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**Re: In the Matter of Pangea LNG (North America) Holdings, LLC  
FE Docket No. 12-184-LNG  
Application for Long-Term Authorization to Export Liquefied Natural Gas to Free  
Trade Agreement Countries - Answer of Pangea LNG (North America) Holdings, LLC**

Dear Mr. Anderson:

Enclosed for filing on behalf of Pangea LNG (North America) Holdings, LLC, please find the Answer of Pangea LNG (North America) Holdings, LLC to the American Public Gas Association's Motion to Intervene, Protest, and Comments; Sierra Club's Late-Filed Motion to Intervene, Protest, and Comments; Sierra Club's Late-Filed Exhibits; and Sierra Club's Motion to have Late-Filed Exhibits Considered; and Motion to Reconsider DOE/FE's Ruling Embodied in DOE/FE's May 10, 2013 Notification.

Should you have any questions about the foregoing, please feel free to contact the undersigned at (202) 662-4555.

Very truly yours,



Erik J.A. Swenson

EJS

Enclosure

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

**IN THE MATTER OF:**

**PANGEA LNG (NORTH AMERICA) ) FE DOCKET NO. 12-184-LNG  
HOLDINGS, LLC**

**ANSWER OF PANGEA LNG (NORTH AMERICA) HOLDINGS, LLC TO  
THE AMERICAN PUBLIC GAS ASSOCIATION'S MOTION TO INTERVENE,  
PROTEST, AND COMMENTS; SIERRA CLUB'S LATE-FILED MOTION TO  
INTERVENE, PROTEST, AND COMMENTS; SIERRA CLUB'S LATE-FILED  
EXHIBITS; AND SIERRA CLUB'S MOTION TO HAVE LATE-FILED  
EXHIBITS CONSIDERED; AND MOTION TO RECONSIDER DOE/FE'S  
RULING EMBODIED IN DOE/FE'S MAY 10, 2013 NOTIFICATION**

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INTERVENE, PROTEST, AND COMMENTS; SIERRA CLUB’S LATE-FILED  
EXHIBITS; AND SIERRA CLUB’S MOTION TO HAVE LATE-FILED EXHIBITS  
CONSIDERED; AND MOTION TO RECONSIDER DOE/FE’S RULING EMBODIED IN  
DOE/FE’S MAY 10, 2013 NOTIFICATION**

Pursuant to Sections 590.303(e) and 590.304(f) of the Department of Energy’s (“DOE”) regulations<sup>1</sup> and the DOE’s Office of Fossil Energy (“DOE/FE”) May 16 Order in this docket granting Pangea LNG (North America) Holdings, LLC (“Pangea”) an extension of time to file its Answer, Pangea hereby submits this Answer to Sierra Club’s and the American Public Gas Association’s (“APGA”) respective Motions to Intervene, Protest, and Comments filed on April 29, 2013 (the “Sierra Club Intervention, Protest and Comments” and the “APGA Intervention, Protest and Comments,” respectively) and Sierra Club’s subsequent related filings.<sup>2</sup> In support of this Answer, Pangea states the following:

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<sup>1</sup> 10 C.F.R. §§ 590.303(e), 590.304(f) (2013).

<sup>2</sup> These filings include: Sierra Club’s April 30, 2013 late-filed exhibits (“Sierra Club Exhibits”) to its April 29 Motion to Intervene, Protest and Comments, as well as its May 6, 2013 Motion to Have Late-Filed Exhibits Considered (“Procedural Motion”). Pangea also takes issue here with the DOE/FE’s May 10, 2013 Notification captioned: “FW: FE Docket 12-184-LNG: Sierra Club Motion to Intervene Out of Time” (“Notification”) and moves for the DOE/FE to reconsider the ruling underlying the Notification. To extent that a waiver is necessary, Pangea also requests the DOE/FE grant any waiver needed to combine its answers to multiple motions and the Notification in a single answer. Pangea asserts good cause exists for a combined pleading as the various motions all relate to a single proceeding and are inter-related. Thus, a single answer will serve administrative efficiency by avoiding repetitious statements on the relevant facts and law and the need to cross reference multiple filings by Pangea.

## I. BACKGROUND

On December 19, 2012, Pangea filed an application (“Application”) pursuant to Section 3 of the Natural Gas Act (“NGA”)<sup>3</sup> with the DOE/FE for long-term, multi-contract authorization to engage in exports of domestically produced liquefied natural gas (“LNG”) in an amount up to 410.5 million Btu per year, which is equivalent to approximately 398.5 billion cubic feet of natural gas per year, for a 25-year period, commencing the earlier of the date of first export or 7 years from the date of issuance of the authorization requested in the Application. Pangea is seeking authorization to export LNG from its proposed South Texas LNG Export Project (“ST LNG Project”)—to be located at the Port of Corpus Christi in Ingleside, Texas—to any country (i) with which the U.S. does not have a Free Trade Agreement (“FTA”) requiring the national treatment for trade in natural gas and LNG; (ii) that has, or in the future develops, the capacity to import LNG via ocean-going carrier; and (iii) with which trade is not prohibited by U.S. law or policy (a “Non-FTA Country”). Pangea is requesting this authorization both on its own behalf and as agent for third parties who hold title to the LNG at the time of export.<sup>4</sup>

A Notice of the Application (“NOA”) was published in the Federal Register on February 27, 2013.<sup>5</sup> The NOA provided, among other things, that protests, motions to intervene, requests for additional procedures and written comments be filed no later than 4:30 p.m. eastern time on April 29, 2013.<sup>6</sup>

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<sup>3</sup> 15 U.S.C. § 717b (2006).

<sup>4</sup> The Application represents the second part of Pangea’s two-part request for authorization to export LNG from the ST LNG Project. On November 29, 2012, Pangea submitted a separate application to the DOE/FE under Section 3 of the NGA for long-term, multi-contract authorization to export up to 398.5 Bcf/year of natural gas in the form of LNG to any country (i) with which the U.S. has, or in the future enters into, a FTA requiring national treatment for trade in natural gas and LNG; and (ii) that has, or in the future develops, the capacity to import LNG via oceangoing carrier. DOE/FE granted the request. *See Pangea LNG (North America) Holdings, LLC*, DOE/FE Order No. 3227, Order Granting Long-Term Multi-Contract Authorization to Export LNG by Vessel from the proposed ST LNG Project to FTA Nations (FE Docket No. 12-174-LNG) (Jan. 30, 2013).

<sup>5</sup> 78 Fed. Reg. 13,330 (Feb. 27, 2013).

<sup>6</sup> *Id.* at 13,331.

While the APGA made a timely filing in accordance with the DOE/FE's procedures for such filings, the Sierra Club narrowly missed the filing deadline with respect to the Sierra Club Intervention, Protest and Comments, filing them at 4:31 p.m. EDT on April 29, 2013. Further, the Sierra Club Exhibits were not filed until the afternoon of April 30, 2013.<sup>7</sup> On May 6, 2013, Sierra Club filed its Procedural Motion, representing that its Intervention, Protest and Comments had been timely filed, and arguing that "insofar as DOE/FE's receipt of Sierra Club's exhibits on April 30, 2013 renders Sierra Club's motion to intervene untimely, Sierra Club . . . has good cause for this untimely submission."<sup>8</sup>

In the wake of the procedural issues with the Sierra Club's filing and in light of the breadth and voluminous nature of the Sierra Club and APGA Interventions, Protests and Comments, including the Sierra Club Exhibits, on May 13, 2013, Pangea requested an extension of time allowed for filing its answers to the Sierra Club and APGA pleadings. On May 16, 2013, the DOE/FE granted Pangea an extension until June 5, 2013 to file this Answer.

## **II. THRESHOLD PROCEDURAL CONSIDERATIONS**

### **A. Sierra Club Should Be Denied Intervenor Status Because It Has Not Met the Standards for Accepting a Late Filing**

Sierra Club should be denied intervenor status because both the Sierra Club Intervention, Protest and Comments and the Sierra Club Exhibits were late filed without good cause and without accepting the record as it stood at the close of the noticed period for the filing of interventions, comments and protests.

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<sup>7</sup> See Email from K. Krust, Paralegal, Sierra Club to fergas@hq.doe.gov (Apr. 29, 2013, 16:31 EDT) (on file with Pangea).

<sup>8</sup> Procedural Motion at 1.

**1. DOE Should Apply Its Rules to Sierra Club in a Manner Keeping with the Circumstances**

As Sierra Club's pleadings attest, Sierra Club is a very large organization experienced in participating in regulatory proceedings.<sup>9</sup> Further, the Sierra Club is well aware of the DOE/FE processes for intervening in LNG export authorization proceedings and, having been excluded for late-filing previously, the potential consequences of a late intervention. Yet, for reasons known only to Sierra Club, it chose to file the Sierra Club Intervention, Protest and Comments after the close of business on the due date and the Sierra Club Exhibits on the next day.<sup>10</sup> While Pangea doubts that Sierra Club intended to file after the deadline established by DOE/FE, we suspect that Sierra Club did deliberately attempt to drag out these proceedings by filing such extensive (but largely generic) materials so late. Although it is Sierra Club's prerogative to play the rules to its advantage, it should be held responsible when its gaming tactics go wrong where there is no intervening good cause for failing to file on time.

The DOE/FE has announced its intention to ignore the untimely nature of the intervention, stating:

Sierra Club's Motion to Intervene, Protest, and Comments will not be considered late-filed. Sierra Club submitted this filing only one minute out-of-time and, assuming all parties were properly served, we cannot identify any material prejudice to any party in this proceeding if we accept the filing as timely under these circumstances. Therefore, in the absence of countervailing information, we find good cause to consider that the Motion to Intervene, Protest, and Comments were filed on the April 29, 2013 due date.<sup>11</sup>

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<sup>9</sup> Sierra Club has sought to intervene in at least 13 other similar dockets. *See* Procedural Motion at FN. 1.

<sup>10</sup> As we discuss below, the reason why Sierra Club chose to file the Sierra Club Exhibits separately from the Sierra Club Intervention, Protest and Comments is relatively clear, but what compelled it to file these materials on separate days is not.

<sup>11</sup> Notification.

Pangea can understand the DOE/FE's inclination to not exclude a party from a proceeding on the basis of a minor technicality, such as missing a filing deadline by one minute. However, the DOE/FE is misapplying its own rules in this instance and failing to consider the context in which the late filing took place.

## 2. Sierra Club's Intervention Was Filed a Day Late

Sierra Club's intervention was filed not one minute late, but one day late. The intervention and exhibits must be treated as a single filing, albeit one filing made in two parts over two days. Sierra Club intended the filings to be treated as such, as evidenced by the facts that: 1) Sierra Club has admitted that the Sierra Club Exhibits are necessary to its intervention,<sup>12</sup> 2) the Sierra Club Exhibits have no separate covering document, 3) the Sierra Club Exhibits were presented on an unlabeled disc with no explanatory file on the disc, 4) the Sierra Club Intervention, Protest and Comments rely on and reference the Sierra Club Exhibits, and 5) the Procedural Motion does not ask, or provide justification, for relief in the form of acceptance of Sierra Club's intervention if the DOE/FE rejects the Sierra Club Exhibits. It is also standard procedure for Federal courts and agencies to treat exhibits as an integral part of pleadings.<sup>13</sup> For these reasons, the intervention and exhibits should be viewed as a single filing, which was not completely filed until April 30, 2013. As such, rather than allowing Sierra Club to use the fact that the Sierra Club Intervention, Protest and Comments were filed just one minute past the close of business on the due date as a basis for dragging the late-filed Sierra Club Exhibits into the

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<sup>12</sup> "Over the past year, Sierra Club has filed similar motions to intervene and protests in a significant number of these proceedings. These filings have **required** the support of numerous exhibits." Procedural Motion at 1-2 (footnote citing to 13 other Sierra Club interventions omitted; emphasis added).

<sup>13</sup> The Federal Rules of Civil Procedure, Rule 10(c) state: "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Similarly, FERC's e filing process assigns a single date and time of filing to even large numbers of files and does not treat them as separate files for the purposes of date stamping. Incomplete filings are not allowed. *See*, <http://www.ferc.gov/docs-filing/efiling-user-guide.pdf>.



proceeding, Sierra Club must show good cause both for filing the Sierra Club Intervention, Protest and Comments one minute late and for filing the Sierra Club Exhibits one day late.

**3. The DOE/FE's Rules Do Not Provide for Deeming Materials Filed after the Filing Deadline to Be Timely Filed**

There is no provision in the DOE/FE's rules for deeming a filing made after the filing deadline, even by one minute, not to be late filed. The DOE/FE established a deadline, which, as objectively demonstrated by the date stamp on the Sierra Club Intervention, Protests and Comments, the Sierra Club missed. No argument has been made by Sierra Club to the effect that the DOE/FE clock was fast or the process by which the date stamped was applied was faulty. As such, the DOE/FE must rule that the filing was late.

**4. Sierra Club's Pleadings Do Not Meet the DOE/FE's Standards for Accepting Late-Filed Pleadings**

Although the DOE/FE does have rules in place to soften the consequences of a late filing in appropriate circumstances,<sup>14</sup> justification has not been presented here. Specifically, allowing in late-filed interventions is subject to three conditions: (1) there must be "good cause shown,"<sup>15</sup> (2) the DOE/FE must consider "the impact of granting the late motion [on] the proceeding,"<sup>16</sup> and (3) the late intervenor must "accept the record of the proceeding as it was developed prior to the intervention."<sup>17</sup>

- (a) No good cause has been shown

DOE/FE's pronouncement that there is good cause to find the filing was made by the due date is not a substitute for having a basis in the record for finding that the due date should be

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<sup>14</sup> 10 C.F.R. § 590.303(d) (2013).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 10 C.F.R. § 590.303(h) (2013). Late protestors are not held to this same standard, but must still show good cause. *Compare*, 10 C.F.R. § 590.304 (2013). Further, protests are considered to be statements of position, have no evidentiary value, and do not otherwise support the validity of any assertion upon which the DOE/FE could issue an order. 10 C.F.R. § 590.304(c) (2013).

extended for Sierra Club. Nor does Sierra Club ever provide a justification for its late filing. Although Sierra Club has moved to have its late-filed Sierra Club Exhibits considered, that motion lacks both (1) a request to have the late-filed Sierra Club Intervention, Protest and Comments accepted, and (2) a showing of good cause for the late filing.<sup>18</sup> DOE/FE's ruling on the subject also offers no rationale for a finding of good cause to accept the late filing (nor, for that matter, finding the filing not to be late).<sup>19</sup>

(b) Negative impact on the proceeding

With respect to the negative impact on the proceeding, the focus of the regulation is not on the impact on the late-filer, but on the proceeding. Moreover, the impact on the proceeding, in this case, is not simply a matter of either one minute or one day of delay.<sup>20</sup> Certainly, the length (or brevity) of the delay can be relevant for the purposes of determining whether the good cause for the failure to timely file justified the late intervention, and a lengthy delay may be a key consideration in denying an intervention in circumstances where an agency would otherwise grant it. However, it is not the only consideration.<sup>21</sup>

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<sup>18</sup> Procedural Motion.

<sup>19</sup> Notification.

<sup>20</sup> In its Procedural Motion with respect to its late-filed exhibits, Sierra Club argues that Federal Rules of Civil Procedure 24 is analogous to DOE/FE rule 10 C.F.R. § 590.303(d) (2013). Procedural Motion at 4. On its face, this is clearly wrong. As Sierra Club admits, Federal Rules of Civil Procedure 24 explicitly deals with “timely motions” and whether delay makes a motion untimely. Obviously, in that context, delay is the central and only question to be addressed. The DOE/FE’s rules take a very different tack, the question is not whether the delay is so short as to make it timely, but rather whether there is sufficiently good cause to allow intervention in light of any prejudice to the proceeding including a delay of the proceedings. Despite Sierra Club’s wishful thinking, the FERC cases Sierra Club cites do not say “that the lack of prejudice itself demonstrated ‘good cause shown,’” rather the cases merely fail to recite what circumstances amounted to good cause.

<sup>21</sup> Sierra Club suggests FERC Rule 214(d), 18 C.F.R. §385.214(d) offers guidance to interpreting the DOE/FE rules on late intervention. Rule 214(d) expressly allows consideration of whether “[a]ny prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention”, in addition to “[a]ny disruption of the proceeding might result from permitting intervention....” More generally, Rule 214 only would allow Sierra Club to intervene to the extent that it represented an interest “an interest which may be directly affected by the outcome of the proceeding.” 18 C.F.R. § 385.214(b)(2)(ii). Thus, Sierra Club’s myriad ascribed indirect effects on its members (e.g., higher gas prices, air pollution) would not suffice were it to be the standard here. This is not to suggest that Sierra Club will not be heard at FERC. The FERC proceedings will directly involve construction and operation of an LNG liquefaction facility, and the direct effects of constructing and operating physical facilities differs from the direct effects of simply authorizing exports.

Here, there is a decision to be made with respect to whether or not Sierra Club enjoys intervenor status, with the rights attendant thereto,<sup>22</sup> whether the DOE/FE must consider Sierra Club's voluminous submission, and whether such submission forms part of the record on appeal.<sup>23</sup> Allowing Sierra Club's intervention would be prejudicial to the proceeding because it would require the DOE/FE to consume significant time and resources to wade through numerous arguments that otherwise would not need to be considered here, thereby delaying the proceedings in circumstances where time and efficiency is of the essence due to the backlog of applications at the DOE/FE, the arguments being made that current studies are stale or becoming stale with the passage of time, and the potentially negative impact a delayed decision will have on the applicant to timely meet the demands of the market for exported LNG. To suggest that such factors need not be weighed against any good cause that might exist for a late filing would undermine the nature of filing deadlines. If the only consideration were how much the delay itself prejudiced a proceeding, where could an agency ever draw a line? If one minute or one day after a deadline can never be too late, what basis is there for drawing a line at any particular time? The very purpose of a deadline is to create certainty through an objective standard. Missing the deadline opens the issue to agency discretion in determining, on the totality of the circumstances, whether the public interest would be served by allowing in the filing.

While the prejudice to the would-be late intervenor need not be considered apart from any negative impact on the proceeding itself, there is little possibility that the denial of Sierra Club's late intervention would leave Sierra Club's positions unconsidered. The Sierra Club has not shown that it has any specific interest in this docket. Rather, it is ideologically opposed to the production and use of natural gas and is seeking to use the DOE/FE's processes to block, or

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<sup>22</sup> Only parties may seek rehearing and appeal of a DOE/FE decision. *See* 10 C.F.R. § 590.501(a) (2013).

<sup>23</sup> Materials accepted as part of a protest, but not an intervention, are considered to be statements of position only and lack any evidentiary value. *See* 10 C.F.R. § 590.306(c) (2013).

at least delay, issuance of export licenses and, thereby, create obstacles for companies engaged in natural gas production, use, or trade. The Sierra Club has had an opportunity to provide its comments on the larger policy issues through (i) its protest to the LNG Export Study and (ii) its various protests in other LNG export dockets. And, it will have another opportunity to raise any legitimate environmental concerns in Pangea's Federal Energy Regulatory Commission ("FERC") NEPA proceeding. Weighing all these circumstances in their totality demonstrates that the circumstances do not warrant admitting Sierra Club as an intervenor.

- (c) Sierra Club has not agreed to the necessary condition that it accept the record of the proceeding as it stood at the close of the deadline for intervention

Even if there were good cause sufficient to justify the prejudice to the proceeding, Sierra Club's pleading fails to comport with the final element required to allow a late intervention – acceptance of the record as it stood at the close of the deadline for intervention. To the contrary, Sierra Club challenges both the legal arguments raised by Pangea (e.g., that DOE need not conduct a NEPA process prior to issuing a conditional ruling<sup>24</sup>) and the evidence submitted by Pangea. For example, Sierra Club states: "DOE/FE must reject Pangea's economic arguments in support of its proposal."<sup>25</sup> Moreover, Sierra Club seeks not only to supplant the existing record with its own lengthy filing and 100 exhibits, it demands an opportunity to "comment on [environmental] issues once additional information is available."<sup>26</sup> Because Sierra Club has not accepted the proceeding on the record and has shown by its actions to take issue with the record, the DOE/FE's rules preclude allowing Sierra Club to intervene.

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<sup>24</sup> Sierra Club Intervention, Protest and Comments at 10.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* at 22. To the extent that it wishes to comment on environmental issues in the sense of contributing evidence to the record, it may do so in the FERC proceedings, assuming it intervenes there on a timely basis. Its commenting on environmental issues in this proceeding, to the extent it is admitted as a party, should be limited to legal arguments as to the inadequacy of the FERC NEPA process for the purposes of DOE/FE issuing an export authorization.

## **B. The Sierra Club Exhibits Should Not Be Considered**

As both Sierra Club and the DOE/FE have acknowledged, the Sierra Club Exhibits were late filed.<sup>27</sup> Sierra Club seeks to treat the Sierra Club Exhibits as distinct from the Sierra Club Motion, Protest and Comments,<sup>28</sup> and the DOE/FE has, at least tentatively, accepted this distinction.<sup>29</sup> If the DOE/FE rejects Pangea's reasoning as to why the Sierra Club Exhibits must be considered an inseparable part of Sierra Club's intervention and accepts the Sierra Club Intervention, Protest and Comments, the DOE/FE should reject the Sierra Club Exhibits as filed-late without good cause. Further, rather than accepting the existing record, the sole purpose of the Sierra Club Exhibits is to remake the record in order to allow Sierra Club to contest the sufficiency of the record to support a finding that the proposed exports are not inconsistent with the public interest.<sup>30</sup> This provides a second basis for excluding the Sierra Club Exhibits.

While the Procedural Motion purports to show good cause for a late filing, a review of the circumstances surrounding the filing<sup>31</sup> fails to show Sierra Club to have a good excuse. Having filed a full day late there obviously is no issue with the Sierra Club's clocks being in error or with some failure of the equipment used to make electronic filings or burn cds, nor was there a third-party courier at fault. Instead, the late filing resulted solely from human error on the part of Sierra Club.

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<sup>27</sup> See Procedural Motion and Notification.

<sup>28</sup> See Procedural Motion.

<sup>29</sup> See Notification (assigning different filing dates to the Sierra Club Intervention, Protest and Comments and the Sierra Club Exhibits, and giving distinct status to the materials filed on each of the different dates).

<sup>30</sup> As discussed previously herein, it appears that late-protests, but not interventions, may take positions contesting the existing record. However, statements made in the protest are not considered as evidence or other support upon which an order may be based. Further, the good cause requirement expressly applies. 10 C.F.R. § 590.304(c) (2013).

<sup>31</sup> Pangea has no independent source of the specific facts relevant to why Sierra Club filed late. For the purposes of this discussion, it can only offer analysis based on the general circumstances and Sierra Club's description of the event that transpired as they appear in the Procedural Motion. Sierra Club's explanation provides few objective details (its affirmants merely state what they understood with no attempt to even paraphrase what they were actually told. See Procedural Motion Exhibits 4 and 5.). Thus, there is nothing to form a basis on which to conclude that Sierra Club had good cause to have gotten the wrong impression.

The issue is whether such error was the result of good cause or the result of Sierra Club trying to stretch out its filing in a manner that has proven to be inconsistent with the DOE/FE's rules. In reviewing Sierra Club's own pleading on the subject, we are told: "Sierra Club had good cause to submit the exhibits in the manner it did because Sierra Club was under the reasonable belief that, in doing so, it was complying with DOE/FE's explicit instructions."<sup>32</sup> In other words, DOE/FE made me do it.

However, the DOE/FE certainly never instructed the Sierra Club to wait until the comment period ran out to file,<sup>33</sup> rather it expressly established, in writing, a last day and hour to file. The DOE/FE's NOA, as published in the Federal Register states: "Protests, motions to intervene ... procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., eastern time, April 29, 2013."<sup>34</sup>

The relevant portion of the Public Comment Procedures section states:

All protests, comments, motions to intervene or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) EMailing the filing to fergas@hq.doe.gov with FE Docket No. 12-184-LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office Natural Gas Regulatory Activities at the address listed in ADDRESSES. The filing must include a

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<sup>32</sup> Procedural Motion at 1. Sierra Club does not even attempt to paraphrase what it was told. Yet, it asserts it received "explicit instructions." How it could have received explicit instructions in a different proceeding at a time when the current proceeding had yet to be notice is not explained.

<sup>33</sup> Even Sierra Club only asserts that it "understood" a DOE/Staff member, in discussing a different docket, "to have requested Sierra Club to file the motion to intervene and protest electronically and to deliver the exhibits thereto on a CD sent via overnight mail postmarked by the filing deadline." Id at 3. This does not amount to a direction that the filing could not be made sooner so as to have the cd arrive by the filing deadline. Sierra Club has yet to explain what good cause prevented it from doing so. An examination of the Sierra Club Exhibits reveals that not one of them refers to Pangea (except as part of a list of projects) or refers back to the Sierra Club Intervention, Protest and Comments. As such, on its face, it appears that the cd could have been prepared well in advance of the Sierra Club Intervention, Protest and Comments so as to allow for all elements of Sierra Club's filings to arrive on or before the filing deadline, and nothing in any of Sierra Club's proceedings explains why this would not be the case. It goes utterly unsaid why Sierra Club needed DOE/FE to allow a special process outside of its written rules in the current proceeding even if that process might have been appropriate for an earlier proceeding.

<sup>34</sup> 78 Fed. Reg. 13,330 at 13,331 (Feb. 27, 2013).

reference to FE Docket No. 12–184–LNG; or (3) hand delivering an original and three paper copies of the filing to the Office of Natural Gas Regulatory Activities at the address listed in ADDRESSES.<sup>35</sup>

Apparently, Sierra Club’s preferred method of deluging the DOE/FE with large exhibits by method (1)(email) was not entirely compatible with the limitations of the DOE/FE’s systems. Sierra Club was allowed to continue to use this method on the condition it limited the size of its email files and submitted its filings in multiple parts, as necessary. Yet, while drafting a 66 page pleading with 100 exhibits was not too much for its resources, sending multiple emails was. Sierra Club wanted to use an easier approach and DOE/FE seems to have tried to accommodate them by allowing the body of the intervention to be submitted separately and in a different manner than Sierra Club’s exhibits in one prior instance. Despite this, Sierra Club persisted with this method rather than adopting one of the alternatives, and supplemented its email filings with courtesy copies on cd.<sup>36</sup> In conjunction with a filing in a different docket Sierra Club states it “understood DOE/FE to have requested Sierra Club to file the motion to intervene and protest electronically and to deliver the exhibits thereto on a CD sent via overnight mail postmarked by the filing deadline.”<sup>37</sup> Sierra Club knew its alleged understanding would necessarily result in the Sierra Club Exhibits not being received until after the filing deadline.<sup>38</sup> It is also responsible for knowing, as the NOA clearly stated, its filing in the current proceeding was required to comply with 10 CFR part 590 (the relevant DOE/FE rules), which rules expressly state, in relevant part:

Any document, including ... [a] motion, ... comment, protest, and any exhibit submitted in connection with such documents, shall be filed with FE under this part. Such document shall be considered officially filed with FE when it has been received and stamped

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<sup>35</sup> *Id.* at 13,333.

<sup>36</sup> Procedural Motion at 2.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> *Id.*

with the time and date of receipt by the Office of Fuels Program, FE.

Despite the clearly written, and duly promulgated, rules of the DOE/FE to the contrary and the DOE's February 2013 published written notice confirming the applicability of those rules, Sierra Club without any additional checking with appropriate members of DOE/FE staff in the intervening months, chose to rely on its interpretation of a call that took place more than four months before the filing was due with respect to another docket and that seems to have had more to do with the form of filing required than the timing of the filing.<sup>39</sup> Moreover, it did so fully understanding that its interpretation of a phone call with a DOE/FE staff member (whom Sierra Club had no reasonable basis for believing had the authority to waive the DOE/FE's rules) was at odds with the DOE/FE's written rules.

Further, DOE/FE warned Sierra Club about the deadline during a call on April 29 and Sierra Club admits "the fault ... lies with us."<sup>40</sup> Just as importantly, Sierra Club does not state that the DOE/FE call on April 29<sup>th</sup> came too late for Sierra Club to timely submit the Sierra Club Exhibits before the close of business on that day.<sup>41</sup> Incredibly, immediately after Sierra Club admits it is at fault, it declines to take the blame stating:

Nonetheless, Sierra Club contends that DOE/FE did not otherwise inform Sierra Club of this change in policy, and in conversations between DOE/FE and Sierra Club, DOE/FE has not identified any other DOE/FE action communicating this change. Accordingly [sic], insofar as DOE/FE's receipt of Sierra Club's exhibits on April 30, 2013 renders Sierra Club's motion to intervene untimely, Sierra Club contends that it has good cause for this untimely submission.<sup>42</sup>

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<sup>39</sup> Sierra Club also discusses its procedures with respect to distribution of courtesy copies of files on cds. *Id.* at 2. This discussion is a complete red herring. By their very nature courtesy copies fall outside of any DOE/FE requirements. To describe courtesy copies as filed to comply with DOE/FE filing requirements is oxymoronic.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> Sierra Club's legislative offices are located at 50 F Street, NW, Washington, DC 20001. See <http://www.sierraclub.org/contact/>. This is a short distance from DOE/FE's offices. What hurdle to timely filing is too small to give rise to good cause if this barrier is sufficient to justify a late intervention?

<sup>42</sup> Procedural Motion at 4.



This attempt at self-exculpation defies common sense. There is a widely accepted, almost two hundred year old, adage: "The weight of the evidence should be proportioned to the strangeness of the facts."<sup>43</sup> Yet, the Sierra Club expects the world to work in quite the opposite way. When told by a DOE/FE staff member something that Sierra Club took to mean that Sierra Club could file in a manner inconsistent with what it knew to be the written rules, it accepted this convenient, though extraordinarily odd circumstance, without question and unilaterally applied it to the current proceeding. Paradoxically, when it was told, in a conversation about the current proceeding, that the written rules actually do apply, it asserts that, because it was told only once, it should not be accountable, instead faulting "DOE/FE's limited actions communicating an apparent change in policy to Sierra Club", while patting itself on the back for "attempting to work with DOE/FE to ensure a filing process that works smoothly for DOE/FE".<sup>44</sup>

We note also that Sierra Club repeatedly claims the DOE/FE's adherence to its written policies in this proceeding would constitute a "change in policy".<sup>45</sup> From Sierra Club's pleadings and the publicly available documents, it is not clear to Pangea that the DOE/FE ever implemented an earlier change in policy that was suddenly changed back to follow the DOE/FE's written rules in the current proceeding. Instead, it appears the DOE/FE is now being faulted for making a one-time accommodation to the Sierra Club in a prior proceeding. Pangea understands that agencies are frequently called upon to read between the lines of their regulations and written policies in order to accommodate specific exigencies case-by-case. For the Sierra

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<sup>43</sup> Subsequent formulations of this piece of common sense include the famous promoter of science Carl Sagan's well-known line from the Cosmos TV series: "Extraordinary claims require extraordinary evidence," and, perhaps particularly appropriate to the current circumstances, Committee for the Scientific Investigation of Claims of the Paranormal founder Marcello Truzzi's: "An extraordinary claim requires extraordinary proof." See [http://en.wikipedia.org/wiki/Carl\\_Sagan](http://en.wikipedia.org/wiki/Carl_Sagan).

<sup>44</sup> Procedural Motion at 4.

<sup>45</sup> Sierra Club also describes DOE/FE's filing procedures as an ongoing and evolving process. Procedural Motion at 2. This knowledge alone should have signaled Sierra Club of the need to exercise some reasonable level of diligence in ascertaining the current acceptability of the unorthodox practice it sought to use.

Club to claim that the DOE/FE's use of its discretion (through arrangements made in advance) in accommodating Sierra Club on a single prior occasion (in a distinct docket where no other parties apparently objected) gives rise to a permanent, unilateral right on the part of Sierra Club to flaunt filing deadlines over the objection of another party to the proceeding threatens to harm the DOE/FE's processes by both undermining existing established rules in favor of misperceptions of the rules held by individual filers and denying the DOE/FE future flexibility in handling circumstances on a case-by-case basis.

In sum, Sierra Club has admitted it is at fault for the late filing of the Sierra Club Exhibits. Far from acting on a reasonable belief, it recklessly disregarded the DOE/FE written rules in favor of Sierra Club's own more convenient fabrication of a generic DOE/FE policy with no reasonable basis for doing so. Even after the DOE/FE attempted to put Sierra Club on the right track on the due date of the filing, Sierra Club stuck with the filing approach it preferred, and has made no claim that DOE/FE's efforts came too late. Finding good cause in these circumstances for Sierra Club's late filing of the Sierra Club Exhibits would not only result in prejudice to the Pangea proceeding, but also undermine the DOE/FE processes generally by establishing too low a threshold for the level of effort would-be intervenors must exhibit to justify late filings.

To the extent that the DOE/FE finds the Sierra Club Exhibits to be confined to the protest portion of the Sierra Club Intervention, Protest and Comments, they still should be excluded due to a lack of good cause for their lateness.<sup>46</sup> If the DOE/FE decides to accept the Sierra Club Exhibits as part of a late filed protest, it should expressly find that such exhibits cannot be used

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<sup>46</sup> Section 590.304(e) of the DOE/FE's regulations, 10 C.F.R. § 590.304(e) (2013), requires a showing of good cause for the acceptance of late-filed protests.

as the evidentiary basis for a finding that the proposed exports are inconsistent with the public interest.<sup>47</sup> This would at least partially mitigate the disruption to the current proceeding.

### **III. SIERRA CLUB'S AND APGA'S PROTESTS SHOULD BE DENIED**

The Sierra Club Intervention, Protest and Comments sets out an extensive list of arguments as to why the DOE/FE cannot or should not grant Pangea the requested authorization, including:

- Pangea has not met its burden to provide evidence to the DOE/FE supporting a finding that the proposed exports would be in the public interest (Sierra Club Intervention, Protest and Comments at 1 and 3).
- The DOE/FE must conduct its own NEPA review prior to taking even conditional action on Pangea's request (Sierra Club Intervention, Protest and Comments at 3, 12 and 18-21).
- Pangea's analysis of cumulative impacts falls short of considering the impact of exports volumes equal to all proposed exports (Sierra Club Intervention, Protest and Comments at 13-15).
- The DOE/FE must first review its previously commissioned studies and prepare a thorough description of local and regional impacts (Sierra Club Intervention, Protest and Comments at 15-16).
- Pangea's proposal is contrary to the public interest due to numerous alleged harmful environmental impacts that Sierra Club seeks to associate with the export of LNG (Sierra Club Intervention, Protest and Comments at 21-64).

As discussed below, the bulk of Sierra Club's arguments have been made in the wrong proceeding at the wrong time, most of these arguments have been previously rejected by the DOE/FE, and all of them are fatally flawed. Sierra Club fails to understand the applicable legal standards, misrepresents existing precedent, and wastes the DOE/FE's and Pangea's resources by making arguments here that must be raised first with FERC, if at all. Moreover, Sierra Club's public interest analysis is not only devoid of any useful quantitative analysis of the impacts of the proposed exports by Pangea upon which the DOE/FE could conclude that the proposal is

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<sup>47</sup> See 10 C.F.R. § 590.304(c) (2013).

inconsistent with the public interest, it is also self-contradictory. For example, Sierra Club simultaneously argues that gas price increases must be considered as against the public interest,<sup>48</sup> while advocating that natural gas production is against the public interest.<sup>49</sup> Yet, banning domestic gas production would impact the balance of supply and demand in favor of higher prices to a much greater degree than allowing LNG exports based on competitive market forces. Lacking the proper tool to tighten the screws of regulation on natural gas production, Sierra Club is trying to throw a wrench into the DOE/FE's export approval processes. DOE/FE is not required to accept Sierra Club's intervention or the arguments therein.

APGA's arguments are, by and large, more appropriate for consideration in the current proceedings considering Pangea's Application. APGA argues:

- Exports of LNG will raise domestic gas prices (APGA Intervention, Protest and Comments at 3).
- Increased domestic gas production provides an opportunity to pursue energy independence and sustained economic growth, while export of LNG will jeopardize these opportunities and natural gas's ability to serve as a bridge fuel to lower carbon technologies (APGA Intervention, Protest and Comments at 3-4).
- Like the Energy Information Administration ("EIA"), Pangea underestimates domestic demand for natural gas, leading to higher than projected increases in natural gas prices and stifling the ability of domestic industry to prosper from low gas prices (APGA Intervention, Protest and Comments at 7-8).
- The benefits of LNG exports will not be distributed evenly throughout society and those without investments or retirement-savings will be impacted by increased gas prices (APGA Intervention, Protest and Comments at 8-9).
- Rather than transferring jobs from other industries to the natural gas industry by allowing exports, the DOE/FE should focus on policies that create new jobs (APGA Intervention, Protest and Comments at 11).
- Rather than allowing LNG to be exported, the U.S. should export processed materials (APGA Intervention, Protest and Comments at 11).
- Exporting LNG will threaten the transition away from coal (APGA Intervention, Protest and Comments at 12).
- Exporting LNG will undermine the U.S.'s best opportunity to eliminate dependence of foreign oil (APGA Intervention, Protest and Comments at 13).

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<sup>48</sup> Sierra Club Intervention, Protest, and Comments at 14.

<sup>49</sup> Id. at 3.

- Shale gas and unconventional reserves are a global phenomenon. The U.S. should focus on exporting its technology for producing such gas, rather than exporting its own gas (APGA Intervention, Protest and Comments at 14-16).
- U.S. LNG export efforts will fail (APGA Intervention, Protest and Comments at 16).
- U.S. and world gas prices will converge squandering the opportunity for renewed U.S. manufacturing (APGA Intervention, Protest and Comments at 17).

However, these arguments have been, for the most part, heard and decided upon before the DOE/FE, as demonstrated by the *Freeport Order*.<sup>50</sup> Further, they are not backed by quantitative analysis or other meaningful support, involve contradictory and illogical premises or conclusions, are based on bad policy or misunderstand the DOE/FE's role.

#### **A. Burden of Proof**

Section 3 of the NGA is worded somewhat awkwardly: “The Commission shall issue [an] order [authorizing the export of natural gas from the United States to a foreign country upon application], unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest.”<sup>51</sup> Had Congress wished to impose the burden of proof on Pangea as the Sierra Club would like, it could have easily directed the DOE/FE to authorize exports only on a finding that “the proposed exportation is in the public interest,” but it did not. While the DOE/FE has wisely commissioned its own studies focused on the national impacts of LNG exports and Pangea has supplemented the record with additional studies covering national level impacts but focused on local and regional impacts, neither had the burden of supplying such information. Because the evidence developed by the DOE/FE and Pangea demonstrates that the exports proposed by Pangea, even in the context of substantial exports by others, would serve the public interest, the burden is squarely on those who oppose

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<sup>50</sup> *Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC*, DOE/FE Order No. 3282, Order Conditionally Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel From the Freeport LNG Terminal on Quintana Island, Texas to Non-Free Trade Agreement Nations (May 17, 2013) (“*Freeport Order*”).

<sup>51</sup> 15 U.S.C. § 717b (2006).

Pangea's Application to demonstrate that the preponderance of the evidence requires a finding the Pangea's proposal would be inconsistent with the public interest.<sup>52</sup>

Yet, the filings of the Sierra Club and the APGA, whether taken individually or together, fail to demonstrate on the basis of evidence, that the requested authorization to export LNG from the ST LNG Project would be inconsistent with the public interest. Instead, both Sierra Club's and APGA's arguments consist almost entirely of a repetition of issues they raised previously in opposition to other proposed export applications.<sup>53</sup> Notably, these arguments have already been rejected by DOE/FE.<sup>54</sup> As such, Section 3(a) of the NGA expressly directs the DOE to grant Pangea's Application,<sup>55</sup> whether or not the evidence developed by the DOE/FE and Pangea considers every conceivable plus and minus of Pangea's proposal.

**B. Sierra Club Fails to Acknowledge, and Both Sierra Club and the APGA Fail to Overcome, the Presumption that the Application Is Consistent with the Public Interest**

The Sierra Club Intervention, Protest and Comments articulates an incorrect standard for evaluating export applications, stating that "Section 3 of the Natural Gas Act provides that DOE/FE cannot authorize exports unless it finds the exports to be in the public interest."<sup>56</sup> In fact, as noted previously, Section 3 requires that DOE/FE authorize exports to a foreign country

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<sup>52</sup> See, e.g., *Freeport Order* at 6; and *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas From Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations (May 20, 2011) ("*Sabine Pass Conditional Order*") at 28.

<sup>53</sup> To the very limited extent that Sierra Club or the APGA have raised any new arguments with respect to Pangea, we respond to those below.

<sup>54</sup> Cf. *Freeport Order* (stating: "The protest submitted by APGA, the only protestor that filed in response to the Notice of Application, was not supported by any significant analysis and, to the extent the arguments raised in APGA's protest constituted substantial evidence, that material did not identify meaningful errors or omissions in the studies submitted by [the Applicant]."); *Sabine Pass Conditional Order*; and *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961-A, Final Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations (FE Docket No. 10-111-LNG) (Aug. 7, 2012) ("*Sabine Pass Final Order*") at 5, 9-28 (denying Sierra Club's motion to intervene out-of-time, and stating that "based on a review of the complete record in the FERC proceeding and the arguments raised in the instant proceeding by the Sierra Club, that there is no need or sufficient justification to supplement the environmental review conducted by the FERC").

<sup>55</sup> Subject only to the completion of the required NEPA review process supporting a Finding of No Significant Environmental Impact by DOE/FE.

<sup>56</sup> Sierra Club Intervention, Protest, and Comments at 3.

“unless” there is a finding on the public record that such exports “will not be consistent with the public interest.”<sup>57</sup> Accordingly, Section 3 of the NGA

creates a statutory presumption in favor of approval of an export application, and the Department must grant the requested export extension unless it determines the presumption is overcome by evidence in the record of the proceeding that the proposed export will not be consistent with the public interest. Opponents of an application bear the burden of overcoming this presumption.<sup>58</sup>

DOE/FE’s public interest review focuses on:

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.<sup>59</sup>

The review also includes “appropriate consideration to the environmental effects of its proposed decisions” under the NEPA.<sup>60</sup> Neither the AGPA, nor the Sierra Club, makes a serious attempt to rebut the presumption that the ST LNG Project is in the public interest, instead recycling the same generic arguments of nationwide applicability<sup>61</sup> that they have deployed against all the other pending applications — not to mention nearly 100 exhibits proffered late by Sierra Club that are not specific to the ST LNG Project or Pangea.

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<sup>57</sup> 15 U.S.C. § 717b(a).

<sup>58</sup> *Phillips Alaska Natural Gas Corp.*, DOE/FE Order No. 1473, Order Extending Authorization to Export Liquefied Natural Gas from Alaska (FE Docket No. 96-99-LNG) (Apr. 2, 1999) at 13 (citing *Panhandle Producers and Royalty Owners Ass’n v. ERA*, 822 F.2d 1105 at 1111 (D.C. Cir. 1987)).

<sup>59</sup> *Sabine Pass Conditional Order* at 10.

<sup>60</sup> *Id.*

<sup>61</sup> For instance, Sierra Club concedes that it “cannot provide a thorough discussion of local impacts,” Sierra Club Intervention, Protest and Comments at 22, but then expends four pages on putative impacts to air quality, water quality, fish and wildlife, and other environmental resources, *id.* at 22–26.

**C. Sierra Club’s NEPA Arguments Are Misplaced and Mistimed and Wrongly Conclude that the DOE/FE Is Not Entitled to Issue a Conditional Order**

The bulk of the Sierra Club Intervention, Protest, and Comments is focused on issues well beyond the scope of this proceeding, including environmental issues associated with the “construction and operation of the terminal, pipeline expansion, and any other associated infrastructure,”<sup>62</sup> as well as environmental issues associated with the presumption of induced shale gas production, and all presumptive direct, indirect and cumulative impacts associated with, not just the Pangea’s Application, but *all* proposed export projects. Sierra Club’s arguments are misplaced because FERC, not DOE/FE is the lead agency for purposes of conducting NEPA analyses. Furthermore, DOE/FE may issue an order conditionally authorizing exports from the ST LNG Project pending review of FERC’s NEPA analyses.

**1. FERC Is the Lead Federal Agency for Purposes of NEPA**

Under Section 3(e)(1) of the NGA,<sup>63</sup> FERC has “the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.” Accordingly, it is FERC, and not DOE/FE, that will review the environmental issues associated with the siting, construction and operation of the ST LNG Project. The Energy Policy Act of 2005 (“EPAAct 2005”)<sup>64</sup> amended the NGA to streamline the process for reviewing and approving natural gas projects, including LNG facilities. It specifically required that “FERC shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act.”<sup>65</sup> Consistent with that

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<sup>62</sup> Sierra Club Intervention, Protest and Comments at 4.

<sup>63</sup> 15 U.S.C. § 717b(e)(1).

<sup>64</sup> Pub. L. No. 109-58, 119 Stat. 594 (2005).

<sup>65</sup> *Id.* § 313(a), 119 Stat. at 688.



mandate, and as reflected in Pangea's Application,<sup>66</sup> DOE/FE will participate as a cooperating agency in the FERC's environmental review process for the ST LNG Project.

DOE/FE has promulgated regulations that govern its role as a cooperating agency in the NEPA process, including through adoption of Council on Environmental Quality ("CEQ") NEPA regulations.<sup>67</sup> The regulations provide that, "[u]pon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency."<sup>68</sup> They further require that "DOE *shall* cooperate with the other agencies in developing environmental information."<sup>69</sup> As the lead agency, FERC is responsible for preparation of NEPA analyses.<sup>70</sup> As a cooperating agency, DOE/FE may adopt FERC's NEPA analyses, as long as FERC has satisfactorily addressed any comments raised by DOE/FE during the cooperating agency process.<sup>71</sup> The lead/cooperating agency process exists to avoid duplication of efforts within the Federal government.<sup>72</sup> A cooperating agency, such as DOE/FE, provides its input through that process by participating in the review and submitting comments before the lead agency issues its NEPA analysis, which in this case will be an Environmental Impact Statement ("EIS").<sup>73</sup> Once the report has been issued, the role of the cooperating agency is normally limited; as a cooperating agency under NEPA, DOE/FE "may adopt without recirculating" FERC's Environmental Impact Statement ("EIS") if, "after an independent review," DOE/FE "concludes that its comments and suggestions have been satisfied."<sup>74</sup>

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<sup>66</sup> See Application at 42.

<sup>67</sup> See 10 C.F.R. § 1021.103 (2013).

<sup>68</sup> 40 C.F.R. § 1501.6 (2013).

<sup>69</sup> 10 C.F.R. § 1021.342 (2013) (emphasis added).

<sup>70</sup> See 40 C.F.R. § 1501.5(a) (2013)

<sup>71</sup> See *id.* § 1506.3(c).

<sup>72</sup> 48 Fed. Reg. 34,263 at 34,265 (July 28, 1983).

<sup>73</sup> See 40 C.F.R. §§ 1503.2, 1503.3(c), 1506.3(c) (2013).

<sup>74</sup> *Id.* § 1506.3(c); see also 48 Fed. Reg. at 34,265–66 (discussing circumstances under which cooperating agencies adopt lead agencies' NEPA analyses).

Because DOE is merely acting consistently with the pre-existing statutory scheme and implementing regulations, Sierra Club's claims that DOE/FE must conduct its own NEPA process amounts to an impermissible and out-of-time collateral attack in the wrong proceeding on the DOE/FE's generic processes.

Pangea agrees, in part, with Sierra Club that "if the NEPA analysis FERC prepares in its capacity as lead agency is inadequate to fully inform DOE/FE's decision or discharge DOE/FE's NEPA obligations, DOE/FE must prepare a separate EIS."<sup>75</sup> However, because DOE/FE is a cooperating agency in the FERC NEPA process, the DOE/FE has sufficient opportunity to provide input into that process, and is experienced in doing so, it is unlikely that FERC's NEPA process and resultant EIS will be inadequate to inform DOE/FE's decision or to discharge its NEPA obligations. Further, should DOE/FE conclude that the FERC's analysis, as reflected in the EIS, does not cover the full scope of issues needed to be considered by DOE/FE, a Supplemental EIS may be prepared providing the necessary additional analysis. DOE/FE need not, and should not, produce a stand-alone EIS.<sup>76</sup> In short, Sierra Club's assertion that DOE/FE should undertake its own independent environmental review process must be rejected as a collateral attack on previously promulgated rules carefully crafted to avoid duplicative agency action that both EPA Act 2005 and the CEQ regulations seek to eliminate.

## **2. Issuance of a Conditional Order Is Appropriate in This Proceeding**

Pangea has requested that DOE/FE issue a conditional order pending completion of the NEPA process for the ST LNG Project by FERC and subsequent issuance of a record of decision

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<sup>75</sup> Sierra Club Intervention, Protest and Comments at 8.

<sup>76</sup> Agencies regularly issue Supplemental EISs. *See, e.g.,* <http://nnsa.energy.gov/about/ouoperations/generalcounsel/nepaoverview/nepa/finalcmrreis;> [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5331996.pdf;](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5331996.pdf) [http://www.nmfs.noaa.gov/pr/permits/eis/arctic.htm;](http://www.nmfs.noaa.gov/pr/permits/eis/arctic.htm) and [http://www.mercurystorageeis.com/547D21CB-912C-489A-B49C-F09752769FE1/FinalDownload/DownloadId-BF3AFE697E605A3BD60A1C59DD9DD64D/547D21CB-912C-489A-B49C-F09752769FE1/Draft\\_Mercury\\_Storage\\_SEIS.pdf.](http://www.mercurystorageeis.com/547D21CB-912C-489A-B49C-F09752769FE1/FinalDownload/DownloadId-BF3AFE697E605A3BD60A1C59DD9DD64D/547D21CB-912C-489A-B49C-F09752769FE1/Draft_Mercury_Storage_SEIS.pdf)

by DOE/FE.<sup>77</sup> Sierra Club takes issue with this request, asserting that DOE/FE may not issue a conditional order authorizing the export of LNG pending completion of the NEPA review process.<sup>78</sup> While acknowledging that DOE/FE has the authority to issue conditional orders, Sierra Club nonetheless states that agencies are prohibited from taking “any action on a proposal prior to completion of NEPA review if that action tends to ‘limit the choice of reasonable alternatives.’”<sup>79</sup> Sierra Club’s position is inconsistent with Section 590.402 of the DOE/FE regulations, which provides that “[t]he Assistant Secretary may issue a conditional order *at any time* during a proceeding prior to issuance of a final opinion and order.”<sup>80</sup> Moreover, Sierra Club provides no convincing rationale as to why issuance of a conditional order (which by its terms explicitly authorizes no final action) should be disallowed, especially given that DOE/FE has issued conditional orders subject to satisfactory environmental review in circumstances similar to those in this matter.<sup>81</sup>

Sierra Club also argues that DOE/FE’s own regulations prohibit it from issuing a conditional order prior to the completion of NEPA analyses.<sup>82</sup> Specifically, it quotes 10 C.F.R. § 1021.211, which states: “While 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

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<sup>77</sup> Application at 11 (citing 10 C.F.R. § 590.402).

<sup>78</sup> See Sierra Club Intervention, Protest and Comments at 18–21.

<sup>79</sup> *Id.* at 19.

<sup>80</sup> 10 C.F.R. § 590.402 (2013) (emphasis added); see also *id.* (“The conditional order shall include the basis for not issuing a final opinion and order at that time and a statement of findings and conclusions. The findings and conclusions shall be based solely on the official record of the proceeding.”); *Ocean State Power*, DOE/ERA Order No. 243-A, Final Order Granting Authorization to Import Natural Gas from Canada, 1 ERA ¶ 70,810 (ERA Docket No. 86-62-NG) (Sept. 14, 1988) (granting the first conditional authorization by predecessor agency, the Economic Regulatory Administration (“ERA”), to import natural gas from Canada, conditioned upon a final opinion and order from ERA after review by DOE of the final EIS being prepared for the Ocean State Project by FERC); *Pub. Utilities Comm’n of Cal. v. FERC*, 900 F.2d 269 at 282 (D.C. Cir. 1990) (stating that an agency can make a final decision, so long as it assesses the environmental data before the decision’s effective date).

<sup>81</sup> See, e.g., *Sabine Pass Conditional Order*; *Rochester Gas & Elec. Corp.*, DOE/FE Order No. 503, Conditional Order Granting Long-Term Authorization to Import Natural Gas from Canada and Granting Intervention (FE Docket No. 90-05-NG) (May 16, 1991).

<sup>82</sup> Sierra Club Intervention, Protest and Comments at 18–19.

issuing an ROD, except as provided at 40 C.F.R. 1506.1.” In the first place, the plain text of this regulation only applies “[w]hen *DOE* is preparing an EIS,” not when DOE is a cooperating agency and another agency is performing NEPA analyses. Certainly, DOE/FE does not read its own regulations in the manner Sierra Club would like. While Sierra Club claims: “The authorities that Pangea cites [including the guidance with respect to the import and export of natural gas] are inapplicable or have been superseded by this regulation”,<sup>83</sup> it is clear from the *Sabine Pass Conditional Order* and the *Freeport Order*, each of which is a conditional order approving LNG exports, that this is not the case.

Further, even assuming that this regulation were applicable, the CEQ NEPA regulation referenced within it specifically allows interim action to be taken unless it would “(1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives.”<sup>84</sup> Issuance of a conditional export authorization would have no environmental impact, because FERC has exclusive jurisdiction over the construction and operation of LNG export terminals.<sup>85</sup> Nor would it limit FERC’s choice of reasonable alternatives to consider in its NEPA analyses. For instance, in proceedings relating to Sabine Pass Liquefaction, LLC, DOE/FE issued an order on May 20, 2011, granting export authorization that was “conditioned on the satisfactory completion of the environmental review process in FERC Docket No. PF10-24-000 and on issuance by DOE/FE of a finding of no significant impact or a record of decision pursuant to NEPA.”<sup>86</sup> FERC issued an Environmental Assessment (“EA”) in December 2011 that considered a number of alternatives, including that of taking no action.<sup>87</sup> Thus, there is no reason to believe that DOE/FE’s issuance

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<sup>83</sup> *Id.* at 19.

<sup>84</sup> 40 C.F.R. § 1506.1(c) (2013).

<sup>85</sup> *See* 15 U.S.C. § 717b

<sup>86</sup> *Sabine Pass Liquefaction Conditional Order* at 41.

<sup>87</sup> *See* Environmental Assessment for the Sabine Pass Liquefaction Project 3-1-3-9, *Sabine Pass Liquefaction, LLC & Sabine Pass LNG, L.P.*, FERC Docket No. CP11-72-000 (Dec. 28, 2011).

of a conditional order would impede FERC, the lead agency in the NEPA review process, in carrying out its responsibilities. In this regard, FERC previously has explained its obligation under the NGA to review alternatives in conjunction with the NEPA process as follows:

[T]he Commission does not direct the development of the gas industry's infrastructure, neither on a broad regional basis nor in the design of specific projects. Instead, we respond when an application is presented to us . . . . Under the NGA, we consider alternatives to a proposed project in determining whether a proposal is in the public interest. Under NEPA, we take a hard look at alternative means to fulfill the purpose and meet the need described in the application and assess the environmental impacts of each alternative. If we were to find the proposed project to be environmentally unacceptable, we would reject the application.<sup>88</sup>

Nor does this issuance of a conditional order mean—as Sierra Club suggests<sup>89</sup>—that DOE/FE will shirk its role as a cooperating agency and irrationally ignore environmental effects. Again, in the proceedings regarding Sabine Pass Liquefaction, LLC, DOE/FE reviewed FERC's EA and issued a Finding of No Significant Impact in which it adopted the findings and conditions in the EA.<sup>90</sup> In its final order granting authorization, DOE/FE explained its role in the NEPA process:

As a cooperating agency in the Commission's environmental review, 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. DOE/FE has reviewed the administrative record compiled at the FERC, including the EA and the Commission's orders. Based on that review, DOE/FE has concluded that supplementation of the record is not warranted or necessary in order for DOE/FE to take final agency action herein.<sup>91</sup>

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<sup>88</sup> *Tex. E. Transmission, LP*, 141 FERC ¶ 61,043 at PP 25–26 (2012).

<sup>89</sup> *See* Sierra Club Intervention, Protest and Comments at 20.

<sup>90</sup> *See Sabine Pass Liquefaction, LLC*, Finding of No Significant Impact for Sabine Pass Liquefaction, LLC Regarding Order Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations (FE Docket No. 10-111-LNG) (Aug. 7, 2012).

<sup>91</sup> *Sabine Pass Final Order* at 27.

This is perfectly consistent with CEQ's NEPA regulations, which provide that "[a] cooperating agency may adopt without recirculating the environmental impact statement of a lead agency . . . after an independent review of the statement."<sup>92</sup>

**D. The Substance of Sierra Club's NEPA Arguments Is Flawed**

Even assuming *arguendo* that Sierra Club's NEPA arguments were well taken as a procedural matter in the context of a DOE/FE proceeding regarding LNG export authorization, their substance is unsupported by facts, regulations, and precedent. Moreover, they do not support the conclusion that a grant of Pangea's pending application would be inconsistent with the public interest.

**1. The Linkage between DOE/FE's Approval of Pangea's Application for Authorization to Export LNG and Environmental Impacts Is Very Different from the Linkage between FERC's Authorization of Pangea's ST LNG Project and Environmental Impacts**

The DOE/FE previously has recognized, quite properly, that the causal link between approvals of LNG exports and environmental impacts is limited by the fact that such approvals are not certain to lead to the construction of an LNG export terminal or the export of LNG from any terminal actually constructed.<sup>93</sup> Indeed, from 2000 to 2010, only 8 new LNG terminals were built even though over 40 applications to build new LNG import facilities were submitted to federal agencies, and many existing U.S. import terminals currently import little or no LNG.<sup>94</sup>

Further, the DOE/FE previously has concluded correctly that the uncertainty surrounding the sources of feed gas for those LNG export facilities that are actually constructed and the techniques and environmental regulations that will apply to the production of such feed gas

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<sup>92</sup> 40 C.F.R. § 1506.3(c) (2006).

<sup>93</sup> See *Freeport Order* at 64 (noting that "the volume of authorized exports to FTA countries is by no means a reliable predictor of the number and capacity of LNG export facilities that will ultimately be financed, constructed, and placed in operation").

<sup>94</sup> *Freeport Order* at FN 79.

remove many of the types of environmental impacts alleged by the Sierra Club here from the proper scope of detailed consideration in the NEPA process.<sup>95</sup>

Both the uncertainty that the facilities will be successfully pursued after exports are approved and the uncertainty surrounding feed gas sourcing and production apply equally to the FERC's assessment of the environmental impacts of its terminal approvals as the DOE/FE's assessment of the environmental impacts of its LNG export approvals. However, there is another important layer of uncertainty to the environmental impacts associated with DOE/FE approvals of exports to non-FTA nations.

Unlike the FERC's up or down decision on a LNG export project, where a denial of an application guarantees a particular facility will not be constructed and will never operate, the DOE/FE's approval of Pangea's exports to non-FTA nations would function more as (i) a destination option, than (ii) a yes or no decision on the terminal and exports in an amount up to the ST LNG Project's throughput capacity. This is true because Pangea already holds an export authorization for exports to FTA countries in an amount equal to the amount sought by Pangea for exports to non-FTA countries and these two amounts are not additive. Thus, by granting Pangea's pending application, the DOE/FE would not be authorizing any increase in exports by Pangea whatsoever. Instead, it merely would be allowing a greater choice of destinations. Consequently, an authorization in this proceeding could well have zero environmental impacts, or at least know ascertainable effect on environmental impacts.<sup>96</sup>

Pangea acknowledges that the grant of a Non-FTA authorization should increase the likelihood of the ST LNG Project's success, including the likelihood that the ST LNG Project

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<sup>95</sup> *Sabine Pass Final Order* at 27-28.

<sup>96</sup> It is true that increased destination options could result in a different customer set using the facility and the different customers set might source gas differently and might deliver gas to different destinations. However, there is no way now to know whether such differences would be associated with greater or lesser environmental impacts.

will ever be built and, in that sense, approving exports to Non-FTA Countries should increase the likelihood that the ST LNG Project will result in environmental impacts. However, the amount by which such an approval would increase the likelihood of the project going forward cannot be meaningfully quantified, and qualitative factors suggest authorizing exports to Non-FTA Countries, while of significance to Pangea, is not as strong an indicator as to whether the project will go forward as it may be for other projects. In this regard, Pangea notes that it is currently 80% directly and indirectly owned by a major South Korean corporation with substantial commercial ties in South Korea, a FTA Country, and such ties substantially improves Pangea's ability to market to customers in South Korea and entities wishing to use the terminal to market gas to South Korea.

Moreover, not all LNG export related impacts are bad. For example, increased economic activity and improved balance of trade are impacts that would benefit the public. A simple decision matrix shows that approval on Pangea's Application for authorization to export to non-FTA nations produces at least as good an outcome for the public interest as a denial of the application, even if the DOE/FE were to accept the Sierra Club's and the APGA's assessment of potential negative impacts.



Simple Decision Matrix Environmental Impact Analysis	Project Is Not Built or Operated	Project Is Built and Operated <sup>97</sup>
<b>DOE Denies Application to Export to Non-FTA Nations</b>	No project related impacts, but all positive project impacts forgone (e.g., no jobs created, no income from sale of LNG abroad, no reduction in world reliance on coal)	Project impacts are created, but positive impacts are limited by inability to direct LNG to where it will have the highest value (and provide the greatest balance of trade benefits)
<b>DOE Grants Application to Export to Non-FTA Nations</b>	No project related impacts, but all positive project impacts forgone (e.g., no jobs created, no income from sale of LNG abroad, no reduction in world reliance on coal)	Project impacts are created, and positive impacts are enhanced by ability to sell LNG to markets providing highest value (and provide the greatest balance of trade benefits)

As can be seen from the matrix, if the ST LNG Project is not built, then the DOE/FE's approval of exports from the facility to Non-FTA nations will have no impacts good or bad, though the U.S. will likely be worse off for lack of exports from the facility. On the other hand, if the ST LNG Project is built and operated project impacts will be experienced. Air, water and other non-economic impacts (whether net positive or negative) will be essentially the same whether the exports are made to FTA nations or non-FTA nations. However, positive economic impacts will be enhanced by allowing exports to non-FTA nations because customers around the globe that attach the highest value to LNG will be competing for Pangea's supply leading to higher net backs to the U.S. exporters.<sup>98</sup>

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<sup>97</sup> It is assumed that, if the ST LNG Project is constructed, it will operate in an effort to return a profit or at least as much of the original cost as possible. However, given access to a smaller demand pool, it is expected that sales to FTA nations only would be at a lower price, bringing in less income to the U.S. economy. Also, some of the nations that could benefit most from U.S. sourced LNG (e.g., Japan) would likely benefit less than if exports to Non-FTA nations were also allowed, leading to a less vigorous world economy and less other positive trade opportunities for the U.S.

<sup>98</sup> Because of the high capital cost and modest operating cost of the infrastructure required to export LNG, it is assumed that the ST LNG Project, if built, will be operated at the highest possible capacity regardless of whether LNG is destined for FTA countries only or non-FTA countries as well. Consequently, any impacts on U.S. domestic gas prices would be the same regardless of the destination of exported LNG. These considerations also seriously undermine the contentions of APGA. The negative effects of exports by Pangea alleged by APGA, to the extent that

For these reasons, it is not possible to draw the conclusion that the grant of Pangea's current application would be inconsistent with the public interest, even if all of the arguments made in the Sierra Club and APGA Interventions, Protests and Comments were accepted as correct. To the contrary, there is a substantial probability that Sierra Club and APGA are advocating against their own, and the public's, interest, even if their stated concerns were found to have some basis in fact.

## **2. There Is No Basis for Preparation of a Programmatic EIS**

Sierra Club is incorrect that DOE/FE must prepare a programmatic EIS ("PEIS") to consider the direct and indirect impacts of all proposed export projects.<sup>99</sup> DOE's NEPA regulations define a PEIS as a "broad-scope EIS or EA that identifies and assesses the environmental impacts of a DOE program."<sup>100</sup> Courts have stated that a PEIS reflects the "broad environmental consequences attendant upon a wide-ranging federal program."<sup>101</sup> The rationale for preparation of a PEIS is that a coordinated federal program is likely to generate disparate but related impacts.<sup>102</sup> Numerous companies have proposed to site, construct, and operate LNG export facilities and their associated filings are pending before FERC and DOE/FE; but these projects are not part of a coordinated Federal program, and individually are not part of an orchestrated series of projects directed by a single decision-maker such as the Federal government. Importantly, FERC does not "direct the development" of LNG or natural gas infrastructure on a regional or national basis, and FERC's review and approval of projects under

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they would exist at all, are independent of the destination to which LNG is exported. By denying exports to Non-FTA Nations, the DOE/FE would merely be reducing the offsetting benefits to be had by maximizing prices for exported gas and improving the lot of our trading partners who would most benefit from U.S. LNG.

<sup>99</sup> See Sierra Club Intervention, Protest and Comments at 13–15.

<sup>100</sup> 10 C.F.R. § 1021.104(b) (2013).

<sup>101</sup> *Found. on Econ. Trends v. Heckler*, 756 F.2d 143 at 159 (D.C. Cir. 1985) (citation omitted).

<sup>102</sup> See *id.* at 158.

the NGA does not constitute a “coordinated federal program.”<sup>103</sup> Consequently, because the Application is not part of a coordinated federal program, there is no basis for preparing a PEIS and Sierra Club’s request that DOE/FE do so must be rejected.

Elsewhere, Sierra Club has taken a position that is diametrically opposed to its arguments here, contending that DOE/FE’s actions on applications for LNG export authorizations do not constitute a broad, coordinated Federal program (such as might require preparation of a programmatic EIS). Indeed, in a recent rule-making petition filed with DOE/FE,<sup>104</sup> Sierra Club lamented precisely the *lack* of such a program. Specifically, Sierra Club characterized DOE/FE orders on export authorization applications as “adjudicatory processes[ that] do not invite broad public participation[,] do not provide a clear venue to announce new agency-wide policy decisions,” and “afford no obvious opportunity for DOE to publicly announce, and seek comment upon, a shift in policy.”<sup>105</sup> It argued that DOE/FE’s actions to date did “not appear tethered to any particular policy proposal,” did “not substitute for a public policymaking process” or “a full policy statement,” and had failed to “articulate a coherent vision for export policy.”<sup>106</sup> Sierra Club alleged “[t]he absence of any formal export policy, or clear guidelines” regarding LNG exports, and requested that DOE/FE “initiate a full public notice and comment process to update its decisionmaking guidelines” through “a larger policy rulemaking” in order “to carefully enunciate a more modern set of policy judgments” and “offer a coherent policy structure.”<sup>107</sup> It noted that “NEPA is often used to make programmatic decisions of this sort,” and further requested that—in the context of this broad rulemaking—“DOE should therefore

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<sup>103</sup> See *Tex. E.*, 141 FERC ¶ 61,043 (2012).

<sup>104</sup> Sierra Club et al., *Petition for Rulemaking Regarding Natural Gas Export Policy* (Apr. 8, 2013), available at [http://action.sierraclub.org/site/R?i=AjClY1L7C4RDXWjymej\\_g](http://action.sierraclub.org/site/R?i=AjClY1L7C4RDXWjymej_g).

<sup>105</sup> *Id.* at 4, 16.

<sup>106</sup> *Id.* at 13, 14, 15.

<sup>107</sup> *Id.* at 8, 4, 17, 12, 16.

prepare (or work with FERC to prepare) a programmatic EIS, fully considering the environmental and public health impacts of possible levels of LNG export.”<sup>108</sup> Thus, Sierra Club has acknowledged that adjudication of an individual application for export authorization (such as Pangea’s) does not trigger the requirement to prepare a PEIS, and indeed that no such requirement would be triggered unless and until DOE/FE undertakes a “larger policy rulemaking” on LNG exports.

As a practical matter, preparation of an individual EIS for each project on a case-by-case basis is the only reasonable approach available to FERC and the DOE. Most of the environmental impacts stemming from approvals of export projects and exports from such projects that fall within the proper scope of the NEPA review process are case specific (e.g., the amount and nature of any wetlands affected by the footprint of a LNG terminal and any dedicated gas supply pipeline) and not susceptible to being analyzed in a generic proceeding. The exception to this would be economic impacts of national scope. Although the DOE/FE previously has commissioned studies to examine just such effects,<sup>109</sup> it has done so without the need for a PEIS, while still providing all interested parties the opportunity to comment fully on such studies. To add additional process to the completion and integration of such studies through reliance on a PEIS would inevitably mean that the impacts considered under the PEIS would be analyzed through the use of studies older than those already being criticized by entities, such as Sierra Club, as stale. Agencies are frequently forced to make a trade-off between making decisions (i) after more analysis and process surrounding older data, or (ii) after more

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<sup>108</sup> *Id.* at 19.

<sup>109</sup> *See* 2012 LNG Export Study, 77 Fed. Reg. 73,627 (Dec. 11, 2012) (“LNG Export Study”), available at [http://energy.gov/sites/prod/files/2013/04/f0/fr\\_notice\\_two\\_part\\_study.pdf](http://energy.gov/sites/prod/files/2013/04/f0/fr_notice_two_part_study.pdf) (Federal Register Notice of Availability of the LNG Export Study).

streamlined analysis and process applied to fresher data. DOE has used its discretion in this case to strike a reasonable balance.

### **3. Sierra Club's Position that the Effects of Induced Additional Production of Natural Gas Must Be Considered in the NEPA and NGA Analyses Should Be Rejected**

Just as it has unsuccessfully done in other proceedings concerning proposals to export domestic LNG, Sierra Club alleges that DOE/FE must consider the environmental effects of induced additional natural gas production from shale in its review of Pangea's Application.<sup>110</sup> But both FERC and DOE/FE rejected this position in their proceedings regarding Sabine Pass Liquefaction, LLC, finding that impacts which may result from additional shale gas production are not "reasonably foreseeable" indirect effects under NEPA.<sup>111</sup> DOE/FE should reach the same conclusion here.

FERC has had multiple opportunities to consider Sierra Club's argument that the environmental impacts of induced production must be considered in the cumulative impacts analysis for proposed natural gas infrastructure projects, and has consistently rejected this position on the grounds that the shale development and its associated effects were not sufficiently causally related to the proposed project.<sup>112</sup> In one of those cases, *Texas Eastern*, the Commission explained that it did not view its determination that there is no causal relationship between a proposed pipeline project and the development of the shale reserves as inconsistent with its obligation under NEPA to consider the incremental impact a proposed action will have

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<sup>110</sup> See Sierra Club Intervention, Protest and Comments at 29–33.

<sup>111</sup> See *Sabine Pass Liquefaction, LLC*, 139 FERC ¶ 61,039 at PP 94–99 (2012) (“[I]mpacts which may result from additional shale gas development are not ‘reasonably foreseeable’ as defined by the CEQ regulations.”); see also *Sabine Pass Final Order* at 28 (“DOE/FE accepts and adopts the Commission’s determination that induced shale gas production is not a reasonably foreseeable effect for purposes of NEPA analysis, for the reasons given by the Commission.”).

<sup>112</sup> See, e.g., *Tex. E. Transmission, LP*, 139 FERC ¶ 61,138 at PP 70–73 (2012); see also *Tenn. Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161 at PP 182–93 (2012); *Cent. N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121 at PP 81–107 (2011), *reh’g denied*, 138 FERC ¶ 61,104 at PP 33–56 (2012), *aff’d sub nom. Coal. for Responsible Growth and Res. Conservation v. FERC*, No. 12-566, 2012 U.S. App. LEXIS 11847 (2d Cir. June 12, 2012).

“when added to other past, present, and reasonably foreseeable future actions.”<sup>113</sup> In support of its position, FERC cited to *Sierra Club v. Clinton*,<sup>114</sup> explaining:

In the *Sierra Club* case and this case, the new pipeline was found to be separated both physically (with hundreds of miles between the project site and production fields) and in terms of the pipeline’s influence on production activities. Accordingly, finding no cause and effect is a shorthand way of saying that the pipeline and production are not related “actions that will have cumulative or synergistic environmental impact upon a region.” If two separate actions may proceed independently, the impacts of these separate actions should not be joined in a cumulative impacts analysis.<sup>115</sup>

Similarly, it is reasonable to anticipate that natural gas production in the U.S. would continue to increase in the absence of proposed LNG export projects, including the ST LNG Project—either in response to increases in gas-fired power generation, for use as a motor vehicle fuel, chemicals production, pipeline exports to Canada or Mexico or for any other source of increased demand. Accordingly, it is not reasonable to link the environmental impacts associated with natural gas production across the country to the environmental review of the ST LNG Project and Pangea’s Application. Just as FERC found in *Sabine Pass* that induced production was neither ““reasonably foreseeable”” nor an “effect” for purposes of a NEPA cumulative impacts analysis within the meaning of the CEQ regulations,<sup>116</sup> the same holds true here and, accordingly, Sierra Club’s position should again be rejected.

In the instant proceeding, Sierra Club contends that, because the Application indicates that “[e]xports through the ST LNG Project will also likely stimulate additional development of natural gas resources by an additional market for North American natural gas,”<sup>117</sup> the NEPA analysis for the ST LNG Project “must consider the broader constellation of indirect and

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<sup>113</sup> *Tex. E.*, 141 FERC ¶ 61,043 at P 41 (“*Texas Eastern*”).

<sup>114</sup> 746 F. Supp. 2d 1025 at 1044 (D. Minn. 2010).

<sup>115</sup> *Texas Eastern*, 141 FERC at P 41 (internal citations omitted).

<sup>116</sup> *Sabine Pass*, 139 FERC ¶ 61,039 at P 96.

<sup>117</sup> Application at 38.

cumulative effects”<sup>118</sup> of “all pending export proposals,”<sup>119</sup> including that “LNG exports will induce additional production in the United States.”<sup>120</sup> This argument misreads both Pangea’s Application and the applicable NEPA regulations and case law.

On the very first page of the Sierra Club Intervention, Protest and Comments, Sierra Club mischaracterizes applicable law by citing *Udall v. Federal Power Comm’n*, 387 U.S. 428, 450 (1967) (“*Udall*”) as supporting the proposition that “DOE/FE cannot authorize exports without fairly weighing significant environmental and economic impacts of [increased natural gas] production.” In *Udall*, the Federal Power Commission considered whether the construction of a hydroelectric project and associated dam were in the public interest for the purposes of the Federal Water Power Act of 1920, as amended by the Federal Power Act (“FPA”). The FPA expressly requires that FERC take environmental considerations into account.<sup>121</sup> Moreover, the environmental impacts the court required consideration of were those created on a particular waterway by virtue of the project being physically situated in that waterway. This is akin to the physical impact that the ST LNG Project would have on its immediate surroundings. Based on FERC practice with respect to other LNG terminals, it is clear that FERC will conduct such an analysis and Pangea does not dispute the need for such a review. However, *Udall* provides no instruction on the proper scope of review in conjunction with permitting the export from the U.S. of natural gas pursuant to the NGA.

On page five of the Sierra Club Intervention, Protest and Comments, Sierra Club continues to misinform DOE/FE of the guidance offered by applicable case law. Here it

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<sup>118</sup> Sierra Club Intervention, Protest and Comments at 12.

<sup>119</sup> *Id.* at 13.

<sup>120</sup> *Id.* at 26.

<sup>121</sup> For example, Section 4(e) of the FPA states, in relevant part: “[When] deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and the enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.”

describes *NAACP v. Federal Power Comm'n*, 425 U.S. 662 (1976) (“*NAACP*”) as explaining that the public interest under the NGA includes environmental considerations. In fact, in *NAACP*, the U.S. Supreme Court explained: “The Court of Appeals rejected the broader argument based upon the statutory criterion of ‘public interest,’ and we hold that it was correct in doing so. This Court’s cases have consistently held that the use of the words “public interest” in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.”<sup>122</sup> As Sierra Club concedes, citing to *United Gas Pipe Line Co v. McComb*, 442 U.S. 529 (1979), the NGA’s fundamental purposes is assuring the public a reliable supply of gas at reasonable prices.<sup>123</sup> In contrast to the FPA, neither the word environment, nor environmental, nor any synonym thereof, appears in any provision of the NGA.

*Pub. Utilities Comm’n of State of Cal. v. F.E.R.C.*, 900 F. 2d 269 (D.C. Cir. 1990)(“*CPUC v. FERC*”) also cited by Sierra Club at page 5 does confirm the holding of *NAACP*, but, as noted above, *NAACP* does not support Sierra Club’s assertion that the NGA requires environmental factors to be considered in determining whether approval of an export application is inconsistent with the public interest. Moreover, although Sierra Club neglects to

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<sup>122</sup> Instead of providing the straight forward quote presented here, Sierra Club fuses two distinct ideas to confuse the issue. *NAACP* at 670 does state the obvious that the NGA incorporates a public interest standard and footnote 6 of *NAACP*, also cited by Sierra Club, does indicate that some statutes include environmental considerations as part of the public interest, but the footnote does not say that environmental considerations fall within the scope of public interest for the purposes of the NGA. Instead the footnote discusses multiple statutes, including the Federal Power Act (“FPA”). The purposes of the FPA expressly include acting “for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat) and for other beneficial public uses....” Thus, it is the FPA that includes environmental concerns within the scope of the term “public interest.” No similar language appears in the NGA to support a claim that the NGA intends the term “public interest” to encompass such concepts. Pangea is not arguing that the DOE/FE has no statutory duty to consider environmental impacts, but does assert that Sierra Club grossly misstates the what (i.e., the scope of the factors to be considered), how (i.e., whether DOE/FE may rely on a FERC prepared EIS and issue a condition order in advance of completion of the NEPA process), and why (i.e., the statutory basis for conducting an environmental review) of doing so.

<sup>123</sup> Sierra Club Intervention, Protest and Comments at 5.



so inform the DOE/FE, *CPUC v. FERC* supports DOE/FE's existing processes and Pangea's positions in various respects. For example, the court says:

California charges that FERC committed a procedural foul by issuing WyCal a conditional OEC before the environmental hearing was completed. While it is generally true that 'NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken,' 40 CFR Sec. 1500.1(b) (emphasis added), we held in *Illinois Commerce Comm'n* that this did not prevent an agency from making even a final decision so long as it assessed the environmental data before the decision's effective date. 848 F.2d at 1259; see also 40 CFR Sec. 1506.1(a). Here, the Commission's non-environmental approval was expressly not to be effective until the environmental hearing was completed. See WyCal Declaratory Order, 44 FERC at 61,013; Wyoming-California Pipeline Co., 45 FERC at 61,676.<sup>124</sup>

Pangea asks that DOE/FE take notice of this case not for the proposition that Sierra Club attempts to ascribe to it, but rather for its clear implications with respect the DOE/FE's authority to issue a conditional order in this proceeding. See further discussion at Section III.C.2 above.

On another relevant topic, which Sierra Club also conveniently fails to mention, the court in this same case stated:

California objects that the Commission failed to assess cumulative impacts from successive similar pipelines. As the proceeding was intended to treat all three then pending proposals for pipelines from Wyoming to the Enhanced Oil Recovery market, Mojave Pipeline Company, 42 FERC at 62,003, such impacts were a theoretical possibility. But the ALJ and the Commission found that the EOR market would not support more than one interstate pipeline, see Mojave Pipeline Co. (Initial Decision on Environmental Issues), 45 FERC p 63,005 at 65,022, 65,036 (1988); Mojave Pipeline Co., 46 FERC at 61,162, a prediction California does not dispute. As successive pipelines were not reasonably foreseeable, there was no need to consider the cumulative impacts of more than one pipeline.<sup>125</sup>

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<sup>124</sup> CPUC v. FERC at 282

<sup>125</sup> *Id.* at 283 (footnote omitted).

Yet, in arguing that “the full volume of proposed exports is ... a required component of DOE/FE’s NEPA analysis. DOE/FE cannot authorize this proposed export project or any other export proposal on the assumption that authorized activity will not actually occur”,<sup>126</sup> Sierra Club makes no attempt to explain away this directly conflicting opinion of the court.

At page 6, the Sierra Club Intervention, Protest, and Comments misapplies yet more case law. After again erroneously claiming that the FPA public interest analysis is similar to the NGA public interest analysis relying on *Udall*, Sierra Club claims that *N. Natural Gas Co. v. Fed. Power Comm’n*, 399 F.2d 953, 973 (D.C. Cir. 1968) (“*N. Natural Gas*”) applied *Udall*’s holding to the NGA. However, to the extent that Sierra Clubs seeks to have the DOE/FE believe that *N. Natural Gas* stands for the proposition that NGA Section 3’s public interest test requires the consideration of environmental factors of the type that are considered under the FPA, Sierra Club is misleading the DOE/FE. First of all, *N. Natural Gas* is a NGA Section 7 case (which Sierra Club does note) and Section 7 contains its own public interest language. More importantly, the proposition that *N. Natural Gas* actually cites *Udall* for is: “[T]he duty imposed on the Commission by Section 7 of the Natural Gas Act is not merely to determine which of the submitted applications is most in the public interest, but also to give proper consideration to logical alternatives which might serve the public interest better than any of the project outlined in the application.”<sup>127</sup> Pangea fails to see how this relates in any way the argument made by the Sierra Club Intervention, Protest and Comments at pages 5-6.

Later, Sierra Club makes an unsupported logical leap, suggesting that Pangea knows precisely how the ST LNG Project would affect production, because “Pangea’s own consultant, Black and Veatch, also claims to have the ability to predict where production will increase in

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<sup>126</sup> Sierra Club Intervention, Protest and Comments at 14.

<sup>127</sup> *N. Natural Gas* at 973.

response to exports, and Black and Veatch imply that they have actually done so, although these predictions are not provided in Pangea’s application materials.”<sup>128</sup> In fact, Black & Veatch made an assessment of the market price impact of the ST LNG Project, including through “base case” assumptions that utilized “a basin-by-basin, play-by-play approach to assess the availability and cost of major supply sources in North America.”<sup>129</sup> The Black & Veatch *Study* estimated the potential price impact of the ST LNG Project at both nationwide and regional scales.<sup>130</sup> But it noted that “[a]ccess to multiple pipelines . . . will allow the ST LNG Project to receive natural gas from multiple supply sources.”<sup>131</sup> As such, the model is not intended to indicate specifically where production to serve the ST LNG Project will be stimulated, but rather to estimate the economic response of the U.S. gas industry as a whole to the demand from the project and the other gas demands assumed by the model. Moreover, it estimated projected production in both North America and Texas,<sup>132</sup> but did “not imply that, but for the ST LNG Project, the resources in this area would not be produced.”<sup>133</sup>

Second, Sierra Club is incorrect that inducing natural gas production nationwide is a “reasonably foreseeable” effect of the ST LNG Project that must be considered in the NEPA analysis for the ST LNG Project.<sup>134</sup> “Indirect effects” under NEPA are those that “are caused by the action and are later in time or farther removed in distance, but are still reasonably

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<sup>128</sup> Sierra Club Intervention, Protest and Comments at 28.

<sup>129</sup> Black & Veatch, *Market Price Impact Study for LNG Exports at the ST LNG Project* at 15 (Dec. 2012) (hereinafter “Black & Veatch Study”).

<sup>130</sup> *Id.* at 3–4; at a regional scale, Black & Veatch looked at South Texas, explaining that “because of their proximity to the ST LNG Project, the South Texas producing regions are logical sources of gas to serve the ST LNG Project.” *Id.* at 13.

<sup>131</sup> *Id.* at 8.

<sup>132</sup> *Id.* at 15–16.

<sup>133</sup> Application at 27; *see also* Black & Veatch *Study* at 13 (“These resources are likely to be developed whether or not the ST LNG Project exports natural gas . . .”).

<sup>134</sup> *See* Sierra Club Intervention, Protest and Comments at 31 (arguing that DOE/FE erred in agreeing with FERC that induced shale gas production is not a reasonably foreseeable effect of LNG exports for purposes of NEPA analyses).

foreseeable.” 40 C.F.R. § 1508.9(b) (2013).<sup>135</sup> Courts have emphasized that cognizable indirect effects “are those ‘which are *caused* by the action.’”<sup>136</sup> The Supreme Court has explained that “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.”<sup>137</sup> Instead, “a plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a ‘proximate cause,’ in the sense meant by tort law, of the proposed agency action.”<sup>138</sup> Thus, agencies need not consider effects that are “speculative” to be reasonably foreseeable indirect effects.<sup>139</sup> For example, in *City of Dallas v. Hall*,<sup>140</sup> Dallas challenged the EA for a wildlife refuge proposed by the U.S. Fish & Wildlife Service on a site where Dallas had previously planned to build a reservoir, arguing that the Federal agency should have considered the refuge’s indirect effect (through precluding the site’s use as a reservoir) on the city’s water supply and urban planning process. The court rejected this argument, finding that these effects were too “speculative” and “not concrete enough” to require discussion in the EA, because there was insufficiently specific information regarding exactly

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<sup>135</sup> To the extent that Sierra Club couches its arguments in terms of the “cumulative impacts” of other LNG export projects’ inducing natural gas production, these too would be indirect effects that must be reasonably foreseeable to be cognizable under NEPA. “Cumulative impact” is defined as “the impact on the environment which results from the incremental impact of the proposed action when added to other past, present, or reasonably foreseeable future actions.” 40 C.F.R. § 1508.7 (2013). The terms, “impact” and “effect” are interchangeable. *See id.* § 1508.8(b). “Effects” can be both “direct” and “indirect.” *Id.* § 1508.8. Thus, inducement of additional natural gas production would have to be a “reasonably foreseeable” indirect effect of a “reasonably foreseeable” LNG export project in order to be cognizable under NEPA.

<sup>136</sup> *City of Shoreacres v. Watersworth*, 420 F.3d 440 at 452 (5th Cir. 2005) (quoting 40 C.F.R. § 1508.8(b)) (“*City of Shoreacres*”).

<sup>137</sup> *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752 at 767 (2004); *see also Met. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 at 774 (1983) (stating that Congress intended that “the terms ‘environmental effect’ and ‘environmental impact’ in [NEPA] § 102 be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue”).

<sup>138</sup> *City of Shoreacres*, 420 F.3d at 452.

<sup>139</sup> *E.g., Webster v. USDA*, 685 F.3d 411 at 429 (4th Cir. 2012) (citing *Wyoming v. USDA*, 661 F.3d 1209 at 1253 (10th Cir. 2011)); *Sierra Club v. Marsh*, 976 F.2d 763 at 768 (1st Cir. 1992).

<sup>140</sup> 562 F.3d 712, 719 (5th Cir. 2009).

where or when a reservoir might have been constructed, and consequently how the city's water supply would be affected by the Federal action.<sup>141</sup>

Sierra Club asserts that induced natural gas production is reasonably foreseeable because Pangea's consultant, the Perryman Group, estimated job creation resulting from the ST LNG Project.<sup>142</sup> But the Perryman Group acknowledged that "additional development of natural gas resources," while "likely," "could occur *in various parts of the United States*," and that the Perryman Group had simply assumed for the purpose of its analyses that "spillover benefits" to the economy from such development would accrue in the Corpus Christi metropolitan area.<sup>143</sup> In other words, the Perryman Group *Study*—like the Black & Veatch *Study*—did not assess the where, when, and how of induced additional natural gas production, as would be necessary in order for its effects to be "reasonably foreseeable" under NEPA.

Sierra Club also attempts to show that the effects of induced shale gas production are "reasonably foreseeable" consequences of the ST LNG Project by extrapolating from long-term nationwide statistical estimates of aggregate natural gas market dynamics that were prepared for a different purpose. Notably, however, courts have rejected plaintiffs' reliance "on broad statistical data discussing general national trends" to show that cognizable indirect effects were ignored, and have instead insisted on "concrete" information.<sup>144</sup> Sierra Club states that the U.S. EIA has predicted that gas production will increase nationwide as a result of exports.<sup>145</sup> As

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<sup>141</sup> *Id.* at 719–20; *see also City of Shoreacres*, 420 F.3d at 451–54 (rejecting argument that EIS for Federal permit to construct ship terminal should have considered the indirect effect of requiring the port's ship channel to be deepened at some point in the future in order to accommodate increased demand for access to the port, because the deepening was too speculative a prospect).

<sup>142</sup> *See* Sierra Club Intervention, Protest and Comments at 27.

<sup>143</sup> The Perryman Group, *The Impact of Construction and Operation of Pangea's ST LNG Project on Business Activity in the Corpus Christi Area* at 13, 14 (Dec. 2012) (hereinafter "Perryman Group Study") (emphasis added).

<sup>144</sup> *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215 at 238 (5th Cir. 2006).

<sup>145</sup> *See* Sierra Club Intervention, Protest and Comments at 27; *see also* EIA, *Effect of Increased Natural Gas Exports on Domestic Energy Markets* at 6 (Jan. 2012), available at [http://www.fossil.energy.gov/programs/gasregulation/reports/fe\\_eia\\_lng.pdf](http://www.fossil.energy.gov/programs/gasregulation/reports/fe_eia_lng.pdf) (hereinafter "EIA Study").

FERC has explained, however, the EIA’s report was “prepared . . . in response to a request from the U.S. Department of Energy’s Office of Fossil Energy,” which had provided the EIA with four hypothetical “export demand scenarios, none of which is specific to the Liquefaction Project to export domestic gas from Sabine Pass LNG’s terminal.”<sup>146</sup> Furthermore, the EIA “caution[ed] that projections of energy markets over the long term are ‘highly uncertain and subject to many events that cannot be foreseen.’”<sup>147</sup> FERC has reasonably concluded that the “EIA’s report provides no assistance for us to reasonably estimate how much of the gas transported . . . to Sabine Pass LNG’s terminal for export will come from current versus future shale gas production, or when and where gas transported . . . to the terminal will be produced, much less any associated environmental impacts of any new gas production from shale.”<sup>148</sup>

An additional reason why the effects of induced shale gas production are not reasonably foreseeable indirect effects of prospective DOE/FE export authorization is that it is impossible for DOE/FE to determine which—if any—additional gas production would be caused by the ST LNG Project. DOE/FE does not have control over shale-gas drilling and therefore “has no ability to prevent [the environmental effects] due to its limited statutory authority over the relevant actions.”<sup>149</sup> Because DOE/FE lacks any direct control over the drilling of shale-gas wells, which could occur for a multitude of reasons unrelated to the ST LNG Project, its grant of authorization could not “be considered a legally relevant ‘cause’ of the effect.”<sup>150</sup>

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<sup>146</sup> *Cheniere Creole Trail Pipeline, L.P.*, 142 FERC ¶ 61,137 at P 57 (2013).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* FERC also reasonably explained that Sierra Club’s reliance on a study by Deloitte—renewed here, *see* Sierra Club Intervention, Protest and Comments at 29—was similarly misplaced: “the Deloitte report, like the EIA report, does not attempt to identify specific locations where the additional gas production induced by exports will occur or otherwise assist us in reasonably assessing the potential environmental impacts from the production of the gas that will be both induced by the export of domestic gas and transported by Creole Trail’s pipeline to Sabine Pass LNG’s terminal.” *Cheniere Creole Trail Pipeline, L.P.*, 142 FERC ¶ 61,137 at P 58 (2013).

<sup>149</sup> *Pub. Citizen*, 541 U.S. 752 at 770

<sup>150</sup> *Id.*

The cases on which Sierra Club relies for the proposition that the effects of induced shale gas production *are* reasonably foreseeable indirect effects of the ST LNG Project are readily distinguishable, because each contained the quantified, factual connection between the specific activity being reviewed under NEPA and reasonably foreseeable environmental effects that the Supreme Court has required. In *Mid States Coalition for Progress v. Surface Transportation Board*,<sup>151</sup> the court held that it had been arbitrary and capricious for an EIS prepared by the Surface Transportation Board (“STB”) for a proposed new rail line not to have evaluated the indirect air quality effects resulting from the fact that rail line would make 100 million tons of coal available annually at reduced cost. But the STB had been presented with evidence as to the specific amount of reduced-cost coal that the proposed activity would provide, allowing the court to deem it “almost certainly true that *the proposed project* will increase the long-term demand for coal and any adverse effects that result from burning coal.”<sup>152</sup> In other words, “*Mid States* concluded that adverse effects from the readily foreseeable increase in coal sales were certain to occur.”<sup>153</sup> Here, in contrast, Sierra Club points to no specific evidence showing that the ST LNG Project will cause impacts attributable to increased natural gas production.

*Northern Plains Resources Council v. STB*,<sup>154</sup> also lends no support to Sierra Club. There, the court held that the STB’s cumulative impacts analysis<sup>155</sup> for a railroad line serving coal mines had been inadequate, in that it had failed to include impacts from coal bed methane wells and a coal mine, facilities that were reasonably foreseeable.<sup>156</sup> The court emphasized, however, that what made these future actions reasonably foreseeable was that a prior EIS by the

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<sup>151</sup> 345 F.3d 520 (8th Cir. 2003).

<sup>152</sup> *Id.* at 549 (emphasis added).

<sup>153</sup> *Habitat Educ. Ctr. v. U.S. Forest Service*, 609 F.3d 897 at 902 (7th Cir. 2010).

<sup>154</sup> 668 F.3d 1067 (9th Cir. 2011) (“*N. Plains Res. Council*”).

<sup>155</sup> Again, to the extent that Sierra Club purports to frame its arguments in terms of cumulative impacts, such arguments must fail because both the future actions *and* their indirect effects must be “reasonably foreseeable.” 40 C.F.R. §§ 1508.7, 1508.8 (2013).

<sup>156</sup> *See N. Plains Res. Council*, 668 F.3d at 1077–82.

Federal Bureau of Land Management had already analyzed the future development of coal bed methane in the vicinity of the proposed rail line, determining the number of coal bed methane wells that were reasonably foreseeable over the next twenty years—down to the county level—as well as projecting the number of field compressors, miles of gathering lines, and other facilities that would be necessary.<sup>157</sup> The prior EIS had also mapped the site of the additional coal mine, a supply of coal from which was quantified and included in the STB’s financial justification for the railroad line.<sup>158</sup> The court emphasized that it was “not asking the Board to peer into a crystal ball,” but merely to evaluate specific cumulative impacts from future projects that prior analyses had quantified and shown to be reasonably foreseeable.<sup>159</sup> In other words, unlike here, the timing, location, and scope of the reasonably foreseeable impact caused by the proposed activity was clear.

*Scientists’ Institute for Public Information, Inc. v. Atomic Energy Commission*<sup>160</sup> does not help Sierra Club’s cause, either. In that case, the court faulted the agency’s failure to consider impacts of radioactive waste when it authorized a new kind of nuclear reactor, because the agency’s own documentation already contained detailed estimates on the amount of waste that would be produced and the amount of land area necessary for its storage.<sup>161</sup> In other words, the agency already knew the quantity, type and cost of waste that would result from the reactor’s operation.

Finally, *Border Power Plant Working Group v. DOE*<sup>162</sup> is also distinguishable. It held that emissions from Mexican power plant infrastructure that was designed to supply electric

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<sup>157</sup> See *id.* at 1079.

<sup>158</sup> See *id.* at 1081–82.

<sup>159</sup> *Id.* at 1079.

<sup>160</sup> 481 F.2d 1079 (D.C. Cir. 1973).

<sup>161</sup> *Id.* at 1096–97.

<sup>162</sup> 260 F. Supp. 2d 997 (S.D. Cal. 2003).



power to the United States were a cognizable indirect effect of authorizing the transmission lines that would transport that electric power across the border.<sup>163</sup> Again, however, the specifics of the power plant infrastructure—and consequently of its resulting emissions—were known, not speculative.<sup>164</sup> And the transmission lines, which were “the only current means” by which power generated by the new infrastructure could be transmitted, were clearly a “but-for” cause of the resulting emissions.<sup>165</sup>

**E. DOE/FE Is Not Required to Analyze Nationwide Effects Under the Endangered Species Act or the National Historic Preservation Act**

Sierra Club argues that—even if no programmatic NEPA analysis considering nationwide effects of LNG exports is required—DOE/FE still has an obligation to evaluate nationwide effects under the Endangered Species Act (“ESA”) and the National Historic Preservation Act (“NHPA”).<sup>166</sup> This argument, too, misses the mark, because FERC (and not DOE/FE) is “the lead agency for purposes of coordinating all applicable Federal authorizations.”<sup>167</sup> Furthermore, neither the ESA nor the NHPA require the nationwide assessment on which Sierra Club insists.

Section 7 of the ESA requires Federal agencies to “insure,” through consultation with expert agencies, that their actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.”<sup>168</sup> In evaluating an action’s effects on listed species and their habitat, the agencies must consider both the area directly and indirectly affected by the action

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<sup>163</sup> *Id.* at 1017.

<sup>164</sup> *See id.* at 1006–07 (describing infrastructure design and emissions).

<sup>165</sup> *Id.* at 1017.

<sup>166</sup> *See* Sierra Club Intervention, Protest and Comments at 10 (arguing that the ESA analysis “must be wide-ranging, because Pangea’s export proposal will increase gas production activities nationwide”); *id.* at 11 (arguing that the NHPA analysis area “should sweep quite broadly here because, as in the ESA and NEPA contexts, the reach of Pangea’s proposal extends to the entire area in which it will increase gas production”).

<sup>167</sup> 15 U.S.C. § 717n(b)(1); *see also* 50 C.F.R. § 402.07 (2013) (allowing for lead agency designation in ESA consultation process).

<sup>168</sup> 16 U.S.C. § 1536(a)(2).

itself, as well as “the effects of other activities that are interrelated or interdependent.”<sup>169</sup> But effects under the ESA are more restrictively defined than under NEPA: “indirect effects” and “cumulative effects” must both be “reasonably certain to occur” under the ESA,<sup>170</sup> a standard that courts have interpreted as applying in narrower circumstances than NEPA’s reasonable foreseeability standard.<sup>171</sup> Thus, for the same reasons that induced additional natural gas production is not a cognizable effect under NEPA, it is also not a cognizable effect under the ESA. Furthermore, the ESA defines “interrelated actions” as “those that are part of a larger action and depend on the larger action for their justification,” and “interdependent actions” as “those that are part of a larger action and depend on the larger action for their justification.”<sup>172</sup> As stated, additional natural gas production is likely to occur whether or not the ST LNG Project is authorized,<sup>173</sup> and thus cannot be considered “interrelated” or “interdependent” with the ST LNG Project for purposes of ESA analysis.

Nor does the NHPA require consideration of nationwide effects. It directs Federal agencies to “take into account the effect” of their actions “on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”<sup>174</sup> The

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<sup>169</sup> 50 C.F.R. § 402.02 (2013).

<sup>170</sup> *Id.*

<sup>171</sup> *See, e.g., Medina County Env'tl. Action Ass'n v. STB*, 602 F.3d 687 at 702 (5th Cir. 2010) (stating that the NEPA standard “applies in a broader set of circumstances but encompasses the ‘cumulative effects’ standard under the ESA—actions ‘reasonably certain to occur’ are also ‘reasonably foreseeable’”).

<sup>172</sup> 50 C.F.R. § 402.02.

<sup>173</sup> *See* Application at 27; *see also* Black & Veatch Study at 13 (“These resources are likely to be developed whether or not the ST LNG Project exports natural gas. . .”).

<sup>174</sup> 16 U.S.C. § 470f. This is done through “consultation” by the Federal agency with the State historic preservation officer, Indian tribes and Native Hawaiian organizations, representatives of local government, and Federal permit applicants. *See* 36 C.F.R. § 800.2(c)(1)–(4) (2013). In addition, “[c]ertain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.” *Id.* § 800.2(c)(5). Sierra Club contends that it is entitled to participate as a consulting party because “its members are interested in preserving intact historic landscapes for their ecological and social value, and reside through the regions affected by Pangea’s proposal.” Sierra Club Intervention, Protest and Comments at 11. Again, however, Sierra Club’s only demonstrated interest in this proceeding is a conclusory assertion that it had 21,527 members in Texas as of January 30, 2013. *See id.*, Ex. 1, ¶ 7. It points to no specific historic property on which it is concerned that the ST LNG Project will have an adverse effect. To the extent Sierra

goal of the process is to “assess” an action’s “effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”<sup>175</sup> The pertinent analysis area is “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties,” and can vary depending on the nature of the action.<sup>176</sup> Just as with NEPA, however, indirect and cumulative effects must be both “reasonably foreseeable” and “caused by” the Federal action.<sup>177</sup> Thus, for the reasons discussed above with respect to NEPA, inducement of additional gas production falls outside of the scope of what must be considered by DOE/FE under the NHPA in determining whether to grant Pangea’s application.

**F. APGA and Sierra Club’s Economic Arguments Have Insufficient Support to Overcome the Presumption in Favor of Exports and the Evidence Supporting Exports**

While the lion’s share of APGA’s and Sierra Club’s protests rehash generic arguments regarding the alleged harmful effects of LNG exports,<sup>178</sup> each of the protests does devote a few paragraphs to attacking the economic analysis contained in Pangea’s Application.<sup>179</sup> But neither entity does not actually introduce any contradictory studies of its own, instead alleging that (i) the studies submitted in support of the Application are unclear, inconsistent with DOE/FE-commissioned studies, or otherwise flawed; and (ii) the summary of a study that has not been placed into the record and that is not publicly available demonstrates Pangea’s proposal is contrary to the public interest. These arguments fail.

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Club is entitled to participate in the NHPA process, it should be as a member of the public, *see* 36 C.F.R. § 800.2(c)(5), not as an additional consulting party.

<sup>175</sup> 36 C.F.R. § 800.1(a) (2013).

<sup>176</sup> 36 C.F.R. § 800.16(d) (2013).

<sup>177</sup> 36 C.F.R. § 800.5(a)(1) (2013).

<sup>178</sup> *See, e.g.*, Sierra Club Intervention, Protest and Comments at 33–53 (alleging broad environmental harms resulting from induced natural gas production).

<sup>179</sup> *See id.* at 54–55, 63–64.

## 1. Sierra Club's and APGA's Arguments as to the Extent that the ST LNG Project Will Increase Natural Gas Prices Are Unsupported

Sierra Club argues that “Pangea ... overstates domestic shale gas supply,” pointing to EIA’s *Annual Energy Outlook 2012*.<sup>180</sup> But Sierra Club ignores the EIA’s *Annual Energy Outlook 2013* (“*AEO2013*”)<sup>181</sup>, which estimates shale gas technically recoverable reserves to be 543 trillion cubic feet (“Tcf”).<sup>182</sup> Pangea believes that DOE/FE should consider *AEO2013* in its entirety, with a focus on those findings that are relevant to projected quantities of both supply and demand in the U.S. Specifically, the EIA’s latest forecast predicts that domestic natural gas production will grow at nearly twice the rate as demand through 2035, increasing by 3.4 Tcf as compared to the *Annual Energy Outlook 2012*;<sup>183</sup> and that domestic supply will exceed consumption by 2020, resulting in the U.S. becoming a net exporter of natural gas.<sup>184</sup> Simultaneously, *AEO2013* projects an increase of 0.75 Tcf in commercial and industrial demand in 2035 as compared to the previous year’s predictions, and an increase of 0.48 Tcf in projected natural gas consumption for power generation in 2035. The *AEO2013* forecast lends support to the fact that the U.S. natural gas resource base is growing, and that recoverable resources are more than sufficient to meet future domestic needs as well as expanded trade in international markets over the long term.

Sierra Club also criticizes the Application’s arguments on the stabilizing effect increased prices would have on the price and availability of natural gas for domestic use, which are

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<sup>180</sup> Sierra Club Intervention, Protest and Comments at 55; see EIA, *Annual Energy Outlook 2012* (June 2012), available at [http://www.eia.gov/forecasts/aeo/pdf/0383\(2012\).pdf](http://www.eia.gov/forecasts/aeo/pdf/0383(2012).pdf).

<sup>181</sup> Available at <http://www.eia.gov/forecasts/aeo/>.

<sup>182</sup> See Adam Sieminski, Administrator, EIA, *Status and Outlook for Shale Gas and Tight Oil Development in the United States* 9 (Feb. 21, 2013) (listing 543 Tcf unproved shale gas resources, and citing *AEO2013*), available at [http://www.eia.gov/pressroom/presentations/sieminski\\_02212013.pdf](http://www.eia.gov/pressroom/presentations/sieminski_02212013.pdf); cf. Sierra Club Intervention, Protest and Comments at 55 (providing EIA estimate of 482 Tcf).

<sup>183</sup> Compare EIA, *Annual Energy Outlook 2012 Reference Case Table 13. Natural Gas Supply, Disposition and Prices*, [http://www.eia.gov/forecasts/archive/aeo12/data.cfm?filter=natural\\_gas#natural\\_gas](http://www.eia.gov/forecasts/archive/aeo12/data.cfm?filter=natural_gas#natural_gas) (last visited May 7, 2013) with *AEO2013 Table 13 Reference Case*, <http://www.eia.gov/forecasts/aeo/er/pdf/tbl13.pdf> (last visited May 7, 2013).

<sup>184</sup> See *AEO2013* at 3.

supported by citations to scholarship. Sierra Club cites no authority, instead relying on speculation and unsubstantiated analogies. It argues that Pangea has not “shown that . . . the public interest would be meaningfully served by reducing volatility,”<sup>185</sup> once again ignoring the fact that it is Sierra Club’s burden to rebut the presumption that granting the Application *would* serve the public interest.<sup>186</sup>

Further, while Pangea has provided a reasoned estimate of future supply, the Sierra Club insists the DOE/FE must analyze price impacts on the basis of a completely unreasonable estimate of future demand. The APGA also argues that Pangea has understated domestic natural gas prices increases as a result of underestimating demand.<sup>187</sup> As noted previously, Sierra Club claims: “the full volume of proposed exports is . . . a required component of DOE/FE’s NEPA analysis. DOE/FE cannot authorize this proposed export project or any other export proposal on the assumption that authorized activity will not actually occur.”<sup>188</sup> Yet, Sierra Club has failed to identify a single expert who claims it would be reasonable to anticipate the 100% of the applied for export authorizations, if granted, would result in exports up to the amount authorized. APGA finds fault in Pangea’s demand estimate for a different reason -- Pangea has failed to “account for the recent strides taken to make natural gas vehicles a mainstay of American transportation”, citing a couple of media reports, one about a plan for about 100 natural gas truck fueling stations and the other noting that the trucking industry is set to expand its use of natural, except that LNG exports could harm the expansion.<sup>189</sup> These reports have no evidentiary value whatsoever, as how they cut and to what degree is left unsaid. For example, if the LNG export

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<sup>185</sup> Sierra Club Intervention, Protest and Comments at 55.

<sup>186</sup> See *Phillips Alaska Natural Gas Corp.*, DOE/FE Order No. 1473, Order Extending Authorization to Export Liquefied Natural Gas from Alaska (FE Docket No. 96-99-LNG) (Apr. 2, 1999) at 13 (stating that Section 3 of the NGA “creates a statutory presumption in favor of approval of an export application”) (citing *Panhandle Producers and Royalty Owners Ass’n*, 822 F.2d 1105 at 1111 (D.C. Cir. 1987)).

<sup>187</sup> APGA Intervention, Protest and Comments at 7.

<sup>188</sup> Sierra Club Intervention, Protest and Comments at 14.

<sup>189</sup> APGA Intervention, Protest and Comments at 8.

industry will kill the use of natural gas in the trucking industry (making the two uses mutually exclusive), how can APGA simultaneously argue that Pangea has failed to incorporate both LNG exports and natural as a transportation fuel into its demand estimates. In any event, APGA provides no estimate of the amount of demand that Pangea has failed to account for, and no quantification of the amount by which such added demand would raise natural gas prices. As the *Freeport Order* states: “The protest submitted by APGA ... was not supported by any significant analysis and, to the extent the arguments raised in APGA’s protest constituted substantial evidence, that material did not identify meaningful errors or omissions in the studies submitted by FLEX.”<sup>190</sup> The same can be said here.

In contrast, both Pangea and the DOE/FE commissioned studies that looked at the effects that encompass the reasonable, quantified, level of exports that might actually occur.<sup>191</sup> Indeed, the DOE Export Study concluded: “Under status quo conditions in the world and the U.S. (U.S. Reference and International Reference cases) there is no feasible level of exports possible from

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<sup>190</sup> *Freeport Order* at 110.

<sup>191</sup> While Sierra Club criticizes the Black & Veatch and Perryman studies placed into the record by Pangea, Sierra Club provides no countervailing studies of its own with respect to the impacts of the ST LNG Project and related LNG exports. Therefore, we find it unnecessary to debate on a point-by-point basis Sierra Club’s unsupported attack on these studies. For example, at Sierra Club Intervention, Protest, and Comment page 54, Sierra Club states: “Pangea’s Black and Veatch report does not explain why its prediction strongly diverge from EIA’s. It appears that, even if Pangea’s proposed exports were considered in isolation, the price impacts of these exports would be significantly higher than Black and Veatch predict.” Sierra Club does not explain its basis for concluding that the prediction “strongly diverge,” nor does it give any evidence for the proposition that the price impacts would be larger than Black and Veatch predict. Pangea does note that there was a typographical error on page 32 of the Black & Veatch report, which created some confusion for Sierra Club, which we regret. The language quoted from the report at Sierra Club Intervention, Protest and Comments should have read “result from the addition of the Pangea Project to the Base (a total of 4.1 Bcf/d of export-related demand).” The 4.1 Bcf/d figure is a rounding issue related to adding the 2.8 Bcf/d base case with the 1.2 Bcf/d related to Pangea. We note that the recently issued May 2013 ICF International Study -- *U.S. LNG Exports: Impacts on Energy Markets and the Economy* (available at: <http://www.api.org/~media/Files/Policy/LNG-Exports/API-LNG-Export-Report-by-ICF.pdf>) supports the reasonableness of the Black and Veatch Study and suggests, if anything, Black and Veatch may have slightly overestimated impacts on U.S. gas prices. Finally, Pangea wishes to correct Sierra Club’s impression that Pangea is advocating that only Pangea provided studies should be considered in these proceedings. See Sierra Club Intervention, Comments and Protest at 55. To the extent that there are other studies placed into the record or of which DOE/FE may take administrative notice that are credible and otherwise are properly before it, the DOE/FE is entitled to take into account all such studies.

the U.S.”<sup>192</sup> As the court in *CPUC v. FERC* observed, there is no need to assess the cumulative impact of facilities that are not foreseeable.<sup>193</sup> Thus, neither Pangea, nor the DOE/FE, are obliged to conduct the study Sierra Club advocates must be performed.

## **2. Sierra Club Cannot Rely on a Working Paper by Kemal Sarica and Wallace E. Tyner**

Sierra Club seeks to rely on a working paper by economists Kemal Sarica and Wallace E. Tyner for to support its claim that exports by Pangea would be contrary to the public interest because according to Sierra Club the paper predicts that “Pangea’s proposal would lead to a net loss of wealth for the U.S.”<sup>194</sup> Even if the DOE LNG Study did not directly contradict this alleged finding, DOE/FE should reject this argument. Not only has the paper not been submitted into evidence or placed in the public domain and made freely accessible,<sup>195</sup> in the summary that is available on line and was included as part of the Sierra Club Exhibits, the authors state: “Our view is that because the net income impacts are so small, it is not appropriate to place much emphasis on that outcome.”<sup>196</sup> In other words, the authors’ own conclusion is that this aspect of their analysis should not drive an up or down decision on exports.

## **3. APGA’s Other Arguments Do Not Stand Up Under Scrutiny**

In the *Freeport Order*, the DOE/FE found that APGA’s arguments to the effect that natural gas represents an unprecedented opportunity for energy independence; domestic natural

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<sup>192</sup> *Macroeconomic Impacts of LNG Exports from the United States*, NERA Economic Consulting (2012) at p. 76.

<sup>193</sup> *CPUC v. FERC* at 283.

<sup>194</sup> Sierra Club Intervention, Protest and Comments at 21.

<sup>195</sup> Oddly, Sierra Club faults Pangea’s studies, which have been placed into the record, as not being sufficiently transparent (Sierra Club Intervention, Protest, and Comments at 55), but in the same pleading suggests that it is appropriate to rely on an assertion stemming from a work paper that it never even attempts to place into the record and which is not freely available for others to review (*Id.* at 21).

<sup>196</sup> *Comparison of Analysis of Natural Gas Export Impacts from Studies Done by NERA Economic Consultants and Purdue University*, Wallace E. Tyner and Kemal Sarica (2013) at 4; available at [http://www.fossil.energy.gov/programs/gasregulation/authorizations/export\\_study/export\\_study\\_initial\\_comments.html](http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/export_study_initial_comments.html).

gas use should be maximized, and higher gas price would make natural gas less competitive in this country as a replacement fuel for higher carbon-content fuels<sup>197</sup> to be unpersuasive. These arguments are essentially similar to ones made by APGA in this proceeding and should be rejected here for similar reasons. APGA further argues here that the benefits of LNG exports will not be distributed evenly through society and certain segments of society will experience the downside of higher gas prices disproportionately;<sup>198</sup> U.S. LNG export efforts will fail;<sup>199</sup> and U.S. and world gas prices will converge squandering the opportunity for renewed U.S. manufacturing.<sup>200</sup> While not attributing them to APGA, the DOE/FE considered and rejected equivalent arguments to these in the *Freeport Order*.<sup>201</sup> The two remaining APGA arguments in this proceeding (*i.e.*, (i) rather than transferring jobs from other industries to the natural gas industry by allowing exports, the DOE/FE should focus on policies that create new jobs;<sup>202</sup> and (ii) shale gas and unconventional reserves are a global phenomenon, and the U.S. should focus on exporting its technology for producing such gas, rather than exports its own gas;<sup>203</sup>) can be disposed of by analogizing to related concepts in the *Freeport Order*. Specifically, the creation of new jobs in other industries and the exporting of technology for producing unconventional gas are not mutually exclusive with exporting LNG from the U.S.<sup>204</sup> Thus, neither constitutes an argument against exporting LNG.

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<sup>197</sup> See *Freeport Order* at 25-27 (summarizing arguments made by APGA in opposing exports in that proceeding).

<sup>198</sup> APGA Intervention, Protest and Comments at 8-9.

<sup>199</sup> *Id.* at 16.

<sup>200</sup> *Id.* at 17.

<sup>201</sup> See *Freeport Order* at 67 (discussing disproportionate burdens), 73-74 (discussing uneven benefits), 83 (considering no exports scenarios), and 94-96 (discussing cost adders for exported LNG compared to U.S. domestic gas costs).

<sup>202</sup> APGA Intervention, Protest and Comments at 11.

<sup>203</sup> *Id.* at 14-16.

<sup>204</sup> See *Freeport Order* at 71 (observing that “[t]here is no one-for-one trade-off between gas used in manufacturing and gas diverted for export”).



#### **G. The DOE Has Carefully Analyzed Its Own Studies and Is Using Them Appropriately**

Sierra Club asserts that DOE/FE must not act until it has thoroughly reviewed the LNG Export Study and assert that DOE/FE must also consider local and regional implications.<sup>205</sup> Pangea asserts that the *Freeport Order* amply demonstrates the thorough job that the DOE/FE has done in analyzing the LNG Export Study and the massive amount of comments received by the DOE/FE with respect to that report. The *Freeport Order* also should serve as assurance to the Sierra Club that the DOE/FE intends to make appropriate use of the LNG Export Study going forward, taking into account that adjustments may be needed in the face of changed circumstances or entirely new studies may be required.<sup>206</sup> In concert with its Application, Pangea has supplied its own studies as well, and while these studies consider impacts at the national level, they focused particularly on the local and regional impacts of exports from the ST LNG Project as these may vary from project to project. These studies were not necessary to support a DOE/FE approval, because as discussed above, the NGA places the burden on opponents to an export application to demonstrate that a grant of such application would be inconsistent with the public interest. Given that the Sierra Club and APGA have produced no studies or other serious, evidence-based, reasoned analysis of the specific impacts of the proposed exports, the evidence supplied in the form of reports by Pangea's recognized experts serve to provide an extra measure of support for positive action on Pangea's Application.

#### **IV. CONCLUSION**

For the reasons stated herein, including Sierra Club's failure to (i) demonstrate good cause for acceptance of either the late-filed Sierra Club Intervention, Protest and Comments or

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<sup>205</sup> Sierra Club Intervention, Protest and Comments at 15-16.

<sup>206</sup> See *Freeport Order* at 113-114.

the Sierra Club Exhibits (whether taken together or treated as separate submissions), taking into account the prejudice to the proceedings that would occur, and (ii) accept the record of the proceedings as they stood at the close of the DOE/FE established period for intervening, DOE/FE should deny Sierra Club intervenor status and reject its comments and the Sierra Club Exhibits.

For the reasons stated herein, including Sierra Club's failure to demonstrate good cause for acceptance of either the late-filed Sierra Club Intervention, Protest and Comments or the Sierra Club Exhibits (whether taken together or treated as separate submissions), taking into account the prejudice to the proceedings that would occur, DOE/FE should reject Sierra Club's late-filed Intervention, Protest and Comments and the Sierra Club Exhibits to the extent that they constitute a protest.

In light of (i) the statutory presumption in favor of authorizing exports, (ii) the evidence properly in the record of this proceeding, (iii) DOE/FE's prior rejection of similar arguments raised by the AGPA and the Sierra Club, and (iv) AGPA and the Sierra Club's failure to meet its burden of proffering evidence that Pangea's export proposal as set forth in its Application is inconsistent with the public interest, DOE/FE should reject the arguments raised by the Sierra Club Intervention, Protest and Comments and by the APGA Intervention, Protest and Comments and should grant the Application.

Respectfully submitted,

/s/ Erik J.A. Swenson\_\_\_\_\_

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Dated: June 5, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 5th day of June, 2013.

/s/ Maguette Ndiaye  
Maguette Ndiaye  
*Paralegal on behalf of*  
*Pangea LNG (North America) Holdings, LLC*