

EDWARD J. MARKEY  
MASSACHUSETTS

COMMITTEES:

COMMERCE, SCIENCE, AND TRANSPORTATION  
SMALL BUSINESS AND ENTREPRENEURSHIP  
FOREIGN RELATIONS

CHAIRMAN:

SUBCOMMITTEE ON INTERNATIONAL DEVELOPMENT AND  
FOREIGN ASSISTANCE, ECONOMIC AFFAIRS,  
INTERNATIONAL ENVIRONMENTAL PROTECTION, AND  
PEACE CORPS  
U.S. SENATE CLIMATE CHANGE CLEARING HOUSE

## United States Senate

SUITE SR-218  
RUSSELL BUILDING  
WASHINGTON, DC 20510-2107  
202-224-2742

975 JFK FEDERAL BUILDING  
15 NEW SUDBURY STREET  
BOSTON, MA 02203  
617-565-8519

222 MILLIKEN BOULEVARD, SUITE 312  
FALL RIVER, MA 02721  
508-677-0523

1550 MAIN STREET, 4TH FLOOR  
SPRINGFIELD, MA 01101  
413-785-4610

June 16, 2014

The Honorable Penny Pritzker  
Secretary  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, D.C. 20230

Dear Secretary Pritzker:

I write concerning the apparent failure of the Department of Commerce to promulgate regulations to prohibit the export of natural gas as explicitly required by the Energy Policy and Conservation Act of 1975 (EPCA).<sup>1</sup>

Thirty-nine years ago, following the oil embargo of the early 1970s, Congress passed EPCA, which included restrictions on the export of American energy supplies to protect American consumers and our national security. The statute contains a clear directive to prohibit the export not only of American oil but also of natural gas. As required by this law, the Commerce Department has issued regulations prohibiting the export of crude oil.

Yet for thirty-nine years, it appears that every single administration has failed to discharge its responsibility to conduct a similar rulemaking prohibiting the export of natural gas, despite the clear statutory requirement to do so. Large-scale exports of U.S. natural gas could significantly drive up prices for American consumers and businesses and squander our opportunity to reduce our reliance on foreign energy supplies.

I am therefore concerned that the apparent failure to issue this regulation as required by EPCA could harm American consumers, our economy and our national security and exposes the U.S. Government to potential litigation under the Administrative Procedure Act (APA). I therefore request that you provide to me the rationale for why such regulations were apparently never issued and describe the actions you plan to take to properly implement this provision of law.

---

<sup>1</sup> P.L. 94-163

**1. The Commerce Department appears to have never satisfied the statutory requirements under the Energy Policy and Conservation Act of 1975.**

Subsection (a) of Section 103 of EPCA<sup>2</sup> grants the President the discretionary authority to restrict the export of oil, natural gas, coal and other domestic energy supplies. However, Section 103(b) then explicitly requires that the President exercise that authority to issue regulations prohibiting the export of crude oil and natural gas produced domestically. Specifically, section 103(b)(1) of EPCA states:

The President shall exercise the authority provided for in subsection (a) to promulgate a rule prohibiting the export of crude oil and natural gas produced in the United States [emphasis added], except that the President may...exempt from such prohibition such crude oil or natural gas exports which he determines to be consistent with the national interest and the purposes of this Act.

Following the passage of EPCA, the authority to administer this section of law was clearly delegated to the Commerce Department by the President. Executive Order 11912, issued by President Gerald R. Ford on April 13, 1976, transferred the authority in Section 103 of EPCA to the Secretary of Commerce. Section 2 of the Executive Order states:

The Secretary of Commerce is designated and empowered to perform without approval, ratification, or other action by the President, the functions vested in the President by Section 103 of the Energy Policy and Conservation Act.

The Commerce Department's Bureau of Industry and Security has promulgated regulations prohibiting the export of crude oil as required by EPCA.<sup>3</sup> However, according to the Congressional Research Service, no such regulation has ever been issued under this section of EPCA to prohibit the export of natural gas produced in the United States, despite the clear requirement in law to do so.

In response to inquiries by my staff regarding the status of any rulemaking in this area, staff of the Commerce Department's Bureau of Industry and Security provided two Federal Register notices. The first, a Commerce Department Federal Register Notice from July 9, 1976 (Federal Register, Vol. 41, No. 133), contains the following statement regarding Section 103 of EPCA:

...[Section 103] grants discretionary authority to the President to control exports of a broad range of energy and energy-related commodities and mandates a prohibition on exports of crude oil and natural gas, except such exports that are determined to be in the national interest and consistent with the purposes of that Act...The Department [of Commerce] is currently developing regulations to implement the provisions of that Act and will promulgate such Regulations in the near future [emphasis added]. In the interim, the decision announced herein to continue the current controls on petroleum and petroleum products constitutes a finding by the Department that such controls are appropriate and consistent with the national interest and the purposes of the Energy Policy and Conservation Act.

The second Federal Register Notice provided by Commerce Department staff, published December 15, 1978 (Vol. 43, No. 242, p. 58544), deals with general licensing policy for all U.S.

---

<sup>2</sup> 42 U.S.C. § 6212

<sup>3</sup> 15 C.F.R. § 754.2

exports. It contains no reference to Section 103 of EPCA and only the following regarding exports of natural gas:

Regulations administered by the U.S. Department of Energy, Washington, D.C. 20545, govern the export of "natural gas"... The regulations relating to "natural gas" are issued under the authority of the Natural Gas Act of 1938, 52 Stat. 822.

Neither of these Federal Register Notices appears to satisfy the EPCA requirement that the Commerce Department must promulgate a rule prohibiting the export of natural gas, with such exceptions as may be in the national interest and consistent with the purposes of EPCA. In fact, the 1976 Notice acknowledges that EPCA mandates the issuance of regulations prohibiting the export of natural gas and clearly states that such regulations are being developed and would be published by the Commerce Department in the near future – an action that appears to never have occurred.<sup>4</sup>

The 1978 Notice suggests that exports of natural gas are governed by the Department of Energy (DOE) under existing regulations pursuant to the Natural Gas Act of 1938 and makes no further mention of the regulations required by EPCA. The fact that DOE has the authority to authorize natural gas exports under a preexisting statute -- the Natural Gas Act -- does not absolve the Commerce Department from fulfilling its statutory duty to promulgate the prohibition subsequently required by EPCA. To the contrary, DOE can only allow for the export of natural gas consistent with EPCA's prohibition and any rule exempting certain exports that are in the national interest and consistent with the purposes of that Act.<sup>5</sup>

It strains credulity to argue that a passing reference in two Federal Register Notices to regulations promulgated by another federal agency would satisfy EPCA's explicit statutory requirement. Thus, I do not believe that the Federal Register Notices provided by the Commerce

---

<sup>4</sup> Indeed, the 1976 Notice refers to Commerce Department export controls existing at the time as "interim" and those interim controls appear only applied to "petroleum and petroleum products," not to natural gas. The 1976 Federal Register Notice also contains a footnote stating that "natural gas and liquefied natural gas (L.N.G.)...require export authorization from the U.S. Federal Power Commission," with a reference to Chapter 15, Section 370.10(g) of the Code of Federal Regulations. That section of the Code pointed to export regulations issued under the Natural Gas Act of 1938; Section 370.10(g) did not make any reference to EPCA.

<sup>5</sup> EPCA requires the executive branch to promulgate regulations prohibiting exports and empowers them to issue exemptions to those rules. However, these exemptions obviously do not empower the executive branch to exempt any and all exports from the prohibition. As noted above, the statute only states that the executive branch may "exempt from such prohibition" such exports of natural gas that are determined to be consistent with the national interest and the purposes of EPCA. Under well-established rules of statutory interpretation, one looks to the generally accepted definition of "exempt" when interpreting that part of the statute's text. To "exempt" someone is only to "say that (someone or something) does not have to do something that others are required to do." See <http://www.merriam-webster.com/dictionary/exempt>. By definition then, an exemption cannot apply to all exports, because such a proposal would effectively swallow the requirement that some exports be prohibited. As a result, the executive branch is required, by statute, to promulgate a rule that prohibits the export of natural gas and it may not exempt all exports from that rule, even if it is determined that all such exports are in the national interest and consistent with the purposes of EPCA.

Department could be deemed to have satisfied EPCA's mandate to promulgate a rule prohibiting the export of natural gas.

In addition, in response to inquiries made by my staff to the Department of Energy regarding any authority DOE may possess under this provision of EPCA, DOE staff responded that in the opinion of DOE's Office of the General Counsel, DOE does not have any delegated authority under this section of law. In fact, DOE staff was not aware of any actions taken by DOE under this provision of EPCA. Therefore, even in the opinion of the Energy Department, it does not appear that DOE has taken any actions that could be deemed to satisfy the statutory requirement under EPCA to prohibit natural gas exports.

**2. The Commerce Department's failure to fulfill this statutory requirement exposes the U.S. government to potential litigation under the Administrative Procedure Act.**

The Administrative Procedure Act requires agencies to implement provisions of law within a reasonable timeframe, stating "within a reasonable time, each agency shall proceed to conclude a matter presented to it."<sup>6</sup> Such failures to act in a timely fashion have been found to violate the APA.<sup>7</sup> When agencies fail to administer statutory requirements, courts can compel agency action under the APA that has been "unlawfully withheld or unreasonably delayed,"<sup>8</sup> even with the extraordinary step of granting a writ of mandamus. Notably, courts have held that an agency engaged in unreasonable delay by failing to release a regulation mandated by statute in one case within twenty-two years,<sup>9</sup> and in another in just ten years.<sup>10</sup> If such a writ were granted, the Department of Commerce could be forced to promulgate a rule prohibiting the export of natural gas as required by EPCA.

The concern regarding litigation related to the Department's failure to follow an almost forty year-old statutory directive to prohibit natural gas exports is amplified by the fact that the Department of Energy is moving forward with the approval of applications to export U.S. LNG under the Natural Gas Act of 1938. I am concerned that this effort may constitute an exemption to a rule that has not yet been promulgated, and under the APA could therefore be considered illogical on its face and evidence of arbitrary and capricious decision-making.

Additionally, if the Commerce Department wished to argue that existing regulations under the Natural Gas Act that were referred to in the 1978 Federal Register notice satisfy the rulemaking requirement in EPCA, then there would appear to not have been a notice and comment period as required by the APA. Per N.C. Growers' Association v. UFW, 702 F.3d 755, 764 (4th Cir. 2012):

---

<sup>6</sup> 5 U.S.C. § 555(b).

<sup>7</sup> In re Core Communs., Inc., 531 F.3d 849, 855 (D.C. Cir 2008).

<sup>8</sup> 5 U.S.C. §706(1).

<sup>9</sup> In re UMW Int'l Union, 190 F.3d 545 (D.C. Cir. 1999)

<sup>10</sup> In re Bluewater Network, 234 F.3d 1305 (D.C. Cir. 2000).

The APA requires that agencies follow certain procedures before issuing a rule. 5 U.S.C. § 553. When an agency is engaged in 'rule making,' the agency must: (1) publish a general notice of proposed rule making in the Federal Register that includes 'the terms or substance of the proposed rule or a description of the subjects and issues involved'; (2) give 'interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments'; and (3) '[a]fter consideration of the relevant matter presented . . . incorporate in the rules adopted a concise general statement of their basis and purpose.' 5 U.S.C. § 553(b), (c).

The important purposes of this notice and comment procedure cannot be overstated. The agency benefits from the experience and input of comments by the public, which help 'ensure informed agency decisionmaking.' *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980). The notice and comment procedure also is designed to encourage public participation in the administrative process. *See Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985). Additionally, the process helps ensure 'that the agency maintains a flexible and open-minded attitude towards its own rules,' *id.* (citation omitted), because the opportunity to comment 'must be a meaningful opportunity,' *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011).

The requirement that a rulemaking receive notice and public comment under the APA cannot be satisfied merely with the statement that the administration has given thought to an issue within some other context. Instead, it requires a formal proposal of a regulation and a public announcement that the rulemaking will be open to comment by the public for a fixed period of time. Following the conclusion of that public comment period, the APA demands that an agency release a final version of the rulemaking that responds to any comments submitted by members of the public.

### **3. The Department of Commerce should issue these long-delayed regulations prohibiting natural gas exports as required by EPCA.**

The Department of Commerce should issue these statutorily-required regulations prohibiting natural gas exports to protect American consumers, businesses and our energy security with all deliberate speed. The summary statement included in the EPCA Conference Report made clear the intent of Congress in passing this legislation. It stated, "For the long run, the Act will decrease dependence upon foreign imports, enhance national security . . . and guarantee the availability of domestic energy supplies at prices consumers can afford."<sup>11</sup>

According to analysis by the Department of Energy, large-scale natural gas exports could drive U.S. prices up by as much as 54 percent. That could translate into as much as \$62 billion a year in higher energy costs for American consumers and businesses. American natural gas also has the ability to enhance our national security by reducing our imports of energy from unstable regions. We should ensure that these American resources benefit American consumers, our economy and our national security.

The Department of Energy has now approved exports from six liquefied natural gas facilities that total nearly 11 billion cubic feet a day of American natural gas. I am concerned that the failure of the Commerce Department to fully implement this provision of EPCA creates uncertainty for

---

<sup>11</sup> Senate Report No. 94-516 at 117; House Report No. 94-700.

Secretary Pritzker  
June 16, 2014  
Page 6 of 6

that DOE process. I therefore request that you respond to me in writing detailing why the Department of Commerce has failed to issue these regulations as required by Section 103 of EPCA and what actions it plans to take to fully administer this provision of law.

Thank you for your attention to this matter. Should you have any questions, please have your staff contact Morgan Gray on my staff at (202) 224-2742.

Sincerely,



Edward J. Markey  
United States Senator

cc: The Honorable Ernest Moniz  
Secretary  
U.S. Department of Energy