

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

Rec'd DOE/FE 03/07/2013

Excelerate Liquefaction Solutions I, LLC

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FE Docket No. 12-146-LNG

**ANSWER OF EXCELERATE LIQUEFACTION SOLUTIONS I, LLC
TO MOTIONS TO INTERVENE, PROTESTS, AND COMMENTS**

ELS Liquefaction Solutions I, LLC (“ELS I”) submits this answer pursuant to Sections 590.303(e) and 590.304(f) of the Department of Energy’s (“DOE”) regulations¹ to the motion to intervene, protest, and comments submitted in this proceeding on February 4, 2013 by Sierra Club² and the motion to intervene and protest of the American Public Gas Association (“APGA”)³ (together, the “Protestors”) on the same day. Both Protestors challenge ELS I’s application for authorization to export domestically-produced natural gas as LNG as proposed in the captioned docket. Neither Protester has demonstrated an interest in this proceeding sufficient to merit its intervention. Even if the DOE, Office of Fossil Energy (“DOE/FE”) does grant intervention pursuant to 10 C.F.R. § 303(f), neither Sierra Club nor APGA has articulated reasonable, supported arguments sufficient to rebut the presumption that authorization of ELS I’s

¹ 10 C.F.R. §§ 590.303(e) and 590.304(f) (2012).

² Motion to Intervene, Protest, and Comments of Sierra Club, *ELS Liquefaction Solutions I, LLC*, FE Docket 12-146-LNG (filed Feb. 4, 2013) (“Sierra Club Protest”).

³ Motion for Leave to Intervene and Protest of the American Public Gas Association, *ELS Liquefaction Solutions I, LLC*, FE Docket 12-146-LNG (filed Feb. 4, 2013) (“APGA Protest”).

application is consistent with the public interest under the Natural Gas Act (“NGA”).⁴ In support of this answer, ELS I states the following:

I. PROCEDURAL BACKGROUND

On October 5, 2012, ELS I filed an application pursuant to Section 3 of the NGA⁵ with the DOE/FE for long-term authorization to export up to 10 million metric tons per annum of LNG, which is equivalent to approximately 1.33 billion cubic feet per day (“Bcf/d”), produced from domestic sources, for a 20-year period commencing on the earlier of the date of the first export or seven years from the date of issuance of the authorization requested (“Application”). Specifically, the Application, filed in FE Docket No. 12-146-LNG, sought to export LNG produced at the floating ELS I liquefaction project that ELS I proposes to locate in Calhoun County, Texas (“ELS Project”) to any country with which the United States does not have a Free Trade Agreement (“FTA”) requiring the national treatment for trade in natural gas; that has, or in the future develops, the capacity to import LNG; and with which trade is not prohibited by U.S. law or policy (together, “non-FTA Countries”). ELS I’s Application requested authorization to export LNG both on its own behalf and as agent for other parties who hold title to the LNG at the time of export. The Application was submitted after ELS I filed its application for authorization to export LNG to FTA countries requiring the national treatment for trade in natural gas in FE Docket No. 12-61-LNG, which the DOE/FE granted in Order No. 3128.⁶

⁴ 15 U.S.C. §§ 717-717z (2006).

⁵ 15 U.S.C. § 717b.

⁶ *ELS Liquefaction Solutions I, LLC*, FE Docket No. 12-61-LNG, DOE/FE Order No. 3128 (Aug. 9, 2012).

Notice of ELS I's Application was published in the *Federal Register* on December 6, 2012.⁷ That notice set February 4, 2013 as the deadline for filing all protests, motions to intervene, requests for additional procedures and written comments in the proceeding. APGA and Sierra Club each filed their protests on February 4, 2013. Answers to the February 4, 2013 filings were originally due 15 days after their submission, but ELS I filed a motion for an extension of time until March 6, 2013 to answer the protests, which motion DOE/FE granted on February 15, 2013.

DOE/FE gave notice on December 11, 2012 that it would incorporate its two-part cumulative impact study (the "LNG Export Study"), along with initial and reply comments, into each docket with a pending application to export LNG to non-FTA Countries.⁸

Concurrently with this proceeding, ELS I and Lavaca Bay Pipeline System, LLC ("Lavaca Bay Pipeline") have commenced a separate proceeding before the Federal Energy Regulatory Commission ("FERC") to obtain authorization under the NGA to construct, own and operate the ELS Project and an associated FERC-regulated pipeline. On November 5, 2012, ELS I and Lavaca Bay Pipeline requested the use of the pre-filing review process for the ELS Project at FERC. ELS I and Lavaca Bay Pipeline received approval of the request from FERC on November 20, 2012 and have commenced the pre-filing review process in Docket No. PF13-1-000.

⁷ Excelsior Liquefaction Solutions I, LLC; Application for Long-Term Authorization To Export Liquefied Natural Gas Produced From Domestic Natural Gas Resources to Non-Free Trade Agreement Countries for a 20-Year Period, 77 Fed. Reg. 72,843 (Dec. 6, 2012).

⁸ Notice of Availability of 2012 LNG Export Study and Request for Comments, 77 Fed. Reg. 73,627 (Dec. 11, 2012) ("LNG Export Study Notice"). The LNG Export Study consists of the Energy Information Administration's Effect of Increased Natural Gas Exports on Domestic Energy Markets published in January 2012 ("EIA Study") and NERA Economic Consulting's Macroeconomic Impacts of LNG Exports from the United States published in December 2012 ("NERA Study").

II. THE DOE/FE SHOULD DENY THE MOTIONS TO INTERVENE SUBMITTED BY APGA AND SIERRA CLUB

DOE/FE should deny APGA's and Sierra Club's motions to intervene. DOE regulations permit any person who seeks to become a party to a proceeding to file a motion to intervene "which sets out clearly and concisely the facts upon which the petitioner's claim of interest is based."⁹ Neither APGA nor Sierra Club satisfy this broad standard.

On February 4, 2013, Sierra Club filed a motion to intervene on behalf of its 21,527 members in Texas, as well as its national members, stating that its members living and working throughout the affected areas will bear the burden of paying increased gas prices.¹⁰ On the same day, APGA filed a motion to intervene, asserting that it is a national association of natural gas distribution companies who are "active participants in the domestic market for natural gas where they secure the supplies of natural gas to serve their end users."¹¹

DOE's regulations distinguish between intervention as a matter of right available to a state commission and intervention linked to a particular interest for "any other person who seeks to become a party to a proceeding."¹² In other words, the DOE distinguishes between intervention as a matter of right and as a matter of interest. Here, neither party is a state commission and may not intervene as a matter of right. Further, neither party has demonstrated sufficient interest in the ELS I proceeding to warrant granting its intervention request.

A. APGA's Intervention Should Be Denied

APGA has failed to establish a particular interest in this proceeding. APGA claims a broad interest in preventing any increase to domestic natural gas prices, but fails to

⁹ 10 C.F.R. § 590.303(b).

¹⁰ Sierra Club Protest at 2.

¹¹ APGA Protest at 2.

¹² 10 C.F.R. §§ 590.303(a) and (b).

explain how its general interest is particular or specific to the ELS I application itself. Rather, APGA attempts to use the ELS I docket to oppose any activity that might increase the price of natural gas. The general nature of APGA's claims is exemplified by APGA's similar protests of other LNG export applications.¹³ Because APGA has not sufficiently set forth the facts upon which its claims of interest are based, the DOE/FE should deny its request to intervene in the above captioned proceeding. Indeed, APGA raised its general concerns in this docket without obtaining intervenor status in response to DOE/FE's request for comments on the LNG Export Study.¹⁴ Accordingly, granting APGA status as an intervenor is inappropriate because it has failed to state a particular interest relevant to the Application and is unnecessary for APGA to assert its concerns with LNG exports generally.

B. Sierra Club's Intervention Should Be Denied

Sierra Club also fails to establish a particular interest in this proceeding. Sierra Club merely asserts that it has aesthetic, spiritual, personal, and professional interests in this proceeding and sets forth highly generalized economic and environmental interests to sustain its motion to intervene. For example, Sierra Club states that it has an interest in the Application proceeding due to the environmental and economic effects of natural gas production activities,¹⁵ "consequences of price changes upon members' finances,"¹⁶ concerns that exports of natural gas

¹³ See, e.g., Motion for Leave to Intervene and Protest of the American Public Gas Association, *Cameron LNG, LLC*, FE Docket No. 11-162-LNG (filed Apr. 23, 2012); Motion for Leave to Intervene and Protest of the American Public Gas Association, *Gulf Coast LNG Export, LLC*, FE Docket No. 12-05-LNG (filed Aug. 3, 2012); Motion for Leave to Intervene and Protest of the American Public Gas Association, *LNG Development Company, LLC*, FE Docket No. 12-77-LNG (filed Nov. 6, 2012).

¹⁴ Comments of APGA, *ELS Liquefaction Solutions I, LLC*, FE Docket 12-146-LNG (filed Jan. 24, 2013).

¹⁵ Sierra Club Protest at 2.

¹⁶ *Id.*

generally will result in increased use of coal and oil,¹⁷ and the need to ensure public disclosure of information under the National Environmental Policy Act (“NEPA”).¹⁸

These concerns are not sufficient to support Sierra Club’s motion to intervene in this proceeding. First, as discussed in Section V.C, the DOE/FE does not and is not required to consider natural gas production activities as part of its determination in this proceeding. As such, Sierra Club’s motion to intervene due to the environmental and economic effects of natural gas production does not establish a claim of interest in the proceeding. Second, the impact on Sierra Club members’ finances is inadequate to support Sierra Club’s intervention for the same reasons applicable to APGA: Sierra Club has not sufficiently set forth the facts upon which its claim of economic interest is based. Third, Sierra Club states generally that authorization of the Application will result in increased use of coal and oil, but it does not identify any specific displacement of natural gas resulting from DOE/FE granting the authorization. Sierra Club’s reasoning that export of LNG will increase the use of oil and coal is too general of a claim of interest to warrant Sierra Club’s intervention in the proceeding. Fourth, Sierra Club does not have a particular interest in the ELS I proceeding in ensuring public disclosure of information under NEPA. Instead, the DOE’s regulations provide for oversight of DOE’s NEPA compliance.¹⁹

Sierra Club’s stated interest regarding the price of natural gas, job losses in energy-intensive industries, and other economic concerns is disingenuous and inconsistent with its “campaigns dedicated to reducing American dependence on fossil fuels, including natural

¹⁷ *Id.* at 58.

¹⁸ *Id.* at 2.

¹⁹ *See* 10 C.F.R. § 1021.105.

gas[.]”²⁰ Sierra Club opposes the production and use of natural gas generally and avers that it has an interest in the ELS I proceeding “[t]o the extent changes in gas prices increase the use and production of coal and oil[.]”²¹ Securing low domestic natural gas prices or reducing natural gas price volatility, therefore, does not concern Sierra Club, as exemplified by Sierra Club’s position taken in other public forums. As one example, the Sierra Club has stated that abundant gas is not in the public interest because low natural gas prices delay the transition to renewable energy resources.²² This position cannot be reconciled with Sierra Club’s statements in the Sierra Club Protest. Sierra Club is not concerned with low gas prices or responding to market constraints that lead to price volatility and only now, in protesting LNG exports, pretends to be. The DOE/FE should not accept their manufactured “interest” in low domestic gas prices.

ELS I does not dispute Sierra Club’s right to submit comments in this proceeding in response to an invitation for public comment. In fact, Sierra Club has already made similar general arguments in this docket through its initial and reply comments made in response to DOE/FE’s invitation for comment on the LNG Export Study.²³ However, these highly generalized comments do not establish a sufficient interest in the ELS I proceeding to warrant granting intervention to Sierra Club.

To the extent that Sierra Club articulates specific concerns applicable to the activities of ELS I, they relate to the pre-filing process at FERC and not DOE/FE’s authorization of the Application. For example, Sierra Club states that it has an interest in environmental

²⁰ Sierra Club Protest at 3.

²¹ *Id.* at 2.

²² Sierra Club, *Look Before the LNG Leap: Why Policymakers and the Public Need Fair Disclosure Before Exports of Fracked Gas Start* at 16 (Feb. 25, 2013), <http://www.sierraclub.org/naturalgas/downloads/LOOK-BEFORE-YOU-LEAP.pdf>.

²³ Initial Comments of Sierra Club, *ELS Liquefaction Solutions I, LLC*, FE Docket 12-146-LNG (filed Jan. 24, 2013); Reply Comments of Sierra Club, *ELS Liquefaction Solutions I, LLC*, FE Docket 12-146-LNG (filed Feb. 25, 2013).

consequences associated with the ELS Project, including effects of the liquefaction process,²⁴ construction and operation of the facility,²⁵ shipping traffic,²⁶ and – less specifically – “emissions associated with all phases of the process from production to combustion.”²⁷ As discussed in Section IV.C, the FERC will address the environmental impacts of the ELS Project as the lead federal agency for NEPA review. Granting Sierra Club’s motion to intervene would result in duplication of efforts undertaken by FERC in Docket PF13-1-000 and, inevitably, delay of the Application proceeding. Accordingly, DOE/FE should deny Sierra Club’s motion to intervene.

III. LEGAL STANDARD

Federal authority over the importation and exportation of natural gas, including natural gas imported and exported in the form of LNG and the facilities used for such import or export, is exercised under Section 3 of the NGA.²⁸ This regulatory authority is currently divided between the DOE/FE, which has authority to approve the importation and exportation of the commodity of natural gas,²⁹ and the FERC, which has authority over the siting of facilities used to import and export natural gas.³⁰

Section 3(a) of the NGA requires that an applicant seeking to export natural gas from the United States to a foreign country first obtain an order of the DOE/FE authorizing such exports. The DOE/FE “shall issue such order upon application, unless, after opportunity for

²⁴ Sierra Club Protest at 61.

²⁵ *Id.* at 20.

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ 15 U.S.C. § 717b.

²⁹ Department of Energy, Delegation Order No. 00-002.00M to the Under Secretary § 1.16 (Aug. 27, 2012); Department of Energy, Redelegation Order No. 00-002.04E to the Assistant Secretary for Fossil Energy § 1.3 (Apr. 29, 2011).

³⁰ *See* 42 U.S.C. § 7172(f); Department of Energy, Delegation Order No. 00-004.00A to the Federal Energy Regulatory Commission (May 16, 2006), at § 1.21A.

hearing, it finds that the proposed exportation or importation will not be consistent with the public interest.”³¹ The DOE/FE has explained that “Section 3(a) creates a rebuttable presumption that a proposed export of natural gas is in the public interest, and DOE must grant such an application unless those who oppose the application overcome that presumption.”³² Therefore, the Protestors must show “that a grant of the requested authorization will be inconsistent with the public interest.”³³ The courts have found likewise.³⁴ Contrary to Sierra Club’s assertion that “DOE/FE [is charged] with determining whether or not a gas export application is in the public interest,”³⁵ Section 3(a) of the NGA does not require DOE/FE to find that an application is in the public interest.³⁶ Instead, the Protestors have the burden of making “an affirmative showing of inconsistency with the public interest to *deny* an application.”³⁷

DOE/FE conducts a public interest review for applications to export LNG to non-FTA Countries. This public interest review is based upon Policy Guidelines issued by the DOE

³¹ 15 U.S.C. § 717b(a).

³² See, e.g., *Sabine Pass Liquefaction, LLC*, FE Docket No. 10-111-LNG, Order No. 2961 at 28 (May 20, 2011) (citing to *Phillips Alaska Natural Gas Corp.*, 2 FE ¶ 70,317, Order No. 1473 at 13 (1999)) (“Sabine Pass Non-FTA Order”).

³³ *Id.* at 42.

³⁴ See, e.g., *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); *Panhandle Producers and Royalty Owners Ass’n v. 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”).

³⁵ *Sierra Club Protest* at 67 (“The NGA, and subsequent DOE delegation orders and regulations, charge DOE/FE with determining whether or not a gas export application is in the public interest.”).

³⁶ *W. Va. Pub. Svcs. Comm’n v. DOE*, 681 F.2d 847, 856 (1982) (“Section 3 therefore differs significantly from other sections under the NGA which condition agency approval upon a positive finding that the proposed activity will be in the public interest.”).

³⁷ *New England Fuel Institute v. ERA*, 875 F.2d 882, 889 (D.C. Cir. 1989) (quoting *Panhandle Producers and Royalty Owners Ass’n v. ERA*, 822 F.2d 1105, 1111 (D.C. Cir. 1987)) (emphasis in original). See also *Sabine Pass Non-FTA Order* at 29 (export opponents have “not shown that a grant of the requested authorization will be inconsistent with the public interest.”).

in 1984 to assist the DOE/FE in assessing applications under NGA Section 3(a).³⁸ While on their face the *Policy Guidelines* apply to natural gas imports, the DOE/FE has determined that the same policies will be applied to natural gas export applications.³⁹ The *Policy Guidelines* state that:

[t]he market, not government, should determine the price and other contract terms of imported [or exported⁴⁰] natural gas. The federal government's primary responsibility in authorizing imports [or exports] will be to evaluate the need for the gas and whether the import [or export] arrangement will provide the gas on a competitively priced basis for the duration of the contract while minimizing regulatory impediments to a freely operating market.⁴¹

DOE/FE has affirmed repeatedly that “[t]he goals of the *Policy Guidelines* are to minimize federal control and involvement in energy markets and to promote a balanced and mixed energy resource system.”⁴²

Pursuant to the *Policy Guidelines* and the DOE/FE's obligations under NEPA, the DOE/FE has described the public interest review criteria as:

the domestic need for the natural gas proposed to be exported; whether the proposed exports pose a threat to the security of domestic natural gas supplies; and any other issue determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. . . . [in addition to] consideration [of] the environmental effects of its proposed decisions.⁴³

³⁸ *New Policy Guidelines and Delegation Orders From Secretary of Energy to Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas*, 49 Fed. Reg. 6684 (Feb. 22, 1984) (“*Policy Guidelines*”).

³⁹ *See Phillips Alaska Natural Gas Corp.*, DOE/FE Order No. 1473, 2 FE ¶ 70,317, Order No. 1473 (1999) (“Order No. 1473”).

⁴⁰ *See id.*; *ConocoPhillips Alaska Natural Gas Corp.*, DOE/FE Order No. 2500 at 44 (Jun. 3, 2008) (“Order No. 2500”).

⁴¹ Order No. 1473 at 14 (quoting *Policy Guidelines*, 49 Fed. Reg. 6684 at 6685).

⁴² *See, e.g., Sabine Pass Non-FTA Order* at 28; Order No. 1473 at 14.

⁴³ *Sabine Pass Non-FTA Order* at 29.

In addition, DOE/FE has indicated that other considerations are relevant to the public interest determination. Other considerations may include benefits to regional economies in which the project is located, mitigation of the U.S. trade imbalance, and sustained economic support for natural gas exploration and development activities.⁴⁴ DOE/FE also noted the relevance of certain other factors and considerations “to inform [its] determination of the public interest in each case.”⁴⁵ Specifically, DOE/FE will consider factors such as energy consumption, production, natural gas prices, GDP, welfare, U.S. economic sector analysis, U.S. LNG export feasibility analysis, and any other factors included in the analyses.⁴⁶ As discussed below, the Protestors have not overcome the presumption that authorization of the ELS Project is consistent with the public interest.

IV. THE PROTESTORS HAVE FAILED TO OVERCOME THE REBUTTABLE PRESUMPTION THAT AUTHORIZATION OF THE APPLICATION IS IN THE PUBLIC INTEREST

For DOE/FE to deny ELS I’s Application, the Protestors bear the burden of providing “an affirmative showing of inconsistency with the public interest.”⁴⁷ Neither APGA nor Sierra Club have met this burden.

A. The Protestors’ Arguments Regarding Natural Gas Price Increases Do Not Support a Finding that the ELS I Application Is Inconsistent with the Public Interest

APGA contends that ELS I’s proposal to export domestic LNG to non-FTA Countries is inconsistent with the public interest for two primary reasons. First, APGA claims that LNG exports will increase domestic natural gas and electricity prices and thereby harm

⁴⁴ *Id.* at 34-38.

⁴⁵ LNG Export Study Notice, 77 Fed. Reg. at 73,628.

⁴⁶ *Id.* at 73,629.

⁴⁷ *New England Fuel Inst.*, 875 F.2d at 889 (quoting *Panhandle Producers and Royalty Owners Ass’n v. ERA*, 822 F.2d 1105, 1111 (D.C. Cir. 1987)).

households and certain domestic industries.⁴⁸ Second, APGA asserts that a convergence of domestic and international natural gas prices will ultimately make the Project uneconomical.⁴⁹

Sierra Club also claims that authorization of the Application will increase domestic natural gas prices, resulting in general harm to the U.S. economy, including through loss of jobs in energy intensive industries. Sierra Club states that ELS I “drastically overstates the benefits of the project while ignoring its costs.”⁵⁰

The Protestors provide scant affirmative evidence to support these assertions and do little to refute the significant benefits that the ELS Project will bring to local, regional, and U.S. economies through job creation, increased economic activity, and tax revenues. The Protestors have therefore failed to demonstrate that authorization of the Application is inconsistent with the public interest.

1. The Protestors Have Not Rebutted Evidence That Price Impacts Resulting From LNG Exports Will Be Minimal.

As part of their claim that the exportation of LNG will not be consistent with the public interest, the Protestors contend that ELS I has underestimated the increase in domestic prices for natural gas due to LNG exports, which will harm households and certain domestic industries.⁵¹ However, the Protestors have provided scant evidentiary support for their assertions, thereby failing to overcome the rebuttable presumption that the proposed exportation of LNG through the ELS Project is consistent with the public interest. As explained below, the

⁴⁸ APGA Protest at 8-11.

⁴⁹ *Id.* at 13-16.

⁵⁰ Sierra Club Protest at 19-20.

⁵¹ *See, e.g.*, APGA Protest at 6-7; Sierra Club Protest at 53-57.

evidence in the record demonstrates that LNG exports will have minimal impact on domestic gas prices.⁵²

a. Domestic Gas Price Projections

While the Protestors' claims focus on higher absolute domestic gas prices, the real issue is not the absolute price of domestic natural gas from LNG exports, but the change in natural gas prices attributable to the export of LNG. Other market factors besides LNG exports, such as increased gas demand for power generation,⁵³ will affect future domestic prices. To illustrate this, the Deloitte Report (appended to the ELS I Application) first developed a baseline projected price without LNG exports against which to estimate the impact of incremental demand from LNG exports.⁵⁴ The report predicts a 0.4% increase in U.S. gas prices as a result of ELS I's exports (1.33 Bcf/d) and a 4.3% increase in U.S. gas prices if up to 12 Bcf/d is exported.⁵⁵

Export Case	U.S. Citygate	Henry Hub	New York
1.33 Bcf/d	0.4%	0.4%	0.3%
3 Bcf/d	1.0%	1.7%	0.9%
6 Bcf/d	2.2%	4.0%	1.9%
9 Bcf/d	3.2%	5.5%	3.2%
12 Bcf/d	4.3%	7.7%	4.1%

⁵² See, e.g., Application, App'x F, Deloitte MarketPoint, *Analysis of Economic Impact of LNG Exports from the United States* at 1 (the "magnitude of domestic price increase that results from exports of natural gas in the form of LNG is projected to be quite small.") ("Deloitte Report").

⁵³ *Id.* at 5-6.

⁵⁴ Sierra Club criticizes the Deloitte MarketPoint model utilized in the Deloitte Report as an "input-output model" (see, e.g., Sierra Club Protest at 67), but the Sierra Club misunderstands the model. It is a general equilibrium model with dynamic supply and demand interactions.

⁵⁵ See Deloitte Report at 3, Figure 2.

Deloitte MarketPoint is not alone in its projection of only minor price increases from LNG exports. The Deloitte Report compared its projected prices at Henry Hub – where the ELS Project is likely to have the largest price impact due to its proximity to the ELS Project – to the projections in other studies, assuming total exports of 6 Bcf/d. Like Deloitte MarketPoint, these projections showed only small price increases, not exceeding 11%.⁵⁶

Study	Price without Exports (\$/MMBtu)	Price with Exports (\$/MMBtu)	Average Price Increase (%)
EIA	\$ 5.28	\$5.78	9%
Navigant (2010)	\$ 4.75	\$ 5.10	7%
Navigant (2012)	\$ 5.67	\$ 6.01	6%
ICF International	\$ 5.81	\$ 6.45	11%
Deloitte MarketPoint	\$ 6.11	\$ 6.37	4%

These conclusions are consistent with the NERA Study, which predicts in most scenarios about a 6% price increase.⁵⁷

Contrary to the Sierra Club’s assertion that ELS I’s analysis contains price forecasts that are “unreasonably low” when compared to forecasts of the EIA,⁵⁸ the Deloitte Report’s projected prices are in fact reasonable and consistent with market projections. As shown in ELS I’s Application, Deloitte’s projected natural gas prices are actually greater than projected by NYMEX forward prices, once adjusted for inflation.⁵⁹ Although the NYMEX forward prices for the time when LNG export projects are expected to come on-line have

⁵⁶ See *id.* at 18, Figure 15.

⁵⁷ See NERA Study at 10, Fig. 6. Price increases above the reference are mostly between 4%-14%, with 6% being the most common result. The two most significant increases, of 17% and 22%, occur where NERA assumes key LNG exporting regions do not increase exports in response to an increase in international prices.

⁵⁸ Sierra Club Protest at 53.

⁵⁹ Deloitte Report at 5-6.

increased slightly since the time of the report, they are still below the Deloitte Report's price projections.

b. Natural Gas Supply

Each of APGA's claim that the Deloitte Report does not properly account for future demand from energy-intensive industries⁶⁰ and Sierra Club's claim that the Deloitte Report overstates domestic supply⁶¹ fails to consider North American gas producers' ability to increase productive capacity in anticipation of LNG export volumes. The Deloitte Report explains that if one assumes that producers will fail to keep pace with domestic and international demand growth, as APGA has done, then the price impact of LNG exports, especially in early years of operations, will certainly be greater than if producers anticipate demand and make supplies available as needed.⁶² However, as the U.S. natural gas industry has shown over the last several years, it is more than capable of responding to market signals and developing supplies.⁶³ Numerous factors indicate that the U.S. natural gas industry will respond to LNG exportation through an increase in natural gas production activities. Given the long lead time (expected to be at least five years) required to permit, site, and construct an LNG export terminal, and the likelihood that LNG export projects will be linked to long-term supply contacts, producers will be able to prepare for the export volumes.⁶⁴

c. Natural Gas Demand

APGA makes the unsupported claim that future natural gas prices will be higher than projected by ELS I because the Deloitte Report fails to "adequately consider" future

⁶⁰ APGA Protest at 6-7.

⁶¹ Sierra Club Protest at 57.

⁶² Deloitte Report at 1, 19.

⁶³ Application at 18 (citing EIA's *Annual Energy Outlook 2012* ("AEO2012")) for support that the rate of U.S. shale gas production from 2006 to 2010 grew at an annual average rate of 48%).

⁶⁴ Deloitte Report at 19.

demand for natural gas from natural gas-intensive manufacturing sectors.⁶⁵ APGA provides no evidence to contradict the estimates in the Deloitte Report. These estimates were drawn from EIA's *AEO2012*,⁶⁶ which shows only a modest increase in gas demand in the industrial sector.⁶⁷ Overall, the Deloitte Report's projection of domestic demand is greater than EIA's because the Deloitte Report used demand projections from EIA's *AEO2012* while replacing EIA's electricity demand projections with its own sector modeling, which indicated that gas demand for U.S. power generation gas was greater than that predicted by EIA's *AEO2012*.⁶⁸ But even with its higher demand estimates, the Deloitte Report projects only small price increases from the export of LNG.

Sierra Club also contends that ELS I has underestimated price increases from LNG exports because the Deloitte Report did not consider the cumulative volumes associated with all pending LNG export applications.⁶⁹ Instead, Sierra Club favors the projected domestic natural gas price increases at Henry Hub in the EIA Study.⁷⁰ However, the EIA Study, which looked at no export volumes greater than 12 Bcf/d, "was limited to the relationship between export levels and domestic prices without, for example, considering whether or not those quantities of exports could be sold at high enough world prices to support the calculated domestic prices."⁷¹ NERA concluded in the NERA Study that "at the highest wellhead prices estimated by EIA, world demand for U.S. exports would fall far short of the levels of exports

⁶⁵ APGA Protest at 7.

⁶⁶ Deloitte Report at 5.

⁶⁷ *AEO2012*, Energy Information Administration at 81 ("Industrial natural gas use grows 8 percent from 2010 to 2035, reflecting relatively low natural gas prices.").

⁶⁸ Deloitte Report at 6.

⁶⁹ Sierra Club Protest at 54-56.

⁷⁰ *Id.*

⁷¹ NERA Report at 3.

assumed in the EIA Study.”⁷² In other words, the projected increase in natural gas prices cited by Sierra Club from the EIA Study are unlikely to occur. Indeed, the EIA’s *Annual Energy Outlook 2013* Early Release reference case projects that LNG export capacity will increase to 4.5 Bcf/d by 2027, with U.S. exports of domestically produced LNG of 1.6 Tcf, or 4.4 Bcf/d, at that time.⁷³

APGA mischaracterizes the Deloitte Report when it asserts, presumably by looking at price increases at different export levels in Table 2 of the Deloitte Report, that the report “concluded that the more gas the U.S. exports, the more domestic prices will increase.”⁷⁴ APGA fails to recognize that the relevant point is not whether prices will rise, but by how much in comparison with a scenario in which no exports occur. In this regard, the Deloitte Report concluded that the “magnitude of domestic price increase that results from exports of natural gas in the form of LNG is projected to be quite small.”⁷⁵

d. Impacts on Electric Generation

The Protestors’ arguments wrongly assume that price impacts from LNG exports will cause an increase in the amount of coal used for electric power generation. Sierra Club argues that LNG exports will “further increase air pollution by increasing the amount of coal used for domestic electricity production,”⁷⁶ while APGA contends that exports will prevent the replacement of coal-fired facilities on economic grounds.⁷⁷ The Protestors are wrong about the

⁷² *Id.* at 12.

⁷³ Energy Information Administration, *Annual Energy Outlook 2013* Early Release Overview at 1, 11 (Dec. 5, 2012), http://www.eia.gov/forecasts/aeo/er/executive_summary.cfm (“*AEO2013* Early Reference”).

⁷⁴ APGA Protest at 6.

⁷⁵ Deloitte Report at 1.

⁷⁶ Sierra Club Protest at 57.

⁷⁷ APGA Protest at 12.

effect of LNG exports on natural gas prices and the relative cost of coal-fired generation given the current and expected regulatory environment and other factors.

The Deloitte Report projects low price impacts from LNG exports on electric generation because gas demand for electricity generation will play a significant part in increases in gas prices, with or without LNG exports, such that price impacts on the U.S. generation fleet's fuel mix can not be reasonably attributed to LNG exports. In addition, the Deloitte Report forecasts that "natural gas consumption for electricity generation [will] drive North American natural gas demand during the next two decades," which "is projected to increase by about 50% (approximately 11 Bcf/d) over the next decade."⁷⁸ This increase in demand for gas-powered generation is attributable in part to competitive gas prices and current and anticipated environmental regulations, which are expected to raise the cost of coal-fired generation.⁷⁹

e. The Protestors Failed to Show that the Impact of Exports from the ELS Project on Domestic Natural Gas Prices is Not Consistent with the Public Interest

In sum, the Deloitte Report, together with the EIA Study and the NERA Study, project only a small impact on natural gas prices from LNG exports, which will have far less of an influence on households and domestic industries than is conceived by Protestors. By relying on nothing more than unsupported allegations, the Protestors have not refuted the Deloitte Report, let alone made the "affirmative showing of inconsistency with the public interest"⁸⁰ required to overcome the NGA's presumption that the ELS Project is in the public interest. In *Sabine Pass*, the DOE/FE approved the LNG exports requested, which were found to have only "a moderate increase in the domestic market price" while providing a number of public and

⁷⁸ Deloitte Report at 6.

⁷⁹ *Id.* See also AEO2013 Early Reference at 11 (describing the panoply of current and likely regulations to which coal-fired power plants must comply).

⁸⁰ *New England Fuel Institute*, 875 F.2d at 889.

economic benefits,⁸¹ because the opponents had not “shown that a grant of the requested authorization will be inconsistent with the public interest.”⁸² Likewise, here the Protestors have provided little evidence to support their assertions as to domestic price increases and the consequential effect on U.S. households and industries. Accordingly, the Protestors have failed to overcome the rebuttable presumption that the proposed exportation of LNG through the ELS Project is consistent with the public interest.

2. APGA’s Contention as to Price Convergence Is Neither Relevant Nor Supported by Fact

APGA opposes LNG exports generally because it believes that U.S. exports of LNG will raise domestic prices and lower international prices to the point of convergence.⁸³ APGA argues that convergence will render exportation of LNG uneconomical and eliminate an opportunity “to foster renewed U.S. manufacturing through competitive natural gas, energy, and processed material costs.”⁸⁴

APGA’s arguments are inconsistent with the DOE/FE’s well-established policy of minimizing federal control and involvement in energy markets.⁸⁵ The *Policy Guidelines* provide that “[t]he market, not government, should determine the price and other contract terms of imported natural gas.”⁸⁶ Denying exports because they may render exportation of LNG uneconomical would run counter to the DOE/FE’s policy of “promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements.”⁸⁷

⁸¹ Sabine Pass Non-FTA Order at 29.

⁸² *Id.* at 42.

⁸³ APGA Protest at 16.

⁸⁴ *Id.* at 16.

⁸⁵ *Policy Guidelines*, 49 Fed. Reg. at 6684-6685.

⁸⁶ Sabine Pass Non-FTA Order at 28 (affirming application of *Policy Guidelines* to LNG exports).

⁸⁷ *Id.* at 28-29.

In any event, APGA has not supported its assertion that domestic natural gas prices will converge with international natural gas prices as a consequence of LNG exports. Differences between U.S. citygate prices and international gas prices are likely to continue to exist, notwithstanding the increase of LNG exports, because of the cost of transporting natural gas as LNG to the international destination.⁸⁸ The NERA Study determined that LNG transportation costs reflect five segments of costs: 1) pipeline shipping costs to move gas from the wellhead to the liquefaction facility; 2) liquefaction cost; 3) shipping cost between the liquefaction to regasification facilities; 4) regasification cost; and 5) the pipeline shipping cost to move gas from the regasification facility to the citygate terminal in the demand region.⁸⁹ Because of these costs, the NERA Study determined that U.S. prices will never get closer to any international price for LNG than “the cost of liquefaction plus the cost of transportation to and regasification in the final destination.”⁹⁰

For these reasons, APGA’s contention as to price convergence does not overcome the rebuttal presumption that the Project is consistent with the public interest.

B. The Protestors Have Not Refuted the Benefits of the ELS Project

APGA and Sierra Club do little to refute the significant benefits that the ELS Project will bring to local, regional, and the U.S. economies through job creation, increased economic activity, and tax revenues. Although the Protestors claim that the Project will be

⁸⁸ Deloitte Center for Energy Solutions and Deloitte MarketPoint LLC, *Exporting the American Renaissance - Global impacts of LNG exports from the United States* at 10 (2013) (“[E]volution to a global gas price is highly unlikely because the transportation cost for gas, unlike for oil, is just too high for this convergence to occur”), http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Energy_us_er/us_er_GlobalImpactUSLNGExports_AmericanRenaissance_Jan2013.pdf

⁸⁹ NERA Study at 98-99.

⁹⁰ *Id.* at 76.

detrimental to the overall U.S. economy because job losses stemming from LNG exportation will exceed job creation benefits,⁹¹ their assessment in this respect is quite limited.

First, the Protestors' arguments focus almost exclusively on the job creation resulting from the construction of the facility, without due consideration to other potential primary and secondary impacts of the ELS Project on job creation. For example, as the B&V Report appended to ELS I's Application indicates, in addition to the thousands of jobs created or supported each year from the ELS Project's initial investment, the ELS Project's annual O&M budget of approximately \$45 million also is likely to create or support hundreds of additional jobs in the energy and other sectors, due in large part to secondary impacts from indirect and induced benefits, as well as thousands of other jobs from upstream impacts.⁹² In this regard, while Sierra Club discounts the reliability of the underlying IMPLAN model utilized to reach these assessments,⁹³ input-output models like IMPLAN have been widely accepted for decades as a valuable tool to generate accurate impact estimates arising from new investment or other changes in economic activity.⁹⁴ In any event, Sierra Club has not proffered any competing arguments to the specific findings of the B&V Report except to cite Sierra Club's own criticism of the NERA Study's conclusions to refute these predictions.

The B&V Report reviewed impacts from the first phase of construction of the ELS Project, but noted the potential for additional job creation if ELS I completes the second

⁹¹ Sierra Club Protest at 65; APGA Protest at 10-11.

⁹² Application, App'x E, Black & Veatch, *Economic Impacts of the Lavaca Bay LNG Project - Estimates of the Construction and Operational Impacts on the Local, State and U.S. Economies* at 35 ("B&V Report").

⁹³ Sierra Club Protest at 6.

⁹⁴ B&V Report at 13 ("Two widely used input-output models are the RIMS II Input-Output model developed by the US Bureau of Economic Analysis, and the IMPLAN (Impact analysis for Planning) model, which is probably the most widely used model for large investment studies. IMPLAN was used in this analysis due to its widespread use and its multi-regional modeling capabilities.").

phase of construction.⁹⁵ The second phase has the potential to create construction jobs, double the productive capability of the ELS Project, and induce additional employment opportunities from associated investments in shipping and export operations located in Lavaca Bay made possible with project dredging.⁹⁶ Accordingly, job creation resulting from the ELS Project exceeds the scope of benefits considered by the Sierra Club Protest.

Second, the Protestors ignore the benefits of increased economic activity and tax revenues that the ELS Project will bring to local, regional, and the U.S. economies. Overall, the combined construction expenditures from the ELS Project are estimated to contribute over \$2 billion in value added, account for nearly \$3.31 billion in total economic output, and generate \$154 million in state and local tax revenues and more than \$241 million in federal tax revenues.⁹⁷ On an annual basis, the combined O&M expenditures from the ELS Project are estimated to contribute nearly \$66 million in value added, account for more than \$102 million in total economic output, and generate more than \$3.7 million in state and local tax revenues and nearly \$6 million in federal tax revenues.⁹⁸ Such figures demonstrate that the ELS Project will have a positive economic impact on not only its “Primary Impact Area,”⁹⁹ but also the Texas and U.S. economies. As such, the Protestors’ arguments as to the economic implications of the Project have failed to overcome the rebuttal presumption that the Project is consistent with the public interest.

⁹⁵ *Id.* at 3. *See also* Application at 7.

⁹⁶ B&V Report at 36.

⁹⁷ *Id.* at 35.

⁹⁸ *Id.*

⁹⁹ The Primary Impact Area during construction consists of eighteen counties in Texas located wholly or substantially within an 80-mile radius of the ELS Project site. The Primary Impact Area during operation consists of the six counties in Texas located wholly or substantially within a 60-mile radius of the ELS Project. *See id.* at 14-15.

C. Sierra Club’s Environmental Arguments Are Properly Raised Before the FERC, Not DOE/FE

Sierra Club protests that authorization of ELS I’s Application is not in the public interest because the ELS Project and associated LNG exports will cause environmental harm by encouraging the production of domestic natural gas and the construction of the export facilities, and a likely increase in coal-fired electricity generation.¹⁰⁰ To the extent that Sierra Club articulates specific environmental concerns applicable to the activities of ELS I, they are properly raised before FERC in the NEPA review for the ELS Project. Accordingly, ELS I defers its substantive responses to the stated environmental concerns of Sierra Club to the EIS process led by FERC.

NEPA requires a Federal agency proposing to undertake a major action to evaluate the environmental consequences of that action.¹⁰¹ The legal framework established by the NGA and NEPA requires the FERC, and not DOE/FE, to conduct an environmental review under NEPA with respect to an LNG export project.¹⁰² Under the NGA, the FERC, which has the exclusive authority for the siting, construction, and operation of export facilities,¹⁰³ is the lead agency for conducting the environmental review “for the purposes of coordinating *all applicable Federal authorizations* and for the purposes of complying with [NEPA].”¹⁰⁴ The DOE/FE is a cooperating agency.¹⁰⁵ Because it is the lead agency, the FERC, not the DOE/FE, is responsible for evaluating the environmental consequences of the ELS Project, which includes

¹⁰⁰ Sierra Club Protest at 4.

¹⁰¹ 40 C.F.R. § 1502.4.

¹⁰² 15 U.S.C. § 717n(b).

¹⁰³ *Id.* § 717b(e).

¹⁰⁴ *Id.* § 717n(b)(1) (emphasis added).

¹⁰⁵ The Council on Environmental Quality (“CEQ”) regulations implementing NEPA define “cooperating agency” as “any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect” to proposed actions for which a NEPA analysis is prepared. *See* 40 C.F.R. § 1508.5.

preparing an environmental impact statement (“EIS”): “Agencies are not required to duplicate the work done by another federal agency which also has jurisdiction over a project. NEPA regulations encourage agencies to coordinate on such efforts.”¹⁰⁶

The FERC initiated its NEPA review of the ELS Project in FERC’s pre-filing process in FERC Docket No. PF13-1-000. The FERC’s preparation of the EIS begins with the identification of issues through public comment in scoping meetings and written comments submitted during the pre-filing period. During the pre-filing process, ELS I and Lavaca Bay Pipeline will submit draft environmental resource reports to be reviewed by the FERC and interested stakeholders. Following the pre-filing process, ELS I and Lavaca Bay Pipeline will file environmental resource reports to accompany the application to receive authorization to construct the export facilities. Interested stakeholders will have ample opportunity to comment on these submissions and a draft EIS issued by FERC prior to its development of a final EIS. The process will also allow DOE/FE, as a cooperating agency, the opportunity to ensure that the EIS meets its responsibilities under NEPA and Section 3 of the NGA.¹⁰⁷ It is in this NGA-mandated NEPA review by the FERC where Sierra Club should raise any specific environmental concerns regarding the ELS Project.

V. SIERRA CLUB’S NEPA ARGUMENTS SHOULD BE REJECTED

A. The DOE/FE May Issue a Conditional Authorization

Contrary to Sierra Club’s assertions,¹⁰⁸ the DOE/FE may conditionally approve ELS I’s Application prior to completion of an environmental review under NEPA.¹⁰⁹ This long-

¹⁰⁶ *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1215 (11th Cir. 2002).

¹⁰⁷ See 10 C.F.R. § 1021.342 (adopting CEQ’s regulation, 40 C.F.R. § 1506.3(c), permitting adoption of lead agency’s EIS).

¹⁰⁸ *Sierra Club Protest* at 17.

¹⁰⁹ 42 U.S.C. §§ 4321-4370h.

established approach is consistent with the NGA and NEPA, ensures efficient use of federal resources, and avoids unnecessary duplication of work while ensuring that the environmental effects of a federal action are adequately assessed.¹¹⁰

When the FERC is the lead agency for purposes of conducting an environmental review, DOE regulations and long-standing DOE/FE practice permit the issuance of conditional authorizations.¹¹¹ The Sierra Club’s reliance on 10 C.F.R. § 2021.211 for its claim that DOE/FE cannot issue a conditional authorization is unfounded.¹¹² That regulation states that “[w]hile DOE is preparing an EIS *that is required under §1021.300(a) of this part*, DOE shall take no action concerning the proposal that is the subject of the EIS before issuing [a Record of Decision].”¹¹³ Because, as discussed above, the FERC – not the DOE/FE – is the lead agency for purposes of NEPA review under Section 15 of the NGA,¹¹⁴ an EIS is not “required under § 1021.300(a),” and, therefore, 10 C.F.R. §1021.300(a) does not apply here.

Sierra Club’s reliance on the CEQ’s NEPA regulations at 40 C.F.R. § 1506.1 is also misguided.¹¹⁵ According to the Sierra Club, this regulation prohibits agencies from taking an action on a proposal prior to completion of NEPA review if that action tends to “limit the choice of reasonable alternatives” or “determine subsequent development.”¹¹⁶ As an initial matter, the language quoted by Sierra Club is found in Section 1506.1(c), which applies to

¹¹⁰ See 40 C.F.R. Part 1501. See also *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d at 1215 (“Agencies are not required to duplicate the work done by another federal agency which also has jurisdiction over a project. NEPA regulations encourage agencies to coordinate on such efforts.”).

¹¹¹ 10 C.F.R. § 590.402.

¹¹² Sierra Club Protest at 17 (“Here, because an EIS is required, but has not yet been completed, DOE/FE regulations specifically prohibit taking any action prior to completion of the EIS”).

¹¹³ 10 C.F.R. § 1021.211 (emphasis added).

¹¹⁴ 15 U.S.C. § 717n(b)(1).

¹¹⁵ Sierra Club Protest at 17.

¹¹⁶ *Id.* (quoting 40 C.F.R. § 1506.1(c)).

“program environmental impact statements” and is not applicable here, as the DOE/FE has not determined that a programmatic EIS for all LNG exports is necessary. In any event, a conditional order as requested by ELS I would violate neither the language incorrectly relied upon by the Sierra Club, nor any applicable provision of Section 1506.1.

A conditional authorization would neither have an adverse effect on the environment, nor prevent the consideration of alternatives, as alleged by Sierra Club. First, because the FERC is the lead agency for purposes of environmental review, a DOE/FE authorization has no effect on the FERC’s alternative analysis. Because construction of the export facilities may not commence until the FERC authorizes such construction following its NEPA review, an authorization by DOE/FE does not have any effect on the availability of alternatives that FERC may consider. In *Sabine Pass*, the FERC considered various alternatives to the Sabine Pass project *after* the issuance of the Sabine Pass Non-FTA Order, including a no-action alternative and alternative fossil energy sources.¹¹⁷ In other words, a conditional authorization from the DOE/FE depends on and anticipates a thorough review of the type undertaken by the FERC in *Sabine Pass*.

Nor will the “conditional” approval influence the NEPA process, as suggested by Sierra Club. Sierra Club argues that by rejecting the “no-action” alternative, FERC was treating the DOE/FE decision as “already made” and that the “[Sabine Pass Environmental Assessment prepared by FERC] was not truly designed [to] assist DOE/FE in deciding whether to allow gas exports.”¹¹⁸ This statement is wrong on several counts. First, Sierra Club points to no statement by the FERC that it has limited its environmental review because of a prior conditional order

¹¹⁷ See *Sabine Pass Liquefaction, LLC*, FE Docket No. 10-111-LNG, Order No. 2961-A at 8 (Aug. 7, 2012) (“Sabine Pass Final Non-FTA Order”).

¹¹⁸ Sierra Club Protest at 19.

issued by DOE/FE. In fact, the DOE/FE has stated that it reviews the FERC-prepared NEPA analysis, and acknowledges that the DOE/FE would independently evaluate environmental impacts based upon the EIS prepared by the FERC.¹¹⁹ Based on that review, the DOE/FE will determine whether further environmental analysis is necessary.¹²⁰ The DOE/FE itself, therefore, has acknowledged that a final decision is not “already made.”

Second, the FERC has rejected the no-action alternative in proceedings other than those in which the DOE/FE has already made a preliminary determination, including projects for which there are no cooperating Federal agencies. For example, in *Central New York Oil and Gas Company, LLC*,¹²¹ the FERC used similar language in rejecting the no-action alternative,¹²² even though there was no cooperating agency in that proceeding. The reason articulated by the FERC there was the same one articulated by the FERC in *Sabine Pass*; namely, the no-action alternative would not meet the project objectives. Past FERC practice, therefore, establishes that FERC’s determinations regarding the “no-action” alternatives are independent of, and in no way influenced by, any conditional order issued by the DOE/FE.

Further, because the NGA designates FERC as the exclusive authority for the siting, construction, expansion, or operation of an LNG terminal,¹²³ no construction can occur until FERC issues its authorization. A conditional authorization will, therefore, have no adverse environmental impact.

¹¹⁹ See *Sabine Pass Final Non-FTA Order* at 27 (“DOE/FE is responsible for conducting an independent review of the results of the Commission’s efforts and determining whether the record needs to be supplemented in order for DOE/FE to meet its statutory responsibilities under section 3 of the NGA and under NEPA.”).

¹²⁰ *Id.* at 6-7.

¹²¹ 137 FERC ¶61,121 (2011).

¹²² *Id.* at P 127 (“We agree that the suggested alternatives are not reasonable because they do not meet the purpose and need for the proposed project.”).

¹²³ 15 U.S.C. § 717b(e)(1).

Contrary to Sierra Club's allegation, a conditional order approving an export project would be neither unwarranted nor – even prior to the conditional authorization issued in *Sabine Pass*¹²⁴ – unprecedented. Sierra Club argues that, contrary to earlier conditional approvals for import projects, “DOE/FE cannot make even a preliminary determination whether export proposals, which may subject the public to massive environmental harms, are in the public interest without balancing exports benefits against environmental and other costs.”¹²⁵ Sierra Club's argument is not supported by law or DOE/FE precedent; Sierra Club cites no statutory provision that draws a distinction between imports and exports for purposes of NEPA review.

Moreover, the DOE/FE has in fact issued conditional authorizations for exports pending environmental review as contemplated by DOE regulations. As early as 1989, the DOE/FE issued conditional authorizations under Section 3 of the NGA for exports of natural gas. In *Great Lakes Gas Transmission Company*, the DOE/FE considered an application for the export of natural gas to Canada while the FERC, which was reviewing an application under Section 7 of the NGA for the associated pipeline facilities, acted as the lead agency for purposes of environmental review. The DOE/FE issued a conditional order approving gas exports to Canada,¹²⁶ stating that “the DOE will independently review the analysis and take the appropriate action to complete the DOE's NEPA responsibilities. The [DOE/FE] will then reconsider this conditional order to import natural gas for firm deliveries beginning in 1990 and issue a final

¹²⁴ That authorization was “conditioned on the satisfactory completion of [the] environmental review process in the [FERC proceeding] and on issuance by the DOE/FE of a finding of no significant impact or a record of decision pursuant to NEPA.” *Id.* at 43 (citing 10 C.F.R. § 590.402).

¹²⁵ Sierra Club Protest at 18.

¹²⁶ *Great Lakes Gas Transmission Co.*, 1 FE ¶ 70,256 (1989).

opinion and order.”¹²⁷ This is precisely the approach requested by ELS I here, and Sierra Club’s arguments to the contrary are supported by neither the law, nor fact.

B. A Programmatic EIS Is Not Required

Sierra Club alleges that the DOE/FE should prepare a programmatic EIS that considers the impacts of all gas export proposals at once, arguing that “DOE/FE is making what is functionally a programmatic decision to radically alter the U.S. natural gas market by allowing for large - scale LNG export.”¹²⁸ A programmatic EIS is neither required nor appropriate.

As Sierra Club acknowledges,¹²⁹ DOE/FE has no obligation to prepare a programmatic EIS.¹³⁰ Moreover, a programmatic EIS is intended to allow the consideration of the “broad environmental consequences attendant upon a wide-ranging federal program.”¹³¹ Under the CEQ regulations, a single EIS is appropriate for “[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action.”¹³² The ELS Project is not part of a coordinated federal program. Nor is it connected to other export projects that may or may not be developed across the country. Rather, it is a discrete and independent proposal to export LNG from Calhoun County, Texas, pursuant to Section 3 of the NGA.

The D.C. Circuit has explained that in determining whether to prepare a programmatic EIS the agency should consider whether the “programmatic EIS [could] be

¹²⁷ *Id.* at 4. DOE/FE issued a final opinion and order in the docket the following year. *See Great Lakes Transmission Co.*, 1 FE ¶ 70,353 (1990).

¹²⁸ Sierra Club Protest at 14.

¹²⁹ *Id.* at 13.

¹³⁰ *See Nat’l Wildlife Fed. v. Appalachian Reg. Comm’n*, 677 F.2d 883, 888 (D.C. Cir. 1981) (finding agency had discretion on whether to prepare a programmatic EIS).

¹³¹ *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 159 (D.C. Cir. 1985) (quoting *Nat’l Wildlife Fed. v. Appalachian Reg. Comm’n*, 677 F.2d at 888).

¹³² 40 C.F.R. § 1502.4(a).

sufficiently forward looking to contribute to the decision-makers' basic planning of the overall program” and whether not preparing a programmatic EIS would unreasonably constrict the scope of environmental evaluation.¹³³ Here, where DOE/FE does not have an “overall program” for the export of LNG, and where there will be a full environmental evaluation of the ELS Project by the FERC, a programmatic EIS in which DOE/FE looks at other gas export projects that may or may not be built in different regions of the country and at different times is neither necessary nor useful.

C. An Analysis of Future Gas Production Wells is Not Required

Sierra Club devotes a significant portion of the Sierra Club Protest discussing the supposed indirect impacts that it claims will arise from natural gas production activities induced by natural gas exports.¹³⁴ This discussion is premised upon Sierra Club's flawed conclusion that the DOE/FE is required to conduct a NEPA analysis that examines, within the scope of the environmental impacts of the project, natural gas production activity that is under the jurisdiction of neither the DOE/FE nor the FERC. The natural gas production activities that it opposes are largely subject to the jurisdiction of state authorities.¹³⁵ Further, as discussed above, the FERC has been expressly charged by Congress to serve as the lead agency for the purposes of coordinating all applicable Federal authorizations and complying with NEPA in connection with LNG export projects. Accordingly, the environmental issues raised by the Sierra Club are more appropriately brought in one of those forums. Further, even if the DOE/FE were to consider the environmental issues raised by the Sierra Club in this proceeding, it should reject Sierra Club's

¹³³ *Foundation on Economic Trends*, 756 F.2d at 159.

¹³⁴ Sierra Club Protest at 25-53.

¹³⁵ See, e.g., *Central N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121 at P 93, *reh'g denied*, 138 FERC ¶ 61,104 at P 8 (2011), *affirmed*, *Coalition for Responsible Growth & Res. Conservation v. FERC*, No. 12-566-ag (2d Cir. Jun. 12, 2012).

invitation to engage in unreasonable speculation regarding the supposed indirect impacts on increased natural gas production.

1. Development of Shale Gas Production Is Not a Reasonably Foreseeable Effect of the ELS Project that Can Be Meaningfully Analyzed under NEPA

Sierra Club claims that induced natural gas production is a “reasonably foreseeable” effect of the ELS Project and, therefore, Sierra Club concludes that DOE/FE must analyze any such production under NEPA.¹³⁶ Sierra Club’s conclusion is contrary to applicable case law and DOE/FE and FERC precedent, and would not serve the policy goals of NEPA. The CEQ regulations require agencies conducting an analysis of a major federal action under NEPA to consider the environmental effects of their proposed actions, including: (1) direct effects, which are caused by the action and occur at the same time and place; and (2) indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.¹³⁷ “An impact is ‘reasonably foreseeable’ if it is ‘sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.’”¹³⁸ Further, the NEPA’s “requirement that the agency describe the anticipated environmental effects of proposed action is subject to a rule of reason. The agency need not foresee the unforeseeable[.]”¹³⁹ While “NEPA requires that an EIS engage in *reasonable* forecasting” and speculation,¹⁴⁰ it does not require an agency to “engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful consideration.”¹⁴¹

¹³⁶ Sierra Club Protest at 28.

¹³⁷ 40 C.F.R. § 1508.8 (2012).

¹³⁸ *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)).

¹³⁹ *Scientists’ Institute for Public Information v. Atomic Energy Comm’n*, 481 F. 2d 1079, 1092 (1973).

¹⁴⁰ *N. Plains Res. Council v. Surface Trans. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (emphasis added).

¹⁴¹ *Id.* at 1078 (internal citation omitted).

Although ELS I's Application estimates that some of the gas it receives for liquefaction may be produced from shale plays, it "does not, and really cannot, estimate how much of the export volumes will come from current shale gas production and how much, if any, will be new production 'attributable' to the project."¹⁴² As the FERC noted in *Sabine Pass*, the development of shale gas production may increase for a variety of reasons, many of which are beyond the jurisdiction of the FERC and the DOE/FE under the NGA.¹⁴³ Accordingly, "the location and subsequent production activity is unknown, and too speculative to assume based on the interconnected interstate natural gas pipeline system."¹⁴⁴ Therefore, the DOE/FE – like the FERC – simply would not have the data or analytical tools necessary for it to conduct "a meaningful analysis of when, where, and how shale-gas development will occur."¹⁴⁵ "[S]ince any environmental impacts from the additional gas production induced by gas export cannot be meaningfully analyzed by [the FERC or the DOE/FE], CEQ regulations do not require that [the agencies] consider such impacts as indirect impacts of [the proposed] project."¹⁴⁶

While ELS I has provided economic analysis regarding the projected natural gas volumes potentially associated with the operation of the proposed ELS Project, these economic models cannot be considered as a proxy for any useful environmental data regarding the specific location, timing, or impact of natural gas production activities. The models ELS I has used to project where production might be sourced over a broad geographic area based upon economic data are not suited for the type of environmental data and modeling that is typically used to support meaningful analysis under NEPA. Neither were ELS I's economic projections intended

¹⁴² *Sabine Pass Liquefaction, LLC*, 139 FERC ¶ 61,039, at P 98, *reh'g denied*, 140 FERC ¶ 61,076 (2012).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Cheniere Creole Trail Pipeline, L.P.*, 142 FERC ¶ 61,137, at P 59 (2013).

to limit the sources of supply to which the ELS Project will have access. ELS I explained in its application that “[a]s a result of the ELS Terminal’s potential to access nine (9) major interstate and intrastate natural gas pipelines, and indirect access to the entire interconnected North American natural gas pipeline grid, the ELS Project’s customers will have a wide variety of stable and economical supply options from which to choose.”¹⁴⁷

Even if it were possible to determine with any degree of certainty the specific gas play(s) where ELS I’s customers will source their gas supplies, this would not be any more useful in conducting an environmental analysis. As the FERC recently explained in *Tennessee Gas Pipeline Co., L.L.C.*, the fact that the agency might be aware of the general location of a potential well does not “provide the degree of specificity necessary for an in-depth review and meaningful analysis” under NEPA.¹⁴⁸ “Knowing the location of a permitted, yet unconstructed, well does not mean that other specific factors are known such as the specific location of gathering lines, access roads, and other associated infrastructure and related facilities[.]”¹⁴⁹ Accordingly, the fact that several shale plays were identified as potential sources of supply for the ELS Project does not make the impacts from any additional wells that might be produced in any of those plays “reasonably foreseeable” or otherwise provide the information necessary for an agency to engage in a meaningful analysis of such impacts.

Sierra Club asserts that adequate tools exist to assist DOE/FE in determining where increased gas production will occur. Sierra Club suggests that the EIA, through its National Energy Modeling System, and Deloitte MarketPoint, in its “World Gas Model,” have the tools necessary to determine where increased production will occur. Thus, concludes Sierra

¹⁴⁷ Application at 12.

¹⁴⁸ 139 FERC ¶ 61,161, at P 190 (2012), *reh’g denied*, 142 FERC ¶ 61,025 (2013).

¹⁴⁹ *Id.*

Club “there is no technical barrier to modeling where exports will induce production going forward.”¹⁵⁰ As the FERC responded recently to Sierra Club’s requests that it consider the EIA’s January 2012 report, “Effect of Increased Natural Gas Exports on Domestic Energy Markets,” this type of economic analysis “provides no assistance for [the agency] to reasonably estimate how much of the gas [exported by the project] will come from current versus future shale gas production, or when and where gas [exported] will be produced, much less any associated environmental impacts of any new gas production from shale.”¹⁵¹ Similarly, the economic models cited by Sierra Club in its protest would not provide the tools necessary to allow the DOE/FE or the FERC to engage in a meaningful environmental analysis.

2. The Authority Cited by Sierra Club Does Not Support Its Position

The cases that Sierra Club cites for the unqualified assertion that “natural resource production and other analogous upstream impacts induced by new infrastructure development must be considered in NEPA”¹⁵² are inapposite to the facts of this proceeding. For example, Sierra Club cites *Northern Plains Resource Council v. Surface Transportation Board*,¹⁵³ where the Ninth Circuit held that the Surface Transportation Board (“STB”) erred by not considering the cumulative impacts of coal bed methane (“CBM”) well development as part of the agency’s NEPA analysis of a proposed new rail line intended to serve specific new coal mines. In that proceeding, the information available to the agency regarding the location, timing, and magnitude of the CBM wells was specific and substantial. For example, the court found that STB was aware of the route of the proposed line, “including the terrain and counties in which it

¹⁵⁰ Sierra Club Protest at 27.

¹⁵¹ *Cheniere Creole Trail Pipeline, L.P.*, 142 FERC ¶ 61,137, at P 57.

¹⁵² Sierra Club Protest at 27.

¹⁵³ 668 F.3d 1067, 1081-82 (9th Cir. 2011).

would operate.”¹⁵⁴ Given the specific data regarding the production wells that would necessarily be served by the new rail line, the court found that an analysis of the cumulative impact of these wells was required. Unlike the circumstances in *Northern Plains*, there is no data regarding the specific timing, location or scope of any potential future production well development associated with the ELS Project. As discussed above, it is doubtful that any such information could be produced to provide the FERC with the analytical tools to engage in a meaningful analysis under NEPA.

Sierra Club claims that “a decision by DOE/FE to rely upon the supposed economic benefits of increased production, while simultaneously ignoring the impacts of this production, would be squarely inconsistent with *Northern Plains*.”¹⁵⁵ To the extent that Sierra Club is suggesting that the DOE/FE must ignore the general economic benefits of the ELS Project under its public interest determination pursuant to Section 3 of the NGA, unless sufficient information is also available to permit a meaningful analysis of any related environmental costs, Sierra Club conflates the two distinct statutory obligations under the NGA and the NEPA. As the FERC explained in *Sabine Pass*:

[U]nder NEPA, agencies are required to consider, among other things, the “reasonably foreseeable” environmental impacts of a proposed project in determining whether the project will have a “major significant impact on the quality of the human environment.” Under NGA section 3, agencies must determine whether the requested authorization would be inconsistent with the public interest. Thus, DOE/[FE] may well have quantified the overall economic benefits of additional shale gas production for purposes of meeting its separate NGA section 3 public interest finding, notwithstanding the fact that the environmental impacts of

¹⁵⁴ *Id.* at 1079.

¹⁵⁵ *Id.*

additional gas production cannot be similarly quantified because the impacts are not reasonably foreseeable.”¹⁵⁶

Sierra Club’s reliance upon *Mid States Coalition for Progress v. Surface Transportation Board*¹⁵⁷ is equally unavailing. That case involved the STB’s approval of a railroad and its decision not to consider the impacts of low sulfur coal to be transported by the line. As the Eighth Circuit later clarified its holding, the flaw in the NEPA analysis in that case arose because the STB “stated that a particular outcome was reasonably foreseeable and that it would consider its impact, but then failed to do so.”¹⁵⁸ In contrast, the DOE/FE and the FERC have both recognized that “induced shale gas production is not a reasonably foreseeable effect for purposes of NEPA analysis.”¹⁵⁹

Sierra Club also cites *Border Power Plant Working Group v. Department of Energy*¹⁶⁰ as a case where the court “required consideration of upstream environmental impacts induced by the construction of new energy infrastructure.” Sierra Club claims that *Border Power* requires DOE/FE “to consider the impacts of natural gas production induced by ELS I’s proposal, regardless of DOE’s regulatory authority over that production.”¹⁶¹ *Border Power* presents an excellent illustration of the hole in Sierra Club’s analysis. In *Border Power*, where Border Power sought DOE authorization to construct a transmission line to transmit electricity

¹⁵⁶ *Sabine Pass Liquefaction, LLC*, 140 FERC ¶ 61,076, at P 20 (2012).

¹⁵⁷ 345 F.3d 520, 548-50 (8th Cir. 2003).

¹⁵⁸ *Arkansas Wildlife Federation v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1102 (8th Cir. 2005) (citing *Mid States*, 345 F. 3d at 550); see also *Habitat Educ. Center v. U.S. Forest Service*, 609 F.3d 897, 902 (7th Cir. 2010) (“The court in *Mid States* concluded that adverse effects from the readily foreseeable increase in coal sales were certain to occur and questioned the defendant’s contention that those effects could not be meaningfully forecast.”).

¹⁵⁹ Sabine Pass Non-FTA Final Order at 28; *Sabine Pass Liquefaction, LLC*, 140 FERC ¶ 61,076, at P 13 (2012) (citing *Central N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121)); see also *Texas Eastern Transmission, L.P.*, 139 FERC ¶ 61,138, at P 73 (2012) (“The scope, scale, and speed of shale gas development cannot be accurately estimated, i.e., it is not ‘reasonably foreseeable.’”).

¹⁶⁰ 260 F. Supp. 2d 997 (S.D. Cal. 2003).

¹⁶¹ Sierra Club Protest at 29.

from Mexico to the U.S., the court held the DOE was required to consider the environmental impacts in the U.S. of the operation of a turbine at a power plant in Mexico.¹⁶² The court stated that the line approved by the DOE was “the only current means” through which the Mexican turbine could transmit power and held that the line was a “but-for cause” of the generation of power at the particular turbine. Therefore, the court found that the effects in the United States of the Mexican generation was a reasonably foreseeable effect of the construction of the power line.¹⁶³ Unlike the turbine in *Border Power*, there is no specific, identifiable gas production facility or facilities that will rely solely upon the ELS Project to maintain commercial viability.

For the foregoing reasons, Sierra Club’s arguments regarding the DOE/FE’s obligation to conduct an independent NEPA analysis and the scope of that analysis should be rejected.

VI. CONCLUSION

Neither APGA nor Sierra Club has established an interest in this proceeding. Accordingly, their interventions should be denied. The evidence in the record supports the statutory presumption that authorization of ELS I’s Application is consistent with the public interest and the Protestors have not shown that the requested ELS I export authorization is not consistent with the public interest. Because the Protestors have not carried their burden of proof, ELS I’s request to export LNG to non-FTA Countries should be approved by the DOE/FE.

¹⁶² *Border Power*, 260 F. Supp. 2d at 1017.

¹⁶³ Notably, in addition to the turbine determined to produce impacts that were indirect effects of the construction of the power line in *Border Power*, the court also examined three additional turbines at the same generation facility: two turbines that would provide power to Mexico exclusively and a third turbine designed to provide power exclusively for export to the United States, but which could provide power to the U.S. using lines different from the line approved by the DOE. Of the four turbines, the court found that only the emissions resulting from the turbine that could only transmit power to the U.S. from the line approved by DOE in *Border Power* could be considered indirect effects of the permitting of that transmission line.

Respectfully submitted,

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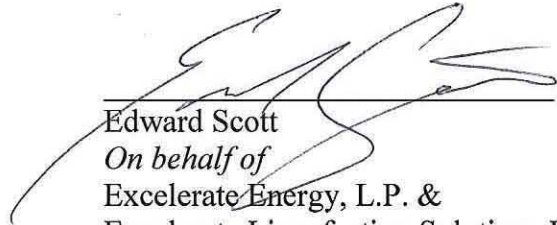
*Counsel for
Excelerate Liquefaction Solutions I, LLC*

Date: March 6, 2013

VERIFICATION

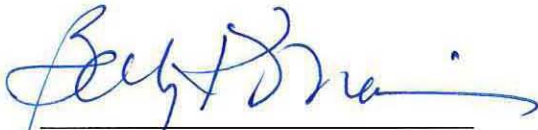
STATE OF TEXAS)
)
COUNTY OF CALHOUN)

Pursuant to 10 C.F.R. § 590.103(b) (2012), Edward Scott, being duly sworn, states that he is Chief Operating Officer for Excelerate Energy L.P.; that he is duly authorized to execute this verification; that he has read the foregoing document and is familiar with the contents thereof; and that all statements of facts therein are true and correct to the best of his knowledge, information, and belief.

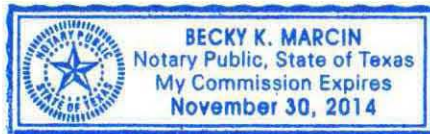


Edward Scott
On behalf of
Excelerate Energy, L.P. &
Excelerate Liquefaction Solutions I, LLC

Subscribed and sworn to before me this 5th day of March 2013, by Edward Scott proved to me on the basis of satisfactory evidence to be the person who appeared before me.



Notary Public Signature



My Commission expires: _____

CERTIFIED STATEMENT OF AUTHORIZED REPRESENTATIVE

Pursuant to 10 C.F.R. § 590.103(b) (2012), I, Thomas E. Holmberg, hereby certify that I am a duly authorized representative of Excelerate Liquefaction Solutions I, LLC, and that I am authorized to sign and file with the Department of Energy, Office of Fossil Energy, on behalf of Excelerate Liquefaction Solutions I, LLC, the foregoing document and in the above-captioned proceeding.

Dated at Washington, D.C., this 6th day of March, 2013.

/s/ Thomas E. Holmberg

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing to be served upon each person designated on the official service list in this docket and on the Office of Fossil Energy, Department of Energy for inclusion in the FE docket in the proceeding, in accordance with the Department's regulations, 10 C.F.R. § 590.107 (2012).

Dated at Washington, DC, this 6th day of March, 2013.

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