by both specifying the volumes and countries to which the Authorization Holder is permitted to export LNG[20] and prohibiting exports to Sanctioned Countries. In some cases, the authorized countries for export are based upon the countries specified by the Authorization Holder in its application. Other export applicants, including most of the recent proposals before the DOE/FE, have requested authorization to export LNG to *all* countries with which the United States currently has, or in the future will have, a free trade agreement requiring national treatment for trade in natural gas (i.e., present and future FTA Countries), or to all Non-FTA Countries with which trade is not prohibited by U.S. law. Several DOE/FE orders have granted these requests, essentially permitting an Authorization Holder to export LNG to all FTA and Non-FTA Countries without further DOE/FE authorization, but still prohibiting trade with Sanctioned Countries. The delivery of exported U.S. LNG in a volume and/or to a country not authorized by a DOE/FE order, or in a manner that otherwise violates the terms of a DOE/FE order may constitute a violation of the NGA and subject the exporter to possible sanctions, as discussed below.

In addition, the DOE/FE generally imposes upon Authorization Holders the obligation to file monthly reports for exports to FTA and Non-FTA Countries, specifying information about the LNG cargoes that were exported during the month. The information to be reported includes, among other things, "the country (or countries) into which the LNG or natural gas is actually delivered and/or received for end use . . . the name of the supplier/seller," and "the name(s) of the purchaser(s)."[21] An exporter's obligation to accurately report information to the DOE/FE as required by the DOE/FE's authorization order is separate from and in addition to the obligation to export only to those destinations authorized by the applicable DOE/FE order. For example, if an LNG cargo were delivered to one country, but reported to DOE/FE as having been delivered to another country, the Authorization Holder could be subject to an enforcement action by the DOE/FE

20. DOE/FE orders have listed in the ordering paragraphs the countries to which the order authorizes exports—e.g., specific countries requested by the Authorization Holder in its application, or all present and future FTA or Non-FTA Countries. *See, e.g., Carib*, DOE/FE Order No. 3487, at 19 (granting authorization to export LNG to all Non-FTA Countries in Central America, South America, and the Caribbean); *see also Cameron*, DOE/FE Order No. 3680, at 11.

21. Corpus Christi Liquefaction, LLC, DOE/FE Order No. 3699, at 15 (Aug. 27, 2015).

under the NGA for a violation of the DOE/FE's reporting requirements due to the inaccurate destination information even if the Authorization Holder would otherwise be permitted to export LNG to both countries under the terms of its DOE/FE export authorization orders.

B. Country to which LNG is Delivered for "End Use"

In 2015, the DOE/FE issued two orders—*Pieridae Energy (USA), Ltd.*[22] and *Bear Head LNG Corp.*[23]—that granted authorization for two unaffiliated LNG projects in Nova Scotia, Canada to export U.S. natural gas to FTA Countries. Subsequently, in early 2016, the DOE/FE issued orders granting both projects authorization to export U.S. natural gas to Non-FTA Countries.[24] Collectively, these four orders established a policy that, in determining whether an export meets the destination restrictions and reporting requirements specified in an export authorization order, the DOE/FE will consider the country in which the natural gas or LNG is delivered for "end use," as defined by the DOE/FE.

The applicants in those proceedings sought authorization to export natural gas from the United States to Canada via pipeline, to subsequently liquefy some of that natural gas at proposed Canadian liquefaction facilities, and to re-export the commodity as LNG to both FTA and Non-FTA Countries. The DOE/FE determined that if a person exports natural gas produced in the United States to an FTA Country, such as Canada, and then re-exports that gas to a Non-FTA Country, the person would require an export authorization from the DOE/FE to the Non-FTA Country. Specifically, the DOE/FE stated that "[i]n determining whether an export is to a FTA or [N]on-FTA [C]ountry, DOE/FE believes it must look to the trade status of the country in which the natural gas or LNG is delivered for *end use*."[25] The DOE/FE defined "end use" to mean "combustion or other chemical reaction conversion process (e.g., conversion to methanol)."[26] The DOE/FE found that "[t]o do otherwise would allow exporters to evade the public interest review and opportunity for public participation afforded in [N]on-FTA export proceedings under NGA section 3(a), simply by transiting the natural gas or LNG through a FTA [C]ountry en route to a [N]on-FTA [C]ountry."[27] The DOE/FE noted that "[t]he destination of the U.S.-sourced natural gas or LNG for end use is critical to [DOE/FE's] determination, as is the trade status of that destination country or countries."[28]

The implication of the *Pieridae* and *Bear Head* orders is that, for the purposes of determining compliance with section 3 of the NGA and the destination restrictions contained in its orders, the DOE/FE will treat natural gas that is exported from the United States to one foreign country and then re-exported to

22. Pieridae Energy (USA) LLC, DOE/FE Order No. 3639 (May 22, 2015).

23. Bear Head LNG Corp., DOE/FE Order No. 3681 (Jul. 17, 2015).

24. Pieridae Energy (USA) Ltd., DOE/FE Order No. 3768 (Feb. 5, 2016) [hereinafter *Pieridae II*]; Bear Head LNG Corp., DOE/FE Order No. 3770 (Feb. 5, 2016) [hereinafter *Bear Head II*].

25. *Pieridae*, DOE/FE Order No. 3639, at 4 (emphasis added).

26. *Id*. at 3 n.7.

27. *Id*. at 4. The DOE/FE stated that it did "not believe Congress intended the dual-track scheme it created in the NGA to be so easily evaded." *Id*.

28. *Pieridae II*, DOE/FE Order No. 3770, at 194; *accord Bear Head II*, DOE/FE Order No. 3768, at 154-55.

one or more other foreign countries as if the natural gas were exported directly to the country where the gas is used for an "end use" and require the exporter to have the appropriate authorization to export to the end use country.[29]

The nation to which LNG is re-exported for "end use" is also a relevant consideration for determining compliance with the DOE/FE's reporting requirements. Consistent with the findings in its *Pieridae* and *Bear Head* decisions, the DOE/FE has amended the standard language that it requires Authorization Holders to include in contracts for the sale of LNG to require downstream purchasers to commit "to cause a report to be provided to [the Authorization Holder] that identifies the country (or countries) into which the re-exported LNG or natural gas was *actually delivered and/or received for end use* . . . ."[30] Accordingly, when determining whether an Authorization Holder is in compliance with the DOE/FE's destination restrictions and reporting requirements, the relevant consideration is the country where the LNG is delivered for end use as a combustible fuel or chemical feedstock.

C. Persons That Must Comply with DOE Destination and Reporting Requirements

Compliance with the DOE/FE's destination restrictions and reporting requirements requires the cooperation of Authorization Holders, persons on whose behalf Authorization Holders export natural gas or LNG in an agency relationship, and downstream purchasers of exported LNG. In general, under NGA section 3(a), a person exporting natural gas (including LNG) must have in place an order from the DOE/FE authorizing the export of natural gas at the time when, and place where, the commodity is exported from the United States. In the case of LNG transported by a bulk, ocean-going, vessel, exports "occur when the LNG is delivered to the flange of the LNG export vessel."[31] The DOE/FE has permitted Authorization Holders to export LNG on their own behalf and acting as agents for other third parties that own the LNG when it is loaded onto the LNG export vessel (referred to by the DOE/FE as "Registrants"), provided that the Authorization Holder and Registrant meet certain requirements developed by the DOE/FE and incorporated into the orders issuing the export authorizations.[32] For example, an

29. The DOE/FE defined "re-export" to mean "to ship or transmit U.S.-sourced natural gas in its various forms (gas, compressed, or liquefied) subject to DOE/FE's jurisdiction under the Natural Gas Act, 15 U.S.C. § 717b, from one foreign country (i.e., a country other than the United States) to another foreign country[]." *Pieridae*, DOE/FE Order No. 3639, at 2 n.3.

30. *Pieridae II*, DOE/FE Order No. 3768, at 229 (emphasis added); *Bear Head II*, DOE/FE Order No. 3770, at 190; *see also Bear Head*, DOE/FE Order No. 3681, at 14 (requiring downstream purchasers "to cause a report to be provided to [the Authorization Holder] that identifies the country of destination, upon delivery, into which the exported LNG was actually delivered, and to include in any resale contract for such LNG the necessary conditions to ensure [the Authorization Holder is] made aware of all such actual destination countries"); *Corpus Christi*, DOE/FE Order No. 3699, at 15 (requiring the monthly report filed by the Authorization Holder to include, among other things, "the country (or countries) into which the LNG or natural gas is actually delivered and/or received for end use"); *accord American LNG*, DOE/FE Order No. 3690, at 140, 142 (Aug. 7, 2015).

31. Dow Chemical Co., DOE/FE Order No. 2859, at 1, 7 (Oct. 5, 2010); ConocoPhillips Alaska Natural Gas Corp., DOE/FE Order No. 3418, at 18 (Apr. 14, 2014).

32. *See, e.g.*, Freeport LNG Expansion, L.P., DOE/FE Order No. 2913 (Feb. 10, 2011); *see also* Gulf Coast LNG Export, LLC, DOE/FE Order No. 3163 (Oct. 16, 2012).

Authorization Holder must provide the DOE/FE with "the same company identification information and long-term contract information of the Registrant as if the Registrant had filed an application to export LNG on its own behalf."[33] Registrants must also agree to be bound by the DOE/FE's regulations and the terms of the DOE/FE's order(s) authorizing the relevant LNG exports, including any restrictions on the destination to which LNG may be exported.[34]

To ensure compliance with the destination restrictions and reporting requirements specified in its export authorization orders, the DOE/FE typically requires Authorization Holders and their Registrants to include some form of the following provision in any agreement or other contract for the sale or transfer of LNG exported pursuant to the DOE/FE's authorization order:

> Customer or purchaser acknowledges and agrees that it will resell or transfer LNG purchased hereunder for delivery only to countries identified in Ordering Paragraph [ ] of DOE/FE Order No. [ ], issued [ ], in FE Docket No. [ ], 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 Authorization Holder] that identifies the country (or countries) into which the 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 ensure that [the Authorization Holder] is made aware of all such countries.[35]

Thus, downstream purchasers must agree to comply with the destination limitations set forth in the DOE/FE order and must agree to provide the correct information about the destination country where exported LNG is delivered or received for end use as a combustible fuel or chemical feedstock.

IV. UNANSWERED QUESTIONS REGARDING DESTINATION RESTRICTIONS AND REPORTING REQUIREMENTS

The DOE/FE's guidance issued in the *Pieridae* order and in subsequent proceedings has clarified some outstanding issues regarding compliance with the DOE/FE's destination and reporting requirements but has left others unanswered. It is clear, for example, that natural gas produced in the United States and exported to another country for liquefaction and re-exported to one or more countries will be treated as if it were exported directly to the country of "end-use" for the purposes of compliance with the DOE/FE's regulatory requirements under NGA section 3.

On the other hand, there are two critical compliance questions regarding the extent of the Authorization Holder's (and Registrants') obligation to track exported LNG molecules that require further clarification from the DOE/FE.

A. Liability for Actions of Downstream Purchasers

First, it is unclear the extent to which the DOE/FE will sanction Authorization Holders, Registrants, and other upstream sellers of exported U.S. LNG for the intentional and unintentional actions of downstream purchasers that cause LNG or natural gas that has been exported from the U.S. to be consumed in

33. *Corpus Christi*, DOE/FE Order No. 3699, at 9 (citing *Gulf Coast*, DOE/FE Order No. 3163, at 7-8).

34. *See, e.g.*, *Corpus Christi*, DOE/FE Order No. 3699, at 13.

35. *Id.*; *American LNG*, DOE/FE Order No. 3690, at 140.

a country that is not permitted by a DOE/FE export authorization order (including Sanctioned Countries) or that is inconsistent with the destination information reported to the DOE/FE.

B. Tracking Molecules for "End Use" when There is Commingling

Another important question that remains unanswered is how far an entity must track the individual molecules of exported U.S. LNG to ensure that the exported LNG is consumed as an "end use" in the destination country authorized by relevant DOE/FE orders and as reported to the DOE/FE. For example, it would be impractical, if not impossible, for an Authorization Holder or Registrant to ensure that every molecule of exported U.S. LNG is consumed in the reported destination country once the LNG is regasified and commingled with the common stock of natural gas in that country. The lack of knowledge and control over the commodity at that point and the inherent properties of flowing natural gas would make it impracticable to ensure that no such molecules ever flowed across an international border. A similar problem is posed if U.S. LNG is commingled with non-U.S. LNG in an LNG storage tank at a receiving terminal in a foreign country or in LNG transport vessels and some of the commingled LNG is re-exported.[36]

V. LIABILITY FOR VIOLATION OF DOE/FE'S DESTINATION RESTRICTIONS AND REPORTING REQUIREMENTS

If the DOE/FE determines that a violation of the NGA, DOE/FE regulations, or an export authorization order has occurred, the statute and regulations provide a number of remedies that the DOE/FE might choose to impose, some of which could have very serious consequences to the parties involved. The DOE/FE's regulations allow the agency to "investigate any facts, conditions, practices, or other matters within the scope of [the regulations] in order to determine whether any person has violated or is about to violate any provision of the NGA or other statute or any rule, regulation, or order within the [DOE/FE's] jurisdiction."[37] Section 3(a) of the NGA authorizes the DOE/FE to issue supplemental orders as necessary or appropriate to protect the public interest, and, under section 16 of the NGA, it may "perform any and all acts and . . . prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate' to carry out its responsibilities."[38] In addition, the NGA arguably provides the DOE/FE with the authority to impose civil penalties for alleged violations.[39]

36. As an operational matter, U.S. LNG will likely first be commingled with a small amount of LNG that is left over in the "heel" of an LNG transportation vessel. This heel is necessary to keep the vessel's LNG storage tanks cold and in a condition ready to load LNG upon berthing. The heel can include LNG from all of the vessel's prior loadings, wherever those occurred. In turn, some of the U.S. LNG loaded onto the vessel could be left over as part of the heel when the vessel delivers the bulk of the U.S. LNG to its destination.

37. 10 C.F.R. § 590.109 (1989).

38. Sabine Pass Liquefaction, LLC, DOE/FE Order No. 2961, at 33 n.45 (May 20, 2011) (quoting 15 U.S.C. § 717o (2015)).

39. The DOE/FE has not claimed authority to impose civil or criminal penalties; however, the DOE/FE could assert that it was delegated this authority pursuant to the DOE Org Act.

A. Revocation or Modification of Existing Authorizations

The DOE/FE has asserted the authority to revoke or modify a previously-issued NGA section 3 authorization whenever a violation of the terms and conditions of the authorization has occurred.[40] In several export authorization orders, the DOE/FE has noted that the failure of an Authorization Holder to perform an obligation under the authorization order—the submission of necessary information for the Authorization Holder's Registrants—would be grounds for rescission of the export authorization.[41] Although there is no direct precedent,[42] the DOE/FE could claim that it has the authority to take similar action for an Authorization Holder's failure to comply with the destination restrictions or reporting obligations set forth in the DOE/FE authorization order.

The potential revocation, suspension, or other modification of an export authorization due to violations of the destination restriction or reporting requirements could have significant consequences to upstream parties that may have invested substantial capital in facilities and commercial arrangements. This is particularly true for Authorization Holders, who tend to be the direct owners and operators of LNG export terminals that can involve investments of billions of dollars.

B. Imposition of Civil or Criminal Sanctions and Injunctive Relief

Another potential remedy that DOE/FE might employ in response to a serious violation is referral of the matter to the Department of Justice for the assessment of criminal penalties under NGA section 21,[43] or the direct assessment of civil

40. Trunkline LNG Co., 1 ERA ¶ 70,117, ERA Docket No. 82-12-LNG (Feb. 25, 1983) (finding that the predecessor of DOE/FE had the authority "to suspend, revoke, rescind or modify [a section 3] authorization to import LNG . . . pursuant to sections 3 and 16 of the NGA . . . if there is a violation of the terms and conditions of the authorization."); Marathon Oil Co., DOE/FE Order No. 261-E (July 18, 1997). Although the DOE/FE has asserted that it has the authority to modify or rescind an authorization following a violation, the agency has stated that it "has no record of having vacated or rescinded an authorization to import or export natural gas over the objections of the authorization holder." Letter from Paula A. Gant, Deputy Assistant Secretary, Office of Oil and Natural Gas, U.S. Department of Energy, to Lisa Murkowski, United States Senator (Oct. 17, 2013), *available at* http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=9e99e412-ce05-449d-8893-dc8d64c32d02. The only instances in which the DOE/FE has vacated or modified an order have been under circumstances "where the authorization holder had not utilized its authorization for several years following the issuance of the authorization and either had requested the authorization be vacated, had gone out of business, or was nonresponsive to [the DOE/FE's] inquiries." *Id*.

41. *See, e.g.*, G2 LNG, LLC, DOE/FE Order No. 3682, at 11 (July 17, 2015).

42. Before the mid-2000s, issues of liability associated with the ultimate destination of exported LNG was not particularly problematic as most exported natural gas was transported by pipeline to adjacent nations, Canada and Mexico. The natural gas that was exported as LNG to non-adjacent countries originated from a single facility in Alaska. As a result, until recently, the DOE/FE has had little occasion to consider compliance and enforcement issues regarding the ultimate destination of exported U.S. LNG.

43. 15 U.S.C. § 717t (2015). Section 21 provides that criminal penalties may be assessed for willful and knowing violations of the NGA (up to $1 million and/or five years in prison, upon conviction) and for willful and knowing violations of "any rule, regulation, restriction, condition, or order made or imposed" under the authority of the NGA (up to "$50,000 for each and every day during which such offense occurs"). 15 U.S.C. § 717t(a)-(b). *See also* Bill J. Graham, 58 F.P.C. 284 (1976) (opinion of the FPC, predecessor to the DOE/FE and FERC, discussing the "willfully and knowingly" standard of NGA § 21).

penalties by the DOE/FE under NGA section 22.[44] Although the DOE/FE has never imposed, or even suggested it would impose, financial penalties for violations of an Authorization Holder, the NGA arguably provides it with such authority.

VI. RECOMMENDATIONS FOR CLARIFYING THE SCOPE OF LIABILITY

Given the scope of sanctions and other enforcement remedies that could potentially be imposed upon Authorization Holders, Registrants, and other parties taking title to exported U.S. LNG, it is important for industry participants to take steps to protect themselves from such liability, particularly under those circumstances arising from the actions of downstream purchasers of exported LNG. Many upstream parties that export LNG under authority granted by the DOE/FE such as Authorization Holders and Registrants have included in their LNG sales agreements provisions requiring their customers to provide indemnification against any regulatory consequences (e.g., loss of export authority) that may arise from the actions or omissions of the customer or any subsequent purchasers or users of the exported U.S. LNG. To the extent such provisions are fully enforceable against the indemnifying party, this may be an effective means of passing through to downstream parties any regulatory liability arising from actions beyond the control of the seller of the LNG, and LNG customers might find such provisions to be useful in their sales agreements with subsequent purchasers.

However, to the extent that regulatory sanctions are particularly severe (e.g., actions that result in an LNG terminal owner's complete loss of the ability to use its facility to export LNG) such that indemnification may not keep whole the non-violating parties in the value chain, other action may be appropriate. Therefore, further clarification from the DOE/FE on the liability of Authorization Holders and Registrants for the actions of downstream purchasers as well as the implications of commingling LNG or natural gas molecules with non-U.S. molecules for purposes of complying with the "end use" requirement is essential. The approaches that other federal agencies have taken with respect to compliance with the legal requirements applicable to the transportation and exportation of merchandise from the U.S. are instructive in this regard.

A. Liability for Actions of Downstream Purchasers

Another federal agency—the Bureau of Industry and Security (BIS) within the Department of Commerce—has wrestled with the issue of the scope of civil liability for an exporter for the actions of downstream purchasers and has adopted a standard of due diligence for the exporter. The approach adopted by the BIS—which reflects years of experience enforcing the nation's export laws—strikes a balance between ensuring compliance with export policies through the exercise of

44. 15 U.S.C. § 717t-1 (2015) (authorizing the assessment of civil penalties "of not more than $1,000,000 per day per violation for as long as the violation continues").

an appropriate level of due diligence and avoiding the unnecessary imposition of liability on parties for actions beyond their control.[45]

The BIS regulates the exportation of goods from the United States through administration of the Export Administration Regulations (EAR).[46] The EAR set forth, among other things, the types of products that are restricted from export from the United States due to concerns about impacts to national security and the domestic supply of commodities.[47] The EAR also set forth restrictions and license requirements for items exported to embargoed countries.[48]

The EAR prohibit persons from engaging directly in actions that are prohibited by the regulations—e.g., directly exporting or re-exporting items subject to the EAR to an embargoed country without a license from BIS.[49] Further, no person may by their own actions cause, aid, abet, or solicit an action that causes a violation of trade restrictions set forth in the EAR.[50] Finally, no person "may order, buy, remove, conceal, store, use, sell, loan, dispose of, transfer, transport, finance, forward, or otherwise service, in whole or in part, any item exported or to be exported from the United States" with "knowledge" that a violation of the EAR "has occurred, is about to occur, or is intended to occur in connection with the item."[51] It is this last prohibition that is the most relevant to the potential liability faced by exporters due to the actions of their downstream customers.

While the BIS has interpreted the export laws and the EAR to apply strict liability to persons for their own actions in unlawfully exporting a controlled item or to an embargoed country without a license, as well as to those that have aided unlawful exports,[52] it does not hold exporters liable for the actions of others (e.g., direct or indirect customers) that result in an exportation or re-exportation of an item in violation of the trade laws, unless the exporter has acted with "knowledge" that a violation "has occurred, is about to occur, or is intended to occur in

45. Although other federal agencies regulate the export of certain classifications of U.S. merchandise, the overwhelming majority of items that are subject to controls on exportation and re-exportation are regulated by the BIS. Thus, the agency's expertise and guidance in administering export controls is uniquely insightful. *See generally* Supplement No. 3 to EAR Part 730, 15 C.F.R. § 730 app. (2016); *see also Export Licenses*, EXPORT.GOV, http://www.export.gov/regulation/eg_main_018219.asp (last updated Apr. 27, 2011) (a listing of other federal agencies and their regulatory responsibilities).

46. 15 C.F.R. §§ 730-774 (2016).

47. 15 C.F.R. § 754.2.

48. 15 C.F.R. § 746 (Embargoes and Other Special Controls).

49. 15 C.F.R. §§ 734.2(b)(1), (6), 764.2(a). For the purposes of the EAR, the term "export" is defined as "an actual shipment or transmission of items out of the United States" and the term "reexport" is defined as "an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country." 15 C.F.R. § 772.1; *see also* 15 C.F.R. § 734.2(b)(1), (4) (containing similar definitions). The EAR further provide that "the export or reexport of items subject to the EAR that will transit through a country or countries, or be transshipped in a country or countries to a new country, or are intended for reexport to the new country, are deemed to be exports to the new country." 15 C.F.R. § 772.1; *see also* 15 C.F.R. § 734.2(6) (containing a similar clarification).

50. 15 C.F.R. § 764.2(b)-(d), (f).

51. 15 C.F.R. § 764.2(e); *see also* 15 C.F.R. § 736.2(b)(10) (setting forth a substantially similar definition of the prohibition).

52. Iran Air v. Kugelman, 996 F.2d 1253, 1258-59 (D.C. Cir. 1993); In the Matter of Wayne LaFleur, 74 Fed. Reg. 5916 (Dep't of Commerce Feb. 3, 2009) (final decision and order); In the Matter of Petrom GmbH International Trade, 70 Fed. Reg. 32,743, 32,754 (Dep't of Commerce June 6, 2005) (decision and order).

connection with the item."[53] The EAR note that "knowledge" of a circumstance includes not only "positive knowledge that the circumstance exists or is substantially certain to occur," but also an "awareness of a high probability of its existence or future occurrence."[54] The EAR state that "[s]uch awareness can be inferred from evidence of the conscious disregard of facts known to a person, as well as from a person's willful avoidance of facts."[55]

To assist companies in complying with various requirements of the EAR that are dependent upon a person's "knowledge" of the end-use, end-user, ultimate destination, or other facts relating to a transaction or activity, the BIS has issued "Know Your Customer" guidance on how individuals and firms should act under this knowledge standard to avoid liability under the EAR.[56] In complying with the EAR, parties can rely upon representations made by customers as to material facts relating to a transaction, provided that such representations do not raise any "red flags" or suspicious circumstances.[57] In other words, the EAR does not impose an across-the-board affirmative duty upon exporters to inquire, verify, or otherwise "go behind" a customer's representations, but exporters do have a duty to exercise due diligence to inquire regarding suspicious circumstances and obtain appropriate and credible information relating to a transaction or activity.[58]

The BIS guidance identifies a number of circumstances that would constitute examples of a "red flag," and directs exporters to investigate any such "red flags." If any "red flags" can be adequately explained, the "Know Your Customer" guidance advises that exporters may proceed with a transaction. If suspicious circumstances cannot be adequately explained, the guidance directs exporters to refrain from the transaction or contact the BIS.[59] The BIS guidance also directs exporters to train relevant staff to identify circumstances that would lead to a "red flag" and to avoid "self-blinding"—i.e., cutting off the flow of information that comes to an exporter in the normal course of business in a way that would prevent uncovering relevant information that might lead to a "red flag."[60] Thus, by refraining from violations of the U.S. trade laws resulting from its own actions, and conducting a reasonable level of due diligence with respect to suspicious activities of its customers, an entity can minimize its risk of liability under the EAR, even where the deliberate or unintentional actions of a customer or other downstream party results in a diversion of exported goods in a manner that would violate the EAR.

The regulatory framework and guidance that the BIS has provided for complying with the trade regulations it administers serves as a good example to sellers of exported U.S. LNG as to the level of due diligence that should be exercised when dealing with sales customers to ensure compliance with the destination restrictions and reporting requirements of the DOE/FE under section

53. 15 C.F.R. § 764.2(e); *see also* 15 C.F.R. § 736.2(b)(10) (setting forth a substantially similar definition of the prohibition).

54. 15 C.F.R. § 772.1.

55. *Id.*

56. Supplement No. 3 to EAR Part 732, 15 C.F.R.. § 732 app. (2016).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

3 of the NGA. It would also serve as a good model for the DOE/FE to adopt in the enforcement of LNG export restrictions under the NGA. Adoption of a regime similar to the BIS standards would ensure that Authorization Holders, Registrants, and other sellers of exported U.S. LNG are held liable for their own direct actions that are in violation of the NGA or DOE/FE orders and regulations. At the same time, the imposition of standards that allow sellers of LNG to rely upon the representations of their customers—unless suspicious circumstances require further investigation—would be an efficient regulatory approach that would promote compliance with the DOE/FE's orders and regulations without imposing an unreasonable burden upon exporters of LNG to verify every representation offer by their customers or to track the activities of all downstream parties and molecules of natural gas. Finally, as a practical matter, adoption of such a due diligence standard would be consistent with the current obligations of exporters of LNG, who must abide by the BIS standards when complying with U.S. trade law, as an explicit standard condition of DOE/FE export authorization orders.[61]

B. Liability for Tracking Molecules for "End Use" when There is Commingling

The introduction of the "end use" standard set forth in *Pieridae* and *Bear Head* for the destination restrictions and reporting requirements in DOE/FE authorizations also raises questions about the liability of the Authorization Holder and its Registrants when U.S. LNG is commingled with non-U.S. LNG. Due to the fungible nature of natural gas, it would be highly impractical for an Authorization Holder to ensure that every molecule of exported U.S. LNG is consumed in the reported destination country once the LNG is delivered to a common tank or the LNG is re-gasified and introduced into the common stock of natural gas in that country. Unlike cell phones or furniture that can be tagged and tracked until the ultimate point of retail sale, natural gas and LNG are fluid and fungible, making it unworkable to physically segregate U.S.-sourced commodities from identical products from other sources. At some point, the obligations of sellers of exported U.S. LNG to physically track the movement of the LNG molecules should terminate.

The difficulties of complying with the "end use" destination restrictions and reporting requirements can arise in at least two distinct ways. First, when LNG is delivered to a country and re-gasified, the re-gasified LNG will ordinarily be commingled in a pipeline system with streams from various sources before it is delivered to the ultimate end user. The lack of knowledge and control over the commodity at that point and the inherent properties of flowing natural gas over pipeline systems that may interconnect to other nations would make it extremely difficult for an Authorization Holder to ensure that no such molecules ever flowed across an international border. Second, if U.S. LNG is delivered to a country where it is commingled in an LNG storage tank with non-U.S. LNG and some of that commingled LNG is re-exported to other countries, it would be nearly impossible to report where the U.S. LNG molecules are ultimately consumed.

61. *See, e.g.*, *Cheniere Marketing,* DOE/FE Order No. 3638, at 216 (directing the Authorization Holder to "ensure that all transactions authorized by [DOE/FE's] Order are permitted and lawful under United States laws and policies, including the rules, regulations, orders, policies, and other determinations of the Office of Foreign Assets Control of the United States Department of the Treasury and FERC.").

To offer a greater degree of regulatory certainty with respect to the scope of liability for sellers of exported U.S. LNG, the DOE/FE should establish criteria for determining compliance with "end use" destination restrictions and reporting requirements that recognize the physical properties of natural gas. In establishing the criteria that will govern how the DOE/FE will determine whether an entity has complied with its destination and reporting requirements, the DOE/FE could look to the intent of the exporter of U.S. LNG rather than whether the exporter can demonstrate that all of the molecules of U.S. LNG are *in fact* consumed in a given country. Under this approach, when a genuine issue of fact arises about the country to which exported U.S. LNG is actually delivered and/or received for end use, the DOE/FE would focus on the *demonstrated intent* of the exporter of U.S. LNG with respect to the ultimate destination of the exported commodity.

The approach that the Customs and Border Protection (CBP) division within the Department of Homeland Security has taken in administering the "coastwise laws," which protect domestic shipping fleets from competition from foreign vessels, is instructive as an "intent" standard for determining compliance with destination restrictions. Generally, under the coastwise laws the transportation of merchandise between points in the United States covered by the coastwise laws (e.g., U.S. ports) is prohibited unless the transportation takes place on a "coastwise-qualified vessel"—i.e., a vessel that is U.S.-built, U.S.-flagged, and owned by citizens of the United States. A vessel that is not coastwise qualified "may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port."[62]

CBP has found that "it would not be a violation of the coastwise laws for a foreign flag vessel to transport merchandise between U.S. coastwise points when there has been a break in the continuity of transportation."[63] In other words, if a non-coastwise qualified vessel transports merchandise from a U.S. point to an intermediate point, and there is a sufficient break in the continuity of transportation, the non-coastwise vessel may transport the goods to a second U.S. point without violating the coastwise laws. CBP has held that "a break in the continuity of transportation occurs if there is *honest intent to introduce merchandise into the common stock of another country*."[64] The type of evidence that CBP has said that it would accept to demonstrate that merchandise was intended to be entered into the common stock of a country includes:

> [S]hipping manifests; foreign country customs and duties receipts; lists containing names of purchasers of merchandise from said vessels indicating type and quantity of such merchandise; auction notices or similar publication documentation

62. 46 U.S.C. § 55102 (2006).

63. Customs and Border Protection Ruling Letter HQ H256883, at 3 (U.S. Customs and Border Prot. Sep. 16, 2014).

64. *Id*. Another area where an "intent" standard has been commonly used to resolve legal issues is in the determination whether federal or state jurisdiction should apply over shipments of goods within the United States. *See, e.g.*, Baltimore & O. S. W. R. Co. v. Settle, 260 U.S. 166 (1922); *see also* Matson Shipping Co., No. 89-2, 1990 WL 427460 (Fed. Mar. Comm'n Apr. 24 1990); Opinion No. 111, *Northville Dock Pipe Line Corp.*, 14 F.E.R.C. ¶ 61,111 (1981); Transportation of Petroleum and Petroleum Products by Motor Carriers Within a Single State, 71 M.C.C. 17 (1957). In addition to interstate transportation, courts have utilized an "intent" standard to determine legal status under other laws. *See, e.g.*, Bermuda, 70 U.S. 514 (1865) (examining the intent of a shipper in determining the status of a ship alleged to have engaged in wartime trade in contraband).

> evidencing the fact that such goods will be offered on the foreign country's market; and an affidavit from a foreign purchaser testifying that the goods are indeed intended to be introduced into the common stock of that country.[65]

Similar to the "honest intent" of the transporter standard employed by the CBP to determine compliance with the coastwise laws, the DOE/FE could adopt an intent standard for determining whether an entity has complied with its destination and reporting requirements. Specifically, where allegations arise that exported LNG has been consumed for end use in a country other than as authorized by a DOE/FE order and reported to the DOE/FE, any entities involved in the export, sale, or resale of that commodity should be able to point to objective evidence of their intent with respect to the country of end use of the commodity, rather than having to engage in the impractical task of demonstrating that all of the gas was *actually consumed* in a specific country. Such evidence might include contracts for sales within the destination country and any restrictions on reexport contained in those agreements, arrangements for regasification of LNG within a specific destination country, gas exchange agreements that require a quantity of natural gas equivalent to the quantity exported from the U.S. to be delivered into a specific country, shipping manifests, customs and duties receipts, storage inventory statements, affidavits/certifications from purchasers or end users, etc.

Examining the intent of the exporter through objective evidence as a means of demonstrating compliance with DOE/FE's orders would be consistent with the DOE/FE's finding in *Pieridae* and *Bear Head*. In those proceedings, DOE/FE was concerned that an exporter of U.S. natural gas could evade the full public interest review for exports to Non-FTA Countries "simply by transiting the natural gas or LNG through a FTA country en route to a non-FTA country," contrary to the congressional intent behind the NGA.[66] In both cases, the intent of the Authorization Holders to reexport LNG to Non-FTA Countries via an FTA Country (Canada) was evident on the face of their applications, which requested authorization to deliver exported U.S. natural gas for the specific use in liquefaction facilities to produce LNG that would then be reexported to a country other than Canada.[67] Application of an "intent" standard in those cases, therefore, would lead to the same substantive result.

A somewhat more difficult regulatory problem might arise if exported U.S. LNG is delivered to LNG facilities that are intended to provide intermediate LNG storage and reloading capability with little or no domestic usage of gas in the country where the facilities are located. Such intermediate facilities allow LNG to be temporarily stored for exportation to other countries: (1) to take advantage of seasonal shifts in demand; (2) to distribute LNG into smaller quantities for

65. Customs and Border Protection Ruling Letter HQ H032036, at 5 (U.S. Customs and Border Prot. July 10, 2008) (emphasis added).

66. *Pieridae,* DOE/FE Order No. 3639, at 4; *accord Bear Head,* DOE/FE Order No. 3681, at 4.

67. Pieridae Energy (USA) Ltd., Application for Long-Term, Multi-Contract Authorization to Export Natural Gas into Canada for Consumption and through Canada to Free Trade and Non-Free Trade Agreement Nations after Conversion into LNG by Pieridae Energy (USA) Ltd., FE Docket No. 14-179-LNG (Dep't of Energy Oct. 24, 2014), *available at* http://energy.gov/sites/prod/files/2015/05/f22/14_179_lng.pdf; Bear Head LNG Corp., Application for Long-Term Authorizations to Export Natural Gas to Canada and to Export Liquefied Natural Gas from Canada to Free Trade Agreement and Non-Free Trade Agreement Nations, FE Docket No. 15-33-LNG at 11 (Dep't of Energy Feb. 25, 2015), *available at* http://energy.gov/sites/prod/files/2015/04/f21/15_33_lng_fta_nfta.pdf.

delivery into smaller markets; and (3) to create a liquid secondary market for aggregators and other LNG traders. It would be difficult for any Authorization Holder to track the ultimate "end use" destination of any particular quantity of LNG delivered to such an intermediate facility and report it to the DOE/FE because the intended "end use" destination would likely be unknown at the time LNG cargoes are delivered to the storage facility and commingled with other quantities. Because the "intent" standard for "end use" delivery and reporting requirements creates unique challenges in the case of intermediate storage, this is one area where the DOE/FE and the industry should work together to find solutions to permit exporters of U.S. LNG to take advantage of the market benefits offered by intermediate LNG storage facilities while maintaining compliance with DOE/FE requirements.

VII. CONCLUSION AND NEED FOR FURTHER ACTION

This article has identified several legal questions that have arisen or that were left unanswered by the DOE/FE's announcement of policy in *Pieridae* and *Bear Head* regarding natural gas or LNG that is exported from the U.S. and then re-exported to a second country. While the DOE/FE has a legitimate interest in ensuring that potential exporters of U.S. natural gas and LNG do not improperly evade the requirements of the NGA and the DOE/FE's regulatory requirements, it is also important that the agency be cognizant of the open-ended scope of liability that its policy decisions may impose on industry participants. The possibility of exposure to such ill-defined legal and regulatory risks may make it more difficult or impossible for exporters, their financiers, and capital backers to engage in certain otherwise beneficial and efficient transactions. Given that these compliance issues may not be soon resolved in individual adjudications, it would be beneficial to all industry players—including Authorization Holders, purchasers, end users, and financiers—for the DOE/FE to provide some guidance about how it will enforce its regulatory requirements. To that end, this article has suggested several approaches that have been adopted by other federal agencies to enforce compliance with legal requirements applicable to the transportation and exportation of merchandise from the United States. In general, those regulatory approaches emphasize the importance of a clear standard of due diligence to demonstrate compliance with applicable regulatory requirements. However, the circumstances applicable to today's natural gas and LNG industry are quite unique. While the recommendations in this article may serve as a blueprint for further action, the authors strongly encourage the DOE/FE and industry participants to recognize the potential regulatory issues and to begin a dialogue about how they may be resolved in a manner that protects the regulatory interests established by the NGA while avoiding unnecessary barriers to participation in markets.