

UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

IN THE MATTER OF)
) FE DOCKET NO. 11-161-LNG
Freeport LNG Expansion, L.P.)
FLNG Liquefaction, LLC)
)

Sierra Club’s Motion to Reply and Reply Comments

Pursuant to 10 C.F.R. § 590.302(a), Sierra Club moves for leave to reply to Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC’s (together “FLEX”) Motion for Leave to Answer and Answer to Sierra Club’s Protest and Motion to intervene. Sierra Club’s reply is incorporated into this document.

I. Sierra Club Hereby Moves For Leave to Reply to FLEX’s Answer

Although DOE/FE rules do not automatically provide parties the right to a reply, the rules allow for a wide range of procedural motions. See 10 C.F.R. §§ 590.302 & 590.310. “Any party may file a motion requesting additional procedures.” 10 C.F.R. § 590.310. Sierra Club requested a reply motion in its timely initial protest filing, and Cameron did not oppose it. See Sierra Club Protest (“Protest”) at 3 n.2. The request, which Sierra Club now renews, is therefore timely, and there is good cause to grant it. DOE/FE should do so here for several reasons:

First, the Natural Gas Act (NGA) requires DOE/FE to decide whether LNG exports are in the “public interest.” 15 U.S.C. § 717b. As Sierra Club explained in its Protest, the public interest embraces a wide range of issues, including environmental concerns. See Protest at 4-6 (citing, e.g., *Nat’l Ass’n for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 670 n.4 & n.6 (1976)). Sierra Club has described its extensive work to protect the public interest, and, in particular, the interests of the thousands of Sierra Club members who will be affected by FLEX’s proposal. Protest at 1-3 & Ex. 1. DOE/FE should ensure that these interests receive a fair hearing by allowing Sierra Club to respond to FLEX’s arguments.

Second, FLEX mounts attacks on Sierra Club’s motion to intervene and upon the arguments in its protest. These attacks are misguided. To ensure that DOE/FE has been fully briefed on all sides of the issues before it, Sierra Club should be allowed to respond to FLEX’s contentions.

For the foregoing reasons, Sierra Club therefore moves for leave to file the reply comments which follow.

II. Sierra Club's Reply

A. Sierra Club Should Be Granted Leave to Intervene

FLEX argues that Sierra Club's motion to intervene should be denied because "Sierra Club's stated concerns are not specific to the FLEX Application, but raise general policy issues associated with regulation of the domestic natural gas market and all uses of natural gas." Answer at 4. This argument misunderstands either Sierra Club's showing or the applicable standard. Sierra Club has shown that FLEX's "specific" proposal will cause or aggravate harms suffered by Sierra Club members, including harms related to the natural gas production FLEX's proposed export will inevitably induce. Thus, Sierra Club has plainly set out "clearly and concisely the facts upon which" its claimed interest is based. 10 C.F.R. § 590.303(c). DOE/FE regulations require no more.

We further note that Sierra Club members live and work near the project site. Protest at 1. Sierra Club intends to raise concerns regarding local effects of the construction and operation of export facilities before FERC. DOE/FE's jurisdiction, however, primarily concerns impacts of exports themselves, *i.e.*, the interests Sierra Club asserts in its protest.

B. Both The Natural Gas Act and The National Environmental Policy Act Require Consideration of Effects of Induced Production

1. FLEX Concedes that the Natural Gas Act's Public Interest Determination Includes Environmental Impacts

FLEX agrees that environmental impacts are within the scope of the NGA's "public interest" standard. Answer at 5. Sierra Club disagrees with FLEX's assertion that consideration of these impacts is discretionary, because courts have already determined that environmental impacts are within the scope of the NGA. Answer at 5 (asserting that environmental impacts are factors that DOE/FE "may consider"), Protest at 5 (summarizing cases). Nonetheless, even if the statute granted DOE/FE discretion as to whether to consider environmental impacts, it is clear that DOE/FE has already exercised any discretion to determine that environmental impacts must be considered. Testimony of Christopher Smith, Deputy Assistant Secretary of Oil and Gas Before the

Senate Committee on Energy and Natural Resources (Nov. 8, 2011),¹ *see also Phillips Alaska Natural Gas Corporation and Marathon Oil Company*, 2 FE ¶ 70,317, DOE FE Order No. 1473, *22 (April 2, 1999) (considering environmental factors); Opinion and Order Conditionally Granting Long-Term Authorization to Export [LNG] from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations (“Sabine Conditional Authorization”), DOE/FE Order 2961 at 29, 37, 40 (May 20, 2011) (considering effects on greenhouse gas and other air pollution emissions).

Although FLEX concedes that the Natural Gas Act’s public interest standard includes environmental factors, FLEX suggests, without explanation, that the standard under section 3 of the Act is somehow narrower than the standard under section 7. Answer at 9. There is no basis for drawing such a distinction. In general, courts presume that the same term has the same meaning when it occurs in multiple sections of a single statute, *See, e.g., Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). More specifically, *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 670 n.4, n.6 (1976), identified the concerns pertinent to the public interest analysis by looking to purposes of the broader statutory framework. In the face of this authority, FLEX’s argument that *Northern Natural Gas Company v. Federal Power Commission*, 399 F.2d 953 (D.C. Cir. 1968) does not apply to section 3 fails. Thus, binding authority holds that *Udall v. Federal Power*, 397 U.S. 428 (1967) applies to the NGA. *See* Protest at 5 (summarizing these cases).

2. NEPA Review Must Precede Decisionmaking, Regardless of Whether FERC Acts as the Lead Agency

Because environmental impacts factor into the public interest determination, DOE/FE logically must assess environmental impacts before making this determination. As explained in Sierra Club’s protest, NEPA ensures “that environmental information is available to public officials and citizens *before* decisions are made.” 40 C.F.R. § 1500.1(b) (emphasis added). Agencies must “integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values.” 40 C.F.R. § 1501.2.

Without discussing these regulations, FLEX asserts that DOE/FE may postpone the NEPA analysis until after DOE/FE has assessed the public interest and granted a conditional authorization. This assertion is contrary to the regulations. It is also incoherent: analyzing environmental impacts after DOE/FE makes its public interest determination will inhibit, if not preclude, incorporation of these impacts into the public interest calculus.

¹ Attached as Exhibit 2 to Sierra Club’s Protest.

Although FLEX is correct that the Energy Policy Act of 2005 designates FERC as the lead agency for coordinated NEPA review, none of the provisions FLEX cites authorize, much less instruct, DOE/FE to issue a conditional authorization prior to completion of NEPA review (whether coordinated by FERC or DOE/FE). 15 U.S.C. §§ 717b-1(a), 717n(b)-(d). Nor has FLEX identified any other statement of general policy directing DOE/FE to issue conditional authorizations prior to completion of NEPA review. Answer at 6 n.13 (citing Sabine Conditional Authorization at 43 and *Rochester Gas and Electric Corp.*, FE Docket No. 09-05-NG, Order No. 503 (May 16, 1991)). The two cited orders the applicants' requests for conditional authorization without articulating a general policy of granting conditional authorization prior to NEPA review. On the other hand, voluminous established authority requires NEPA review to be completed as early as possible in the process of agency decisionmaking. 40 C.F.R. § 1501.2, 10 C.F.R. §§ 1021.100, 1021.211. "[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered." *Com. of Mass. v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (citing *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978); *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512-13 (D.C. Cir. 1974)). Thus, although DOE/FE may coordinate its NEPA review with FERC, this does not relieve DOE/FE of the obligation to wait until the NEPA process is complete before assessing the public interest.

3. Both Inducement of Additional Gas Production and The Environmental Impacts Thereof Are Reasonably Foreseeable Effects of Exports

FLEX continues to assert that its export proposal will induce additional gas production. Answer at 20. FLEX argues that although an increase in production is foreseeable, the environmental effects of this increase are not, such that environmental impacts of increased production need not be considered in the NEPA and NGA public interest analyses. Answer at 10-12. In so doing, FLEX overstates the degree of specificity required for NEPA review and understates DOE/FE's obligation to consider uncertain impacts.

FLEX argues that the environmental impacts of induced production can be excluded from analysis because it is uncertain which new or future individual wells will supply the FLEX facility. Answer at 10. This presents a straw man argument, as Sierra Club never suggested that such fine-grained prediction was required. DOE/FE can and must assess the aggregate impact of wells sufficient to provide the gas this project will require. EIA has already predicted what fraction of induced production will come from each type of gas supply. EIA, *Effect of Increased Natural Gas Exports on Domestic Energy Markets* ("*EIA Study*"), p.1 (Jan. 19, 2012).² For each type of production, DOE/FE can predict

² Attached as Exhibit 3 to Sierra Club's Protest.

upper and lower bounds on, for example, water that will be required, wastewater that will be produced, and aggregate air emissions. Here, where FLEX has identified the regions that will be the primary suppliers of gas (such as the Eagle Ford Shale, Answer at 17), DOE/FE can make such predictions in light of the characteristics of the main supplying regions. Such an assessment does not require prediction as to where individual wells will be placed. This type of macro-level analysis is often performed in programmatic Environmental Impact Statements, and is appropriate here.³ Because this information is available, DOE/FE cannot disregard it. *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) (NEPA requires agencies to conduct "[r]easonable forecasting and speculation," and courts "must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'").⁴

FLEX next suggests that Sierra Club's argument leads to the absurd conclusion that impacts of induced production must be considered for "every new gas water heater" and numerous other distributed and small-scale consumers of natural gas. Answer at 11. These other consumers are easily distinguished by their small scale. As noted in Sierra Club's protest, pending proposals seek to export over a fifth of current domestic gas production, and DOE/FE must consider the impacts of these export proposals cumulatively. Protest at 40. The various small consumers identified FLEX do not come anywhere near this scale. Nor are these small consumers within the ambit of the specific statutory commands facing DOE/FE: it is unclear whether any of these would be "major federal actions" requiring NEPA review, and DOE/FE's specific statutory command to determine whether exports are in the public interest is not narrowed by the possibility of other activities having similar negative impacts on the public interest.

Finally, FLEX mistakenly relies on *Central New York Oil and Gas Company, LLC*, 137 FERC 61,121 (2011) ("CNYOG Order"), *reh'g* 138 FERC 61,104 (2012), and those orders' discussion of *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). FERC orders carry merely persuasive weight before DOE, and the cited orders were wrongly

³ Indeed, as Sierra Club's protest argues, DOE/FE should prepare or cause to be prepared a programmatic EIS that encompasses all pending export applications.

⁴ *Scientists' Institute for Public Information* further explained that agencies may not use one standard of foreseeability for economic benefits and another, more stringent, standard for environmental harms. There, the Atomic Energy Commission had performed a NEPA analysis for nuclear power plants, and excluded the environmental costs of long term nuclear waste storage and disposal from its NEPA analysis. 481 F.2d at 1092. The Commission had prepared a 30-year cost-benefit analysis touting the project's purported benefits, and had used this analysis in seeking to persuade Congress to fund the project. *Id.* The agency had nonetheless concluded that assessing environmental impacts on this scale would require a "crystal ball inquiry," and the agency accordingly omitted such assessment. *Id.* at 1086, 1092. The court rejected this approach, concluding that there was no reason to believe that environmental forecasts would be any less accurate than the agency's analysis of economic benefits, and that the agency could not impose a higher standard of certainty on environmental review. *Id.* at 1092.

decided, such that their flawed interpretation of “reasonably foreseeable” is unpersuasive. Additionally, these orders rest on facts not present here. There, FERC concluded that increased production was not a reasonably foreseeable consequence of the proposed pipeline because the same gas could be sold in the same markets with or without the pipeline. CNYOG Order PP 91-92. That is not the case here: natural gas cannot be exported to non-free trade agreement countries without DOE/FE approval. As such, the production necessary to supply this market will not occur absent DOE/FE grant of export licenses. *See also* Answer at 20 (reiterating FLEX’s contention that gas producers will increase production to supply exports). A second distinction is that in CNYOG cases, the pipeline proponents did not predict increased production jobs as an economic benefit of the pipeline. Here, in contrast, FLEX itself predicts increased production as a result of the proposed export, and every other observer joins in this prediction.

The CNYOG Orders in turn misinterpreted *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). *Department of Transportation* held that “where an agency has *no ability* to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect,” and that the effect could be excluded from NEPA analysis. *Id.* at 770 (emphasis added). There, where the agency had “*no discretion* to prevent the entry of Mexican trucks, its [environmental assessment] did not need to consider the environmental effects arising from the entry.” *Id.* (emphasis added). Here, DOE/FE unquestionably has authority to prevent export by virtue of its public interest analysis. Because environmental impacts are within the scope of the NGA, DOE/FE has the authority to prohibit export on the basis of environmental concerns. Prohibiting export would prevent the effect of inducing the additional production that would satisfy the export market. Accordingly, *Department of Transportation* does not support FLEX’s argument.

4. FLEX Misrepresents Sierra Club’s Argument Regarding The Relationship between Coal and Gas

Sierra Club’s protest addressed the relationship between gas exports and coal in two contexts. First, we noted that gas exports will increase domestic gas prices and lead to higher rates of domestic coal consumption than would occur absent gas exports. Protest at 35-37 (citing *EIA Study* at 6, 17-19). This shift will harm the environment by increasing emissions of greenhouse gas and conventional pollutants. *Id.* Second, we noted that the available science calls into question, if not rebuts, any suggestion that gas exports will provide a global climate benefit by reducing overseas coal consumption. *Id.* at 37-40. Regarding this second argument, as FLEX observes, gas combustion, when considered in isolation, produces the same greenhouse gas emissions regardless of where combustion occurs. Answer at 5. FLEX ignores, however, the fact that liquefying and transporting American-produced gas to foreign markets produces much higher emissions than does pipeline transportation of American gas to American consumers. Accordingly, inducing a

shift from actual or potential gas consumption to coal consumption in the US produces a clear environmental harm, but displacing international coal consumption with consumption of US-sourced LNG⁵ does not produce a corresponding climate benefit.

5. FLEX Does Not Dispute The Scope or Magnitude of Production's Impacts

FLEX does not meaningfully dispute Sierra Club's characterization of the environmental harms that will result from increased production, or the conclusion that these harms, when considered, demonstrate that the project is contrary to the public interest. Accordingly, the only material in the record regarding environmental effects of increased production is that submitted by the Sierra Club. As explained in Sierra Club's protest, this evidence clearly demonstrates the environmental harms associated with gas production and the absence of environmental benefit from LNG export.

C. Price and Economic Impacts

Sierra Club's protest demonstrated that FLEX overstates the economic benefit of the project and fails to account for many economic costs the project will entail, both in terms of job creation and domestic gas prices. FLEX fails to rebut any of these arguments.

For gas price impacts, Sierra Club principally relied on the *EIA Study* cited above. As we explained, this study considered "slow" and "rapid" growth of both "low" and "high" volumes of exports, although the "high" volumes considered by the EIA were less than two thirds the volume of exports presently proposed. Protest at 40. Without disputing DOE/FE's obligation to consider the cumulative impact of all proposed exports, FLEX merely argues that "rapid" export scenarios modeled in this study are unlikely to occur. Answer 13-14. EIA has determined that the rapid scenarios are likely enough to warrant consideration; if DOE/FE disagrees, the basis for such disagreement must be articulated in the record. Moreover, it appears likely that even a "slow" export scenario involving the full volume of proposed exports would lead to increases comparable to those considered in EIA's rapid 12bcf/d scenario.

FLEX then disputes, in essence, whether the specific price increases EIA predicts would be significant. Sierra Club cited the EIA study and the "Drill Here, Sell There, Pay More" report prepared by Democratic Staff of the House Natural Resources Committee,⁶ which predicted that price increases will negatively affect domestic manufacturing and other industries. FLEX asserts that the same price increases will have only a "minimal to moderate" effect. Answer at 15. Insofar as FLEX disagrees as to whether a certain price

⁵ We reiterate that FLEX has provided no evidence that LNG exports will in fact displace consumption of other fossil fuels. Protest at 37.

⁶ Attached as Exhibit 4 to Sierra Club's Protest.

increase will have significant impacts, the appropriate response is for DOE/FE to postpone evaluation of FLEX's application until DOE/FE has concluded its forthcoming study of this issue. Protest at 11-12. Because that study will influence both this application and others, Sierra Club reiterates the need for opportunity for public comment on that study. *Id.*

Finally, Sierra Club identified numerous flaws in FLEX's prediction of economic benefits from increased production, to which FLEX offers only a cursory response. Protest at 43-51, Answer at 20. Sierra Club identified many flaws inherent in the IMPLAN model FLEX used, and Sierra Club further demonstrated that FLEX's modeled predictions were contradicted by empirical analyses of communities where gas production has boomed. FLEX's sole response on this issue is to quote the President's assertion, in his 2012 State of the Union address, that "the development of natural gas will create jobs." Answer at 20. Although the President plays a central role in the formation of administrative policy, this unsupported *factual* assertion taken from a speech is not the type of record that must inform agency decisionmaking.

III. Conclusion

The record before DOE/FE shows that LNG exports will (1) raise gas prices, (2) cause significant economic disruption and support fewer jobs than FLEX claims, and (3) come with major environmental and resultant economic costs. FLEX's largely rhetorical response to Sierra Club's protest does not seriously disturb any of these conclusions. As such, on this record, DOE/FE can only rationally conclude that FLEX's proposed exports are not in the public interest. DOE/FE also may not move forward until it fully complies with NEPA, ESA, NHPA, and its other statutory obligations. Sierra Club's protest should be granted.

Dated: May 30, 2012.

Respectfully submitted,

/s/ Nathan Matthews

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CERTIFICATE OF SERVICE

I hereby certify that I caused the above documents to be served on the applicant and all others parties in this docket, in accordance with 10 C.F.R. § 590.107, on May 30, 2012.

Dated at San Francisco, CA, this 30th day of May, 2012.

/s Nathan Matthews
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