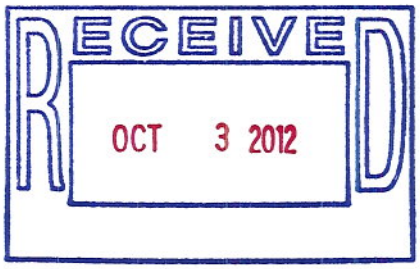

UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

In the Matter of:	)	**Docket No. 12-05 LNG**
GULF COAST LNG EXPORT, LLC	)	
	)	
	)	

MOTION FOR LEAVE TO RESPOND TO AND RESPONSE OF GULF COAST LNG EXPORT, LLC TO SIERRA CLUB'S RENEWED MOTION TO REPLY AND REPLY COMMENTS

Communications with respect to this
pleading or this process should be addressed to:

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I.

INTRODUCTION

Pursuant the Department of Energy's ("DOE") regulations,[1] Gulf Coast LNG ("Gulf Coast") hereby submits this Response to the Sierra Club's Renewed Motion to Reply and Reply Comments ("Renewed Motion"), filed on September 18, 2012. As explained below, Sierra Club's "Renewed Motion" should be denied and its protest and comments given no weight.

II.
SIERRA CLUB'S "RENEWED" MOTION TO REPLAY IS PROCEDURALLY DEFECTIVE AND SHOULD BE REJECTED

A. Sierra Club's Renewed Motion to Reply Is Beyond The Date Established By DOE/FE For Motions 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

[1] 10 C.F.R. § 590.303(e) and 590.304(f) (2010).

specifically established August 3, 2012[2] as the final date for parties to intervene or file motions with respect to the Gulf Coast application in DOE Docket No. 12-05-LNG (the "Application").[3] On August 3, 2012, the last permitted day to file, Sierra Club filed its original motion to intervene and protest.

On September 18, 2012, forty-six (46) days after the deadline for motions established by DOE, the Sierra Club, filed its renewed motion to intervene and a protest and comments. In the Federal Register notice, DOE expressly stated: "All protests, comments, motions to intervene or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.[4] Sierra Club has not demonstrated any basis for DOE/FE to waive the August 3, 2012 deadline, and its motion should be denied as untimely.

B. Sierra Club's "Footnote Motion" and Renewed Motion Should Not Be Allowed To Circumvent The DOE/FE's August 3, 2012, Deadline.

Perhaps in an attempt to circumvent the August 3, 2012 deadline for motions, buried in a footnote of its motion to intervene and protest, Sierra Club demands that if any party opposes its intervention and protest that it be automatically allowed to reply. Sierra Club attempted the same improper tactic in two other dockets pending before DOE, namely Cameron LNG, LLC, DOE Docket No. 11-162-LNG and Freeport LNG Expansion, DOE Docket No. 11-161-LNG. However, it is clear that the applicable procedural rules must apply and the footnote attempt to circumvent those rules must not be permitted. Sierra Club claims that "DOE/FE regulations explicitly allow any party to request additional procedures by motion, *see* 10 C.F.R. §§

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[2] Federal Register, 32962-5 of June 4, 2012,

[3] Federal Register, ibid. ("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 no later than 4:30, eastern time, August 3, 2012.").

[4] On this basis alone, as well as for the additional reasons stated below, Sierra Club's Renewed Motion and protest should be denied and given no weight.

590.302(a) & 590.310."[5] However Sierra Club's assertion in this regard is misplaced. 10 C.F.R. 590.302(a) provides that procedural motions must specify the "grounds and statutory or other authority relied upon." And 10 C.F.R. 590.310 expressly states that: "[f]ailure to request additional procedures within the time specified in the notice of application … shall constitute a waiver of that right unless the Assistant Secretary for good cause shown grants additional time for requesting additional procedures." Rather than support the position of Sierra Club, these provisions expressly establish that the "Footnote Motion," failing to meet the requirements of 10 C.F.R. 590.302(a), must be denied.

Even if the "Footnote Motion" of Sierra Club were to be treated as a proper motion, which it is not, it has already been denied by DOE. A review of the docket index in this proceeding confirms that DOE/FE did not issue an order granting Sierra Club's "footnote motion" of August 3, 2012. 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." Substantially more than 30 days has expired since Sierra Club's "footnote motion" of August 3, 2012, and no order granting the "Footnote Motion" was issued. Therefore, it was denied on September 2, 2012 by operation of law. Since Sierra Club's "footnote motion" has already been denied by operation of law, Sierra Club's Renewed Motion is in fact either an impermissible attempt to re-submit the previously denied motion significantly beyond the August 3 deadline established by DOE for motions or an improper attempt to appeal the denial of the Footnote Motion.

In addition, although characterizing its most recent filing as a "Renewed Motion," Sierra Club improperly seeks to include material that is in the nature of a reply brief that seeks to

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[5] Renewed Motion, p. 1.

present rebuttal arguments to Gulf Coast's answer filed on August 31, 2012.[6] These new arguments by Sierra Club do not serve to further illuminate the record. They add nothing germane to Sierra Club's original filing on August 3, 2012. Furthermore, this most recent submittal by Sierra Club is not permitted under 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 Renewed Motion with its reply protest and such is not permitted under the applicable regulations, it should be rejected by DOE/FE and given no weight.

C. Should DOE/FE Allow the Renewed Motion, Protest & Comments of Sierra Club, Then Gulf Coast Should be Permitted to Respond.

As discussed above, both the Footnote Motion and the so called Renewed Motion by Sierra Club should be rejected by DOE/FE and given no consideration. However, in the event DOE/FE should permit the Renewed Motion, Gulf Coast respectfully responds below to the arguments and allegations made by the Sierra Club in it Renewed Motion and reply protest. 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."

III. REVIEW OF ENVIRONMENTAL IMPACTS UNDER NEPA WOULD BE PREMATURE AT THIS TIME.

A. The Natural Gas Act, Energy Policy Act and DOE Precedent Contemplate The Conditional Approval Of LNG Export Applications Pending Environmental Review.

As an initial matter, Sierra Club mischaracterizes Gulf Coast's Application and position

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[6] DOE/FE docket reflects September 4, 2012 as the date received and docketed.

as asking DOE to forego the NEPA process.[7] That is simply not correct. In reference to exports to non-FTA countries, Gulf Coast has specifically only requested a *conditional* approval of its Application at this time, pending a later environmental review under NEPA. This would, by law and precedent, involve input from both FERC and DOE on potential environmental impacts of the LNG facility. In fact, as discussed in Gulf Coast's Answer and discussed further below, this is the precise timing and procedure set forth in the Natural Gas Act ("NGA") and the Energy Policy Act of 2005 for ensuring environmental review of LNG exports projects.[8] This process of allowing DOE to conditionally approve an application pending further environmental review by FERC, with DOE's involvement and input, has been followed by DOE in the past, and should be followed in this case as well. It does not eliminate the application of NEPA, rather it coordinates two agencies work in that regard.

As addressed thoroughly in Gulf Coast's Answer, both the NGA and the Energy Policy Act define the dual roles of FERC and DOE in the process for approval of LNG export projects.[9] Under the NGA, FERC is the lead agency under NEPA.[10] This is also the process mandated by the Energy Policy Act of 2005, which amended the NGA to coordinate the process in complying with NEPA by designating FERC as the lead agency.[11] DOE/FE, pursuant to its own regulations, acts as a coordinating agency in the NEPA process, and has the ability to adopt the

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[7] *See* Sierra Club Reply at 6.

[8] *See* Answer at 14-20.

[9] *See* Answer at 14-20.

[10] *See* 15 U.S.C. § 717n(B)(1) ("The Federal Energy Regulatory Commission shall act as lead agency for the purpose of coordinating all applicable federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969.").

[11] *See* Energy Policy Act of 2005, Pub. L. 109-58, H.R. 6, 109th Cong. (2005).

environmental review prepared by FERC or, if it finds it inadequate, to supplement or modify the analysis and recommendations.[12]

As detailed in Gulf Coast's Answer Brief, DOE/FE routinely follows this bifurcated process by approving conditional applications and making such authorizations conditional on FERC's appropriate review, coordinated with DOE, of environmental impacts under NEPA..[13] Most recently, DOE/FE conditionally approved a similar application for long-term authorization to export LNG from the Sabine Pass LNG Terminal.[14] Sierra Club attempts to dismiss DOE's past course of action in the Sabine Pass matter by claiming that DOE's final decision in that proceeding should be disregarded simply because Sierra Club disagrees with the decision made by DOE.[15] Surely that is not a legal basis to overturn or disregard the determinations of a DOE final decision. Obviously Sierra Club makes no attempt to distinguish the facts of the Sabine Pass matter from the Gulf Coast project because it cannot make any such distinction. Regardless, DOE/FE's order in the Sabine Pass matter is still standing precedent and governs DOE/FE's action in this matter as well. DOE/FE should conditionally approve Gulf Coast's application for exports to non-FTA countries pending environmental review.

B. NEPA Review of the Requested *Conditional* Approval Would Be Based on Pure Speculation, which is Not Required By NEPA.

Taking this bifurcated approach is consistent with NEPA itself and would avoid DOE/FE's unnecessary and inappropriate speculative analysis of the environmental and human impacts of the proposed conditional authorization. The conditional approval does not authorize

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[12] 10 C.F.R. § 1021.342.

[13] *See* Answer at 16.

[14] *Sabine Pass Liquefaction LLC*, FE Docket No. 10-111-LNG, Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations, Order No. 2961 at p 29 (May 20, 2011).

[15] *See* Sierra Club Reply at 9-10.

the applicant to take any action that could impact the human environment. It does not authorize the construction of any facilities, the performance of liquefaction or the export of LNG.

Furthermore, analysis under NEPA is only required where there is a "'reasonable close causal relationship' between the environmental effect and the alleged cause."[16] "In order to be sufficiently causally connected, the environmental impact must be 1) caused by the proposed action, and 2) reasonably foreseeable."[17] As Gulf Coast noted in its Answer, the actual scope of any environmental and human impacts that might allegedly occur at some time in the unspecified future by entities other than Gulf Coast, that is unnamed natural gas producers neither controlled nor owned by Gulf Coast, are too speculative for DOE/FE to evaluate.

In this case, there is no question that the export of LNG from the Brownsville LNG Terminal, once constructed, will support increased natural gas production. At this time, however, the extent, location, and timeframe for such increased production are all unknown. It is impossible for DOE/FE, in the course of evaluating Gulf Coast's proposed conditional authorization, to identify specific, reasonably foreseeable environmental impacts that have a "reasonable close causal relationship" with any authorization. NEPA does not require agencies to "foresee the unforeseeable."[18]

Despite this well-established standard, Sierra Club nonetheless incorrectly claims that DOE/FE is required to consider the induced "national environmental impacts" of the proposed LNG exports in the same way that Gulf Coast has estimated the economic impacts of its

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[16] *Central N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121 at pp 83-84 (2011) ("*CYNOG*"), reh'g denied, 138 FERC ¶ 61,104 at pp 33-56 (2012), *on appeal, Coalition for Responsible Growth & Resource Conservation v. FERC*, 2d Cir. No. 12-566; *see also Sabine Pass, FERC Order* at p 96; *Texas Eastern Transmission, LP*, at p 72.

[17] *Id.*

[18] *See City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975).

proposal.[19] Economic projections, which are primarily rooted in quantitative data regarding the monetary or employment impact of a particular action, are well established and knowable at this time. However, they are not analogous to an environmental analysis under NEPA, which addresses specific physical impacts to, for example, air, water, and land in a particular location. Simply because Gulf Coast has acknowledged the economic benefits of the proposed LNG exports based on standard economic models does not mean that DOE/FE can conduct a credible NEPA analyze of alleged environmental impacts from future increased natural gas production. Analyzing environmental impacts under NEPA necessarily requires information about the action that will cause environmental impacts in a certain location, and in this case the proposed conditional authorization of LNG exports does not give DOE/FE that kind of information.[20]

Although "uncertainty" regarding the environmental impacts caused by a certain action may indeed be a reason to perform a NEPA analysis, uncertainty with respect to the nature and location of the action or actions that would create those environmental impacts is not.[21] In other words, although NEPA indeed provides a "well-defined process for analyzing uncertainty," that process assumes a major federal action causing reasonably foreseeable environmental impacts. In this case, Gulf Coast's proposed authorization to export LNG to non-FTA countries is not the

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[19] Sierra Club Reply at 8.

[20] Sierra Club again cites to *Border Power Plant Working Group v. Dept. of Energy*, 260 F.2d 997 (So. Cal. Dist. 2003), as the pinnacle case in support of its "induced impacts" argument. Sierra Club, however, fails to address (or even acknowledge) the clearly divergent facts at issue in the *Border Power Plant* case. *See* Response Brief at 19-20. In *Border Power Plant*, the court looked at whether it should analyze the impacts of two upstream power plants in conjunction with its review of a transmission line project serving, among other facilities, those two plants. As discussed more fully at pages 19-20 of Gulf Coast's Answer, the power plants at issue in *Border Power Plant*, unlike the potential upstream impacts at issue here, were already sited and under construction. Here, as Sierra Club tacitly acknowledges, the location and associated impacts of any future natural gas production – unlike the impacts of the two power plants under construction in the *Border Power Plant* case -- are entirely unknown. Sierra Club does not, and cannot, point to any particular natural gas development project that is known at this time that will supply natural gas to the Gulf Coast project, nor can it say whether any such production will be a direct result of DOE's approval of the Application. Thus, the court's holding in *Border Power Plant* is entirely inapposite to the facts presented here.

[21] *See* Sierra Club Reply at 5.

proximate cause of reasonably foreseeable environmental impacts at any particular location. Furthermore, only a conditional authorization for the export of LNG is requested at this stage. No facilities are thereby authorized to be constructed and no exports are authorized to occur.

Requiring DOE/FE to conduct a NEPA analysis of Gulf Coast's proposal at this stage would contravene existing judicial and agency precedent, be contrary to the clear intent of the law and would purely be speculative. DOE/FE is weighing a *conditional* approval, which is the type of preliminary agency decision that courts have found are *not* subject to NEPA.[22] Just as the sale of leases to an oil company did not commit the federal agency to any activity that would disturb the environment as held by the Ninth Circuit in *Connor v. Burford*,[23] DOE/FE's granting of a conditional authorization for LNG exports would not authorize any actual environmental impacts. Gulf Coast will still need to obtain FERC approval for the construction and operation of the proposed LNG terminal. That approval will require a NEPA analysis and it will be done in concert with DOE/FE.

In addition, consideration of the environmental impacts of increases in future natural gas production generally are not even an appropriate subject of any NEPA analysis that FERC and DOE might conduct. FERC has found repeatedly that it need not consider generalized increases in future natural gas production as part of its NEPA analysis.[24] Furthermore, DOE/FE has previously evaluated the claims of Sierra Club in another recent proceeding and determined that the type of speculative and unsubstantiated claims raised by Sierra Club in the Gulf Coast docket

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[22] *See, e.g., Sierra Club v. FERC*, 754 F.2d 1506, 1509 (9th Cir. 1985) (FERC's grant of preliminary permit for hydroelectric project was not a commitment to any future action on the ground); *Conner v. Burford*, 848 F.2d 1441, 1448-49 (9th Cir. 1988) (sale of leases did not require EIS because leases did not commit agency to any activity that could disturb the environment).

[23] *Conner*, 848 F.2d at 1448-49.

[24] *See Texas Eastern Transmission, LP*, 139 FERC ¶61,138 at pp 70-73 (2012); *Sabine Pass Liquefaction, LLC*, 139 FERC ¶61,039 at pp 94-99 (2012) ("*Sabine Pass FERC Order*"); *CYNOG* at pp. 81-107.

do not establish the requisite causal connection, required by NEPA, between future unspecified shale gas development or other natural gas development and the LNG export authorization requested by Gulf Coast.[25] Requiring an agency to evaluate the impacts of production from unidentified wells at unspecified times in undetermined locations "would at best amount to speculation as to future events and would be of little use as input in deciding whether to approve the [project]."[26] Those impacts are not reasonably foreseeable as a result of an authorization to export LNG, but instead would be specific to as yet undetermined specific wells and infrastructure. Any NEPA analysis required by such production operations would be handled by the agencies permitting such locations and operations, which is not DOE/FE, and not within the scope of this proceeding.

Sierra Club also criticizes Gulf Coast's citation to FERC's decision in the MARC 1 Pipeline matter. *See* Sierra Club Reply at 9. Its attempt to distinguish MARC 1 from the facts of this case is unpersuasive. Although that case addressed the environmental impacts of a pipeline, and not an LNG export facility, it is nevertheless instructive of how courts consider speculative future environmental impacts in cases such as this. As in this action, the MARC 1 proceeding looked at whether, in analyzing the environmental impacts of the *current* project at issue in that proceeding, FERC should have included a quantitative analysis of the cumulative impacts of the *future* Marcellus Shale development in northeastern Pennsylvania and beyond that *might* stem from that project. FERC rejected this notion, in part, on the basis that "the widespread nature and uncertain 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

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[25] Order No. 2961-A, at p. 28

[26] *CYNOG* at p 100.

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."[27] On appeal, the Second Circuit unanimously affirmed FERC's decision on the same basis.[28]

Sierra Club fixates on the "causal connection" language used by both FERC and the Second Circuit in the MARC 1 case, and argues that natural gas development here, unlike in MARC 1, is causally connected to the Gulf Coast LNG project. But this is not supported by the facts, logic or the law.. Like here, there was no question in MARC 1 that some level of natural gas develop would stem from the pipeline project, but the timing, location and extent of that development was unknown. FERC's conclusion that it could not legitimately analyze alleged impacts from future natural gas development, and the Second Circuit's affirmation of that decision, turned on that uncertainty -- those impacts were just too far in the future and too tenuous and speculative to attribute to the project at the time of the project's inception.

The Gulf Coast Application presents the same basic fact scenario – a current project that will trigger some increased natural gas development to supply the project at an unknown location, in an unknown manner and at an unknown time in the future. As in the MARC 1 project, there is not a sufficient causal connection between Sierra Club's so called "induced production" and Gulf Coast's request for conditional authorization to export LNG to require an environmental impact statement under NEPA by DOE/FE at this time.

The arguments made by Sierra Club in this docket, are the same arguments that were

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[27] 137 FERC ¶ 61, 121 at 21.

[28] *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.)

previously made by the Sierra Club in the MARC I case, the Sabine Pass proceeding at FERC and the DOE/FE i Final Decision in the Sabine Pass LNG export proceeding. Those arguments were properly and firmly rejected in those three preceding matters and should be rejected here. If anything, the lack of a causal connection between the requested non-FTA LNG export authorization and the Sierra Club alleged "induced production" is even more remote and speculative than it was in MARC 1. Sierra Club acknowledges that each of these decisions rejected the arguments of Sierra Club; but the simple and repetitive assertions by Sierra Club that each of these precedential decisions was decided in error, neither establishes support for Sierra Club's position nor does it change the long established law on the requirement of a sufficient causal connection for a NEPA analysis. It certainly does not repeal the relevant provisions of the NGA and the Energy Policy Act of 2005.

IV.

CONCLUSION

First, for the reasons discussed above, it is clear that Sierra Club "Footnote Motion" fails to comply with the procedural requirements of the applicable DOE regulations. Secondly, even if the "Footnote Motion" was procedurally adequate and appropriate, it has already been denied by operation of law on September 2, 2012. Third, Sierra Club's Renewed Motion of September 18, 2012 is not permitted by the applicable DOE regulations. Even if it had been compliant with procedural requirements, it was filed beyond the time established by DOE/FE in the Federal Register Notice. Therefore the Renewed Motion should be denied and the associated protest and comments given no weight.

In its reply comments and protest, Sierra Club seems uncertain why during the brief period allowed by the DOE procedural rules Gulf Coast did not reply specifically to each

statement contained in the almost 8,000 pages of material it filed as part of its August 3, 2012 protest. Perhaps this encyclopedic, electronic download by Sierra Club was intended to either intimate DOE/FE or Gulf Coast by the sheer number of megabits, but the fact remains that the arguments and voluminous material Sierra Club delivered are not relevant to this proceeding and neither require nor deserve point by point replies. This material, obviously part of Sierra Club national protest against natural gas itself and all natural gas usage and production, is general in nature, not specific to the Gulf Coast non-FTA LNG export application. It simply lacks the causal connection required before it can be considered as part of a legitimate NEPA analysis of the Gulf Coast application.

Furthermore, as discussed above in this reply, and as discussed in detail in Gulf Coast's September 4, 2012 Answer, at this stage in these proceedings Gulf Coast is simply requesting a conditional authorization for LNG exports to the non-FTA. Consistent with the law and well established practice and policy, FERC will be the lead agency for the NEPA analysis and DOE/FE will be the co-operating agency. No NEPA review is required or permitted by any federal entity at this stage in these proceeding.

Respectfully submitted,

Les Lo Baugh
Brownstein Hyatt Farber Schreck, LLP
Attorneys for
Gulf Coast LNG Exports, LLC
October 2, 2012

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Respectfully submitted,

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Gulf Coast LNG Exports, LLC

October 2, 2012

In the Matter of: **GULF COAST LNG EXPORT, LLC**	))))	**Docket No. 12-05 LNG**

VERIFICATION

County of Los Angeles

State of California

Pursuant to C.F.R. § 590.103(b), Leslie E. Lo Baugh, Jr., being duly sworn, affirms that he is authorized to execute this verification, that he has read the foregoing document, and that all facts stated herein are true and correct to the best of his knowledge, information and belief.

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Sworn to and subscribed before me, a Notary Public, in and for the State of California, this 2nd day of October , 2012.

Patricia Cormier Herron, Notary Public

PATRICIA CORMIER-HERRON
Commission # 1919012
Notary Public - California
Los Angeles County
My Comm. Expires Dec 26, 2014

In the Matter of: **GULF COAST LNG EXPORT, LLC**	))))	**Docket No. 12-05 LNG**

CERTIFIED STATEMENT OF AUTHORIZED REPRESENTATIVE

Pursuant to C.F.R. § 590.103(b), I, Leslie Lo Baugh, hereby certify that I am a duly authorized representative of Gulf Coast LNG Export, LLC; and that I am authorized to sign and file with the Department of Energy, Office of Fossil Energy, on behalf of Gulf Coast LNG Export LNG, LLC, the foregoing documents and in the above-captioned proceeding.

Dated at Los Angeles, California, this 2nd day of October, 2012.

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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 2nd day of October, 2012.

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