



**UNITED STATES OF AMERICA  
BEFORE THE  
DEPARTMENT OF ENERGY  
OFFICE OF FOSSIL ENERGY**



**In the Matter of:  
FREEPORT LNG EXPANSION, L.P.  
FLNG LIQUEFACTION, LLC**

**Docket No. 11-161 LNG**

**FREEPORT LNG EXPANSION, L.P. AND FLNG LIQUEFACTION, LLC'S  
RESPONSE TO THE MAY 30, 2012 MOTION TO REPLY AND  
REPLY COMMENTS OF SIERRA CLUB**

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Pursuant to the Department of Energy's ("DOE") regulations,<sup>1</sup> Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC (collectively, "FLEX") hereby submit this Response to the Sierra Club's Motion to Reply and Reply Comments, filed on May 30, 2012.

This submittal by FLEX is in response to the May 30, 2012 filing by Sierra Club ("Motion 2"). As explained below, Sierra Club's Motions should be denied and its Protest given no weight. It fails to overcome the presumption that FLEX's proposed export of LNG is in the public interest.

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<sup>1</sup> 10 C.F.R. § 590.303(e) and 590.304(f) (2010).

**I. MOTION 2 IS PROCEDURALLY DEFECTIVE**

**A. Motion 2 Is Beyond The Date Established By DOE/FE For The Application And Should Not Be Permitted.**

Although the DOE/FE procedural rules do contain general provisions that permit motions under some circumstances, such a motion must be filed within the procedural time frame established for the proceeding. 10 C.F.R. 590.310. In the instant proceeding, DOE/FE specifically established April 13, 2012 as the final date for parties to intervene or file motions with respect of FLEX's December 19, 2011 Application (the "Application"): "Protests, motions to intervene or notices of intervention, as applicable, request for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than April 13, 2012." Federal Register, Vol. 77, No 29, page 7569, February 13, 2012. On April 13, 2012, the last permitted day to file, Sierra Club filed its original motion, intervention and protest ("Motion 1"), although the verification for Motion 1 is dated one day later, namely April 14, 2012.

In Motion 1, the Sierra Club correctly acknowledged that in conducting the required review pursuant to National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321, *et seq.*, the Natural Gas Act requires that the Federal Power Commission (now the Federal Energy Regulatory Commission) is the lead agency. 15 U.S.C. 717n; Motion 1 at 9. (It is well settled law that NEPA is a procedural requirement which does not require any particular result Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)). Despite that acknowledgment, Sierra Club launched a broad attack in Motion 1 on the natural gas industry, stating that "(n)atural gas production - both from conventional and unconventional sources - is a significant pollution source, can disrupt ecosystems and watersheds, leads to industrialization of entire

landscapes, and presents challenging waste disposal issues.” Motion 1 at 13. It also gave quick service to The Endangered Species Act, demanding that DOE/FE “first, conduct a biological assessment” and demanded that DOE conduct a review under the National Historic Preservation Act. Motion 1 at 9-10. At the conclusion of its presentation, the Sierra Club described DOE/FE’s recent approval of the Sabine Pass export application as “irrational” and the FERC’s related decision as “incoherent” and having an “illegal effect.” Motion 1 at 55. Although the demands and polemics are abundant in Motion 1, no substantive data is presented in Motion 1 demonstrating that any of the alleged environmental harms are reasonably foreseeable or rationally related to the matters present to DOE/FE in the Application.

On May 30, 2012, Sierra Club, filed a second motion (Motion 2). This was filed 47 days after the April 13th deadline established by DOE/FE in its February 13, 2012 Notice in the Federal Register. Sierra Club has not demonstrated any basis for DOE/FE to waive the April 13, 2012 deadline. On that basis alone, as well as for the additional reasons stated below, Motion 2 should be denied and given no weight.

**B. Sierra Club’s “Footnote Motion” In Motion 1 Should Not Be Allowed To Circumvent The DOE/FE’s April 13th, Deadline.**

Perhaps in an attempt to circumvent the April 13th deadline, Sierra Club claims that its Footnote (on page 3 of Motion 1) was, in fact, a motion to permit the filing of Motion 2: “Sierra Club requested a reply motion in its timely initial protest filing, and Cameron did not oppose it.” First, it should be noted that FLEX is not “Cameron” and the actions or inaction of Cameron are not relevant to this proceeding. Second, 10 C.F.R.590.302(a) specifically requires all motions to “set forth the ruling or relief requested and state the grounds” for the motion. None was stated by Sierra Club in its April 13th “footnote motion”. Third, the fact that DOE/FE did not issue an

order granting Sierra Club's "footnote motion" of April 13th cannot be used as an affirmative ruling by the DOE/FE to permit Motion 2. Pursuant to 10. C.F.R. 590.302(c), a motion "shall be deemed to have been denied, unless the Assistant Secretary or presiding official acts within thirty (30) days after the motion is filed." Since Sierra Club's footnote motion was made on April 13, 2012, and no order was issued within 30 days thereafter. Therefore, it was denied on May 14, 2012 by operation of law. Since Sierra Club's "footnote motion" already has been denied by operation of law, Motion 2 should be denied and given no weight.

**C. Motion 2 Is Contrary To DOE/FE Long Established Procedures.**

Motion 2 does not serve to further illuminate the record, adds nothing germane to Sierra Club's original filing on April 13, 2012, and is not consistent with the relevant DOE/FE procedures. 10 C.F.R. 590.303 sets forth the allowed procedures for filing of a protest and an answer to that protest. It clearly does not provide for the filing of "replies" to an answer to a protest. Since Sierra Club has also failed to satisfy its burden of providing sufficient and timely grounds for Motion 2, it should be rejected by DOE/FE and given no weight.

**D. Should DOE/FE Permit Motion 2, Then FLEX Should be Permitted to Respond.**

As discussed above, Motion 2 should be rejected by DOE/FE and given no consideration. It is not permitted under the procedures established by the DOE/FE or by the Federal Notice for this proceeding, and Sierra Club has failed to show why it should be granted an exception to the long established DOE/FE procedures. However, in the event DOE/FE should permit the Motion 2, FLEX respectfully responds below to the arguments and allegations made by the Sierra Club in Motion 2. This is the only result consistent with 10 C.F.R. 590.302(2), which provides that any party to the proceeding "may file an answer to any written motion within (15) days after the motion is filed...."

## **II. SIERRA CLUB'S "INDUCED PRODUCTION"**

### **ARGUMENT IS WITHOUT MERIT**

Sierra Club has failed to show any specific potential harm to be suffered by Sierra Club or its members that would result from "induced production" allegedly to arise from the natural gas liquefaction and export services FLEX proposes to provide, nor has it identified the specific future so called "induced production" to be proximately caused by the FLEX proposal.

In addition to Sierra Club's failing to provide any support for its "induced production" claims, those claims necessarily fail due to impossibility, lack of reasonable foreseeability, lack of a reasonably close causal connection and lack of sufficient nexus between the alleged harm and FLEX's activities. The specific sources of the natural gas that will arrive at its facilities for processing cannot be known, as it is simply impossible to determine which natural gas production wells or fields will supply the natural gas that will be delivered to the FLEX facility over the 25 year period of the project beginning several years in the future. Nor can it be known now whether the gas will come from new wells or from existing production wells. Thus any impacts on habitat, fauna, flora, water, etc. associated with such wells cannot be reasonably foreseen. Any such environmental impacts are specific to the wells producing the gas, where they are located and how they are operated.

FLEX is aware that the U.S. EPA and various states have developed or are developing regulations related to the safe exploration and production of natural gas. These are the proper forum to raise the type of issues Sierra Club seeks to raise, and it should be in that context and within those jurisdictional venues where concerns over specific wells or technologies should be addressed.

No federal action is requested by FLEX concerning any specific production area or natural gas production technology. Sierra Club's generalized allegations that future natural gas production could be harmful to certain unspecified geographic locations do not create a nexus to the specific FLEX proposal. There are innumerable activities that could affect the future demand for natural gas, including new and existing chemical plants, increases in steel production or manufacturing, policies favoring the conversion of coal plants to natural gas, the production of natural gas vehicles, the removal of hydro-electric generating facilities, policies favoring the replacement of fuel oil heaters with natural gas, the relatively low price of natural gas itself, certain states' prohibitions concerning coal plant, the retirement of nuclear plants, EPA air regulations concerning emissions from coal fired generation, imports of natural gas from Canada, adoption of future anti-gas flaring policies, the continuation of policies and rates favoring the use of natural gas for residential and other uses, growth in population, commercial and industrial uses, general improved economic conditions, production of plastics and fertilizer, just to name a few. It is not possible to perform a global analysis of the future type Sierra Club demand with such a vast multitude of unknown and unknowable factors. Sierra Club has simply failed to identify any reasonably foreseeable harm or potential harm that would be proximately caused by FLEX's proposed natural gas liquefaction and export services. In fact, it has failed to show that any specific alleged harm would be proximately caused by the FLEX proposal.

In regards to the current Application, FERC is the Lead Agency for NEPA purposes and it is quite capable of doing so. In the recent FERC certificate proceeding involving the MARC 1 Project, FERC addressed very similar issues. 137 FERC ¶ 61, 121. In its decision approving the project, FERC noted that "..., the EA does not include a quantitative analysis of the cumulative impacts of Marcellus Shale development in northeastern Pennsylvania and beyond. It explains



that the widespread nature and under certain timing of gas well drilling relative to construction of the MARC 1 Project make it difficult to identify and quantify cumulative impacts: since the development of natural gas reserves in the formation is expected to take 20 to 40 years due to economics and other factors, the exact location, scale, and timing of future Marcellus Shale upstream facilities that could potentially contribute to cumulative impacts in the project area is unknown at this time.” 137 FERC ¶ 61, 121 at 21. Several interveners protested the adequacy of the EA under NEPA. In the decision FERC rejected the argument that these alleged “induced” future events required a full EIS. “...Marcellus Shale development and its associated potential environmental impacts are not sufficiently causally-related to the MARC 1 Project to warrant the more comprehensive analysis that commenters seek.” 137 FERC ¶ 61, 121 at 27-28. Likewise, in this Application proceeding, the alleged potential impacts of generalized so called “induced production” are not sufficiently causally related to the FLEX proposal in this Application to require an environmental impact statement under NEPA by either DOE/FE or FERC. Sierra Club has made similar claims in matters before FERC challenging its NEPA review. In an appeal to the 2nd Circuit Court of Appeals from the FERC certificate decision approving the project, it was alleged that FERC failed to conduct an adequate cumulative impact analysis and specifically that its analysis of the future development of natural gas from the Marcellus Shale was inadequate. In a summary order on June 12, 2012 a three judge panel of the 2nd Circuit correctly confirmed the adequacy of the FERC review under NEPA. *Coalition for Responsible Growth and Resource Conservation, Damascus Citizens for Sustainability and Sierra Club v. United States Federal Energy Regulatory Commission, 2nd Cir. Summary Order (12-556g), June 12, 2012.* (Copy attached hereto and served upon all parties in this proceeding in accordance with Local Rule 32.1.1.)

Sierra Club's reliance on *Phillips Alaska Natural Gas Corporation, Marathon Oil Company*, 2 FE 7,317, DOE Order No. 1473 (April 2, 1999), is misplaced. Motion 2 at p. 3. In that April 21, 1999 DOE order, the specific production areas involved were well known locations in Alaska. DOE considered the environmental concerns of that proposed export in the context of NEPA, but even then determined that it was not required to perform an analysis of the potential environmental effects of granting the export renewal. *Id.* at 52.

In addition, in the above proceeding the DOE very clearly confirmed the appropriate application of the special Natural Gas Act statutory presumptions that are also in force here. Section 3 of the Natural Gas Act creates a statutory presumption in favor of approval of an export application. It mandates that the DOE must grant the requested export extension unless it determines by evidence in the record of the proceedings that the proposed export will not be consistent with the public interest.

Contrary to the Sierra Club characterization, it is not the position of FLEX that in approving an LNG export authorization, DOE/FE has no responsibilities under NEPA. National Environmental Policy Act, 42 U.S.C. 4321, *et seq.* Rather, it is the position of FLEX that such a consideration must be rational and consistent with the law. Such a consideration must not drift off into mere speculation as requested by Sierra Club. This rational and practical focus requirement was recognized by DOE/FE in *Phillips Alaska*, *Supra* at 29.

The future additional FLEX facilities will be the subject of the NEPA review by the Federal Energy Regulatory Commission ("FERC") in the Natural Gas Act Section 7 proceedings. In its Motion 2, Sierra Club does state that members who live or work near the existing LNG terminal of FLEX may have specific environmental concerns over future additional LNG facilities and will raise those at FERC. Motion 2 at 3. FLEX agrees with the

inference of Sierra Club's statement that FERC, not this DOE/FE application docket, is the proper forum to raise those allegations.

### **III. SIERRA CLUB'S COLLATERAL ATTACK ON FERC ORDERS IS INAPPROPRIATE**

Contrary to Sierra Club's assertions, FERC's interpretation of "reasonably foreseeable" is not "flawed" and "unpersuasive". Motion 2 at 5-6. To support its assertions, Sierra Club incorrectly claims that FERC "misinterpreted *Department of Transportation V. Public Citizens*, 541 U.S. 752 (2004)." In fact, in that case, the U.S. Supreme Court re-affirmed its prior holding in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 744 (1983), that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause," analogous to the "familiar doctrine of proximate cause from tort law." *Id.* at 767. The Court also noted that even indirect effects must "still be reasonably foreseeable". *Id.*, at 764. Furthermore, the Court also found in that case that the "respondent failed to identify any evidence that shows that any effect from these possible actions would be significant or even noticeable...." *Id.*, at 765. The argument of the Sierra Club, with its generalized allegations about natural gas production and the use of natural gas, suffers this same flaw.

In addition, Sierra Club mistakenly seeks to distinguish the Application from the FERC's holding in *Central New York Oil and Gas Company, LLC*, 137 FERC 61,121 (2011), *re 'hg* 138 FERC 61,104 (2012). Sierra Club's argument that the "natural gas cannot be exported to non-free trade agreement countries without DOE/FE approval" misses the point on at least two measures. (Motion 2 at 6.) First, the same natural gas can be exported to Free-Trade Agreement countries or non-Free Trade Agreement countries from the same proposed FLEX facilities. Second, the alleged concerns of Sierra Club are not the market/geographic area where the LNG

will be consumed, but rather where the natural gas will be produced. Sierra Club has failed to demonstrate a reasonably close relationship between the FLEX proposed natural gas processing facilities and any specific environmental effect it would allegedly cause. In other words, Sierra Club has failed to demonstrate the requisite proximate cause.

Contrary to the assertion of Sierra Club, FLEX has not proposed that DOE use different standards in evaluating environmental and non-environmental factors in its public interest analysis. It is the position of FLEX that that standard should be what is reasonably foreseeable, that there be a reasonably close relationship between the actions FLEX proposes and the reasonably foreseeable alleged harm. In addition, the alleged harm to be identified by Sierra Club and that the NEPA analysis must not be based on pure conjecture. It must be reasonably related to the FLEX proposal.

#### **IV. THE FLEX APPLICATION IS IN THE PUBLIC INTEREST**

The merits of the FLEX proposal have already been clearly articulated in the Application and need not be reiterated here. The evidence in the record of this proceeding solidly supports the finding that the FLEX proposal is not inconsistent with the public interest and should be approved. Nothing is served by discussing again the deficiencies in Motion 1—those have already been addressed in the Answer of Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC to Motion to Intervene and Protest of Sierra Club, filed on May 15, 2012. However, FLEX does think it would be useful to add some clarification after the confusion evidenced in Sierra Club's Motion 2.<sup>2</sup>

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<sup>2</sup> However, to reduce the risk of future confusion, FLEX does note that Sierra Club may be misinformed about the location of the FLEX facilities. Sierra Club alleges that an endangered beetle is at the location of the current FLEX facilities while the additional LNG processing facilities will also be constructed. FLEX respectfully suggests that Sierra Club may be confusing the FLEX location with Cove Point.

First, there are several points on which FLEX and Sierra Club do agree. FLEX does agree with the position of Sierra Club that the DOE/FE consideration of exports follows from the Natural Gas Act and the subsequent delegation orders. Motion 2 at 4. FLEX also concurs that the public interest inquiry under the Natural Gas Act is grounded in access to a “reliable supply of gas at reasonable prices.” Motion 2 at 5; *see also United Gas Pipe Line Co v. McCombs*, 442 U.S. 529 (1979). FLEX agrees with the Sierra Club’s correct acknowledgement that, under the Natural Gas Act, the Federal Power Commission (now the Federal Energy Regulatory Commission) is the lead agency for NEPA purposes. 15 U.S.C. 717n; Motion 1 at 9. FLEX agrees that the law does provide that exports of natural gas to countries with which the United States has signed a Free Trade Agreement requires approval by DOE “without modification or delay.” Motion 2 at 3, also *see Energy Policy Act of 1992*. DOE has already granted two such export approvals for FLEX and those exports will use the same FLEX facilities as those that will be used to process natural gas for export to non-Free Trade Agreement countries. Those facilities will be required whether the processed natural gas (LNG) is exported to Free Trade Agreement countries or to non-Free Trade Agreement countries.

Furthermore, FLEX agrees with Sierra Club that when considering an export of natural gas to a non-Free Trade Agreement country, the controlling provision of law is Section 3 of the Natural Gas Act, which provides as follows:

(DOE/FE) shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. *15 U.S.C. 717b(a)*

It is well settled law that in evaluating an export request, the law first requires imposition of the statutory presumption that the export is in the public interest. As Christopher Smith, Deputy Assistant Secretary of Oil and Gas, stated in his testimony before the Senate Committee

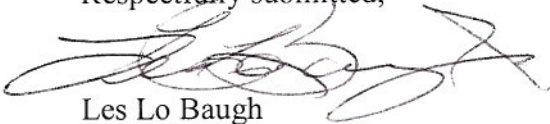
on Energy and Natural Resources (Nov. 8, 2011), DOE considers a long list of matters which fall within the scope of “public interest,” of which environmental issues are but one of many factors to be considered. Any party protesting an export application bears the burden of proof to demonstrate that the proposed export is not consistent with the public interest. As protestor, Sierra Club bears the burden to clearly establish that the proposed export is contrary to the public interest. Neither of the Sierra Club Motions provides any basis for DOE to depart from its traditional deference to FERC, as the lead agency for NEPA purposes, in its prior and recent handling of export applications. Nor does either Motion provide any credible evidence that the FLEX proposal is not consistent with the public interest or any lawful basis to deny the Application. Sierra Club has simply failed to bear its burden of proof. No reasonably foreseeable environmental harm has been identified by the Sierra Club. Nor has Sierra Club shown any potential environmental harm to have a reasonably close causal relationship with the proposed activities of FLEX.

## V. CONCLUSION

The record before the DOE/FE clearly demonstrates that the FLEX proposal is not inconsistent with the public interest. In fact, it will result in increased employment and new job creation, improve the balance of trade and payments of the United States, assist the United States in important foreign policy objectives, stimulate the economy, raise tax revenues on the federal, state and local levels, and encourage additional natural gas development. Sierra Club has inundated the record of these proceedings with voluminous material. In its two motions its has presented vigorous arguments against the exportation of LNG and the general production of natural gas in this country. Nevertheless, the record is clear. There is no credible evidence and no rational reason, consistent with NEPA and the procedures of DOE/FE, to find that the FLEX

Application is not consistent with the public interest. Accordingly, and for these reasons, the Application should be promptly approved by the DOE/FE.

Respectfully submitted,



Les Lo Baugh  
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Attorneys for  
Freeport LNG Expansion, L.P.  
FLNG Liquefaction, LLC

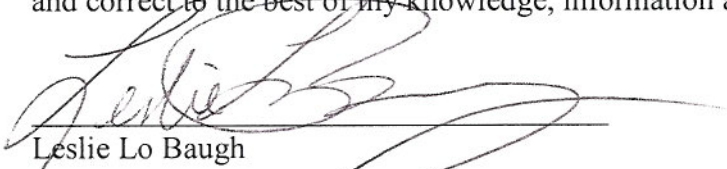
June 13, 2012

VERIFICATION  
and  
CERTIFIED STATEMENT

County of Los Angeles

State of California

I, Leslie Lo Baugh, being duly sworn on his oath, do hereby affirm that I am a duly authorized representative of Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC; that I am familiar with the contents of this application; and that the matters set forth therein are true and correct to the best of my knowledge, information and belief.

  
\_\_\_\_\_  
Leslie Lo Baugh

Sworn to and subscribed before me, a Notary Public, in and for the State of California, this 13th day of June, 2012.

  
\_\_\_\_\_  
Patricia Cormier Herron, Notary Public

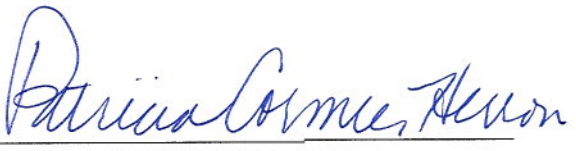




## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the movant and all other parties in this docket and on DOE/FE for inclusion in the FE docket in the proceeding in accordance with 10 C.F.R. § 590.107(b)(2011).

Dated at Los Angeles, California, this 13th day of June, 2012.

By:   
Patricia Cormier Herron  
Brownstein Hyatt Farber Schreck, LLP  
2029 Century Park East, Suite 2100  
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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12<sup>th</sup> day of June, two thousand twelve.

PRESENT: RALPH K WINTER,  
DENNY CHIN,  
CHRISTOPHER F. DRONEY,  
Circuit Judges.

- - - - -x

COALITION FOR RESPONSIBLE GROWTH  
AND RESOURCE CONSERVATION,  
DAMASCUS CITIZENS FOR SUSTAINABILITY,  
AND SIERRA CLUB,  
Petitioners,

v.

12-566-ag

UNITED STATES FEDERAL ENERGY  
REGULATORY COMMISSION,  
Respondent,

CENTRAL NEW YORK OIL AND GAS COMPANY,  
Intervenor.

- - - - -x

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FOR RESPONDENT: KARIN L. LARSON, Attorney (Michael A.  
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Washington, D.C.

FOR INTERVENOR:

ROBERT J. ALESSI (Jeffrey D. Kuhn, on the brief), DLA Piper, New York, New York (William F. Demarest, Jr., Michael A. Gatje, Husch Blackwell LLP, on the brief), Washington, DC.

Petition for review of two orders of the United States Federal Energy Regulatory Commission ("FERC").

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the petition is **DENIED**.

We assume the parties' familiarity with the facts and procedural history, which we reference only as necessary to explain our decision to deny the petition.

Petitioners Coalition for Responsible Growth and Resource Conservation, Damascus Citizens for Sustainability, and Sierra Club (collectively, the "Coalition") seek review of: (1) a Certificate of Public Convenience and Necessity (the "Certificate Order") granted by FERC pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to the Central New York Oil and Gas Company ("Central NY Oil") and (2) an order denying the Coalition's Request for Rehearing of the Certificate Order (the "Rehearing Order").

The Certificate Order authorizes Central NY Oil to build and operate the MARC I Hub Line Project natural gas pipeline -- 39 miles long and 30 inches in diameter -- to run through Bradford, Sullivan, and Lycoming Counties, Pennsylvania, and to build and operate related facilities.

Under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347, a federal agency proposing a "major Federal action[]" significantly affecting the quality of the human

environment" must prepare a detailed statement about the environmental impact of the proposed action -- an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C)(i); Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 12 (2d Cir. 1997). If an agency is uncertain as to whether the action requires an EIS, it must prepare an environmental assessment ("EA") that ["b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. §§ 1501.3, 1508.9(a)(1). If the agency finds that an EIS is not necessary, the agency will issue a finding of no significant impact ("FONSI"). 40 C.F.R. § 1508.9(a)(1).

In reviewing a decision whether to issue an EIS, this Court must consider: (1) "whether the agency took a 'hard look' at the possible effects of the proposed action" and (2) if the agency has taken a "hard look," whether "the agency's decision was arbitrary or capricious." Nat'l Audubon Soc'y, 132 F.3d at 14; see also 5 U.S.C. § 706(2)(A) (court may set aside an agency's decision not to require an EIS only upon a showing that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Under NEPA, this Court's role is to "insure that the agency considered the environmental consequences" of the federal action at issue. Town of Orangetown v. Gorsuch, 718 F.2d 29, 35 (2d Cir. 1983) (citation omitted); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) ("NEPA merely prohibits uninformed -- rather than unwise -- agency action").

Here, in considering Central NY Oil's application, FERC prepared an EA, issued a FONSI, and concluded that an EIS was not required. We conclude, based on our review of the administrative

record, that FERC took a "hard look" at the possible effects of the Project and that its decision that an EIS was not required was not arbitrary or capricious. Its 296-page EA thoroughly considered the issues. The Certificate Order carefully reviewed the concerns raised by the comments. The Rehearing Order addressed petitioners' concerns and further explained FERC's basis for issuing the FONSI.

The Coalition argues that FERC's cumulative impact analysis was inadequate. We disagree. FERC's analysis of the development of the Marcellus Shale natural gas reserves was sufficient. FERC included a short discussion of Marcellus Shale development in the EA, and FERC reasonably concluded that the impacts of that development are not sufficiently causally-related to the project to warrant a more in-depth analysis. In addition, FERC's discussion of the incremental effects of the project on forests and migratory birds was sufficient. FERC addressed both issues in the EA and has required Central NY Oil to take concrete steps to address environmental concerns raised by petitioners and others. For example, in the Certificate Order, FERC required Central NY Oil to comply with its Riparian Forested Buffer Enhancement Plan to address forest fragmentation. In Environmental Condition 17 of the EA, FERC required Central NY Oil to prepare and execute a Migratory Bird Impact Assessment and Habitat Restoration Plan. The environmental concerns identified by commenting parties, including the Environmental Protection Agency, were considered and addressed by FERC in the EA and the Rehearing Order.

Accordingly, we hold that FERC properly discharged its responsibilities under NEPA. We have considered all of petitioners' remaining arguments and conclude that they are without merit. The petition for review is **DENIED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk