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UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

IN THE MATTER OF)
) FE DOCKET NO. 12-100-LNG
Southern LNG Company, L.L.C.)
)

SIERRA CLUB'S RENEWED MOTION TO REPLY AND REPLY COMMENTS

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Pursuant to 10 C.F.R. §§ 590.302(a) & 590.310, Sierra Club moves for leave to reply to Southern LNG’s answer to its protest. Sierra Club’s reply is incorporated into this filing. Sierra Club stands by the arguments raised in its motion to intervene and protest, and re-asserts those arguments here. Below, we provide limited and specific responses to several arguments raised in Southern LNG’s answer.

I. Sierra Club Hereby Renews its Motion for Leave to Reply to Southern LNG’s Answer

DOE/FE rules allow any party to move for additional procedures in any case. See 10 C.F.R. §§ 590.302(a) & 590.310. Sierra Club did so in its protest, moving for a reply if any party opposed its motion to intervene. See Sierra Club Protest at 3 n.2. Sierra Club now renews that motion.

DOE/FE is confronting a very large, and novel, wave of LNG export applications. Each such application raises important questions as to whether the economic and environmental implications of export are in the public interest. See 15 U.S.C. § 717b; see also *Nat’l Ass’n for the Advancement of Colored People v. Federal Power Comm’n*, 425 U.S. 662, 670 n.4 &n.6 (1976); *Udall v. Federal Power Comm’n*, 397 U.S. 428 (1967). As DOE/FE and Deputy Assistant Secretary Smith have acknowledged, “a sound evidentiary record is essential to reach a reasoned decision in these [LNG export] proceedings.”¹ Sierra Club has provided DOE/FE with an extensive, careful, discussion of relevant impacts in its protest. DOE/FE should allow Sierra Club to reply in order to ensure that these arguments are fully aired before it, and the record is fully developed before DOE/FE makes its final determination.

¹ Letter from Secretary Smith to Rep. Edward Markey (Feb. 24, 2012) at 4.

II. Sierra Club Must Be Granted Leave to Intervene

Southern LNG argues that Sierra Club should not be granted intervention here because Sierra Club can participate in other forums and because on the existing record Sierra Club is unable to identify its interests (and potential injury thereto) with the particularity Southern LNG desires. Both arguments fail, because DOE/FE's own regulations require Sierra Club to intervene in this proceeding at this stage in order to protect its interests.

Beginning with Southern LNG's arguments regarding Sierra Club's interests, Southern LNG criticizes Sierra Club for extrapolating likely site-specific environmental impacts from other LNG export proposals. We disagree with Southern LNG's assertion that any showing beyond what we have made here is or should be required. On the other hand, we agree that a more sensible framework for handling intervention would be to allow Sierra Club to intervene in this docket once environmental review was underway, *i.e.*, once more definite plans had been put forward by Southern LNG and once a draft NEPA document was circulated. At that stage, Sierra Club will be able to provide additional detail regarding likely environmental effects (although such specific showing should not be required for intervention). Nonetheless, DOE/FE recently rejected Sierra Club's effort to proceed in precisely this manner (*i.e.*, to intervene once DOE/FE began considering environmental impacts, on a more complete record).² Accordingly, insofar as DOE/FE requires interested parties to intervene at this early stage, DOE/FE cannot also require those parties to support their motions to intervene with factually specific information that will only be available at a later stage.

Second, Southern LNG argues that Sierra Club can defend its interests in the FERC proceeding for the proposed terminal and by commenting on the NERA macroeconomic study. Neither of these forums provides an acceptable substitute for intervention here. The FERC docket will provide an opportunity to present environmental information to FERC for consideration in NEPA review, but that proceeding is an incomplete substitute for participation here. Comments regarding macroeconomic impacts, which appear to be more squarely within DOE/FE's jurisdiction, should be made here. Additionally, Sierra Club will be better able to preserve its right to seek judicial review of DOE/FE's decisions by intervening here: DOE/FE cannot insulate itself from review by arguing that Sierra Club can intervene before another agency. As to comments on the NERA study, as DOE/FE explained in the notice of availability included in this docket, DOE/FE is not opening a separate docket for the NERA study, and DOE/FE has instead directed persons with interests of the pending LNG proposals to intervene in the distinct facility dockets.³

² DOE/FE Order 2961A.

³ Docket entry #6, at 9 (Dec. 5, 2012)

III. DOE Should Not Postpone Its NEPA Analysis

Southern LNG argues that NEPA review can be done by FERC, and that DOE/FE should issue a conditional authorization now, to be revisited by DOE/FE after FERC concludes its NEPA review. Sierra Club has no objection to FERC acting as lead agency for NEPA review, but we reiterate our argument that DOE/FE should not issue a conditional authorization now.

As to FERC's role as lead agency, contrary to Southern LNG's apparent assertions, Answer at 12, 14-15, Sierra Club does not object to FERC acting as lead agency for NEPA review. Of course, DOE/FE has an independent obligation to ensure that DOE/FE and the public are adequately informed regarding (and that DOE/FE actually considers) the environmental impacts of proposed DOE/FE actions, as both DOE/FE and FERC have recently recognized. See *Sabine Pass LNG*, FERC Docket No. CP11-72-001, 140 FERC ¶ 61,076 P 32 (July 26, 2012) ("DOE has separate statutory responsibilities with respect to authorizing the export of LNG from Sabine Pass; thus it has an independent legal obligation to comply with NEPA."), DOE/FE Docket No. 10-111-LNG, Order 2961-A, 27 (Aug. 7, 2012) (DOE/FE recognizes that it is "responsible for conducting an independent review" of FERC's analysis 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."). As such, we do not object to FERC acting as lead agency for purposes of NEPA, but if FERC's NEPA documents provide an inadequate basis for DOE/FE's NEPA review, DOE/FE must amend this deficiency.

On the other hand, DOE/FE can and should wait until NEPA review is completed (whether lead by FERC or not) before issuing a conditional authorization. As we explained in our protest, NEPA requires consideration of environmental impacts at the earliest possible time, and insofar as environmental impacts are part of the NGA public interest analysis, it would be nonsensical to conduct a balancing of effects on the public interest until environmental impacts have been examined pursuant to the NEPA process. Southern LNG cites DOE's thirty-year old guidance published as *Import and Export of Natural Gas*, 46 Fed. Reg. 44,696 (Sept. 4, 1981), but this guidance should not be applied here. In that guidance, DOE opined that, in proposals for LNG import, "Before expending the time and resources needed to develop an EIS, the FERC would benefit from a preliminary indication from [DOE/FE] regarding consistency of the importation with the public interest." *Id.* at 44,700. This guidance is inapplicable here for several reasons. It is superseded by DOE/FE's subsequently published regulation at 10 C.F.R. § 1021.211, which prohibits any action on proposals subject to an EIS (which, as we explained initially, this proposal should be). Similarly, this guidance document cannot displace DOE/FE's obligations under NEPA and CEQ's implementing regulations, such as the requirement that DOE/FE avoid any action that would limit alternatives or prejudge the issues prior to completion of NEPA review. See 40 C.F.R. § 1506.1. Finally, this opinion concerns imports, and the reasoning underlying it poorly fits the export context. Imports, by introducing natural gas to U.S. markets, do not impose the range or severity

of domestic environmental effects imposed by exports. As we explain below, exports will induce domestic gas production that must be considered in DOE/FE's public interest analysis. Accordingly, although in some circumstances it may be possible for DOE/FE to make a preliminary public interest determination regarding imports without the information provided by NEPA review, the same cannot be said for export proposals.

Southern LNG also cites *Pub. Utilities Comm'n of State of Cal. v. F.E.R.C.*, 900 F.2d 269, 281 (D.C. Cir. 1990) and *City of Grapevine, Tex. V. Dept. of Transp.*, 17 F.3d 1502, 1509 (DC Cir. 1994) as purportedly condoning issuance of a conditional order prior to NEPA review. We note that these cases concern agencies other than DOE/FE and factual scenarios different than the export considered here. Even if they apply here, however, they at most permit, but do not require, DOE/FE to issue a conditional authorization. For the reasons we stated previously, DOE/FE should not issue a conditional authorization now, because doing so will frustrate public review and lead to a less fully informed decision.

IV. Scope of NEPA Analysis

As we previously argued, a programmatic EIS provides the most sensible way to evaluate the environmental impacts of authorizing LNG export. Regardless of whether a programmatic EIS is prepared, however, the cumulative impacts of all pending export proposals must be considered. DOE/FE must reject Southern LNG's passing suggestion that some of these export proposals are too speculative to fall within the scope of cumulative impacts that must be considered. Answer at 16-17.

Similarly, DOE/FE must reject Southern LNG's assertion that discussion of induced production "would be to require DOE to 'foresee [] the unforeseeable,'" as "the location and type of any such increased production is completely unknown." Answer at 18. As we explained, this argument fails for two reasons. First, DOE/FE can reasonably and usefully assess the likelihood and impacts of induced production even if the precise location and type of production is unknown. Protest at 28-31. Second, DOE has precisely the tools necessary to foresee this production, including EIA's National Energy Modeling System and other analogous systems developed by private consultancies. Protest at 26-28. Southern LNG has not acknowledged or responded to these arguments.

Instead, Southern LNG merely asserts that that "[t]he development of natural gas will happen regardless of whether DOE approves SLNG's Project," without acknowledging these models, or even its own assertion to the contrary. Answer at 19. As we have shown, all available evidence indicates that the *amount* of natural gas development will increase if Southern LNG's terminal is approved. Protest at 26-28. Indeed, the Navigant report Southern LNG itself submitted quantifies the increase in production specifically attributable to Southern LNG's proposal, as 0.2 bcf/d, with two thirds of this production coming from shale. Protest at 26 (citing App. at appx. A p.45). These predictions underlie

Southern LNG's entire discussion of purported economic benefit. Of course, even if Southern LNG were to disown these predictions and throw out its assertion of jobs created from induced production as well, DOE/FE could not follow suit, as all available evidence indicates that this induced production will in fact occur.

This extensive and unanimous factual and expert showing distinguishes this case from the FERC pipeline cases Southern LNG cites. Answer at 19 n.76. Those cases all turn on the absence of the kind of factual showing regarding inducement of production that EIA provided in its January 2012 export study, and that EIA's NEMS model can further provide here. For example, in *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121 at ¶ 91-92 (Nov. 14, 2011). FERC determined that the proposed pipeline would not directly increase shale development, because the same gas could be sold in the same markets regardless of whether the pipeline was constructed. An unpublished Second Circuit decision upheld FERC's decision on the ground that "the impacts of that development are not sufficiently causally related to the project to warrant a more in-depth analysis." *Coalition for Responsible Growth and Resource Conservation v. FERC*, 2012 WL 2097249, *2 (2nd Cir. 2012). Although Sierra Club contends that these decisions were wrongly decided even as applied to the pipelines in question, they are in any case completely inapplicable here, because they turn on FERC's and the Circuit's determination that the pipelines had not been shown to cause gas development.⁴ The instant case is factually distinct because the EIA export study, NEMS, and Southern LNG's own export report all show that the proposed project will induce production. Moreover, unlike the prior pipeline cases, which would induce production by making access to markets *easier* (provided shorter and higher throughput routes between gas wells and consumers, thereby making delivery to customers cheaper), DOE/FE export authorization is *essential* to exports to non-FTA countries.

Finally, Southern LNG argues that DOE/FE need not consider induced production because DOE/FE cannot regulate production direction. Answer at 20 (quoting *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 751, 770 (2004)). *Public Citizen* held that "where an agency has *no ability to prevent* a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect," and that the effect could be excluded from NEPA analysis. *Id.* at 770 (emphasis added). There, where the agency had "no discretion to prevent the entry of Mexican trucks, its [environmental assessment] did not need to consider the environmental effects arising from the entry." *Id.* (emphasis added). Here, DOE/FE unquestionably has the authority and duty to consider environmental impacts in its public interest analysis, the authority to deny export authorization on the basis of environmental impacts, and thereby to

⁴ FERC also maintained that the pipeline's impacts could not be localized for analysis. Sierra Club has already explained why localization is not a prerequisite to NEPA analysis. The Second Circuit did not address FERC's reasoning on this point.

prevent the environmental harms associated with induced production. Accordingly, *Public Citizen* does not support Southern LNG's argument.

The fact that states can also affect gas production's impacts, in that state regulate gas production directly, does not remove induced production from the ambit of DOE/FE's NGA and NEPA review. This conclusion is plain from the many cases requiring, for example, NEPA analysis of vehicle traffic that non-transportation federal projects will induce. *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 29 (D.C. Cir. 2008), *Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 863 (D.C. Cir. 2006). Similarly, states and other federal agencies, rather than DOE/FE, regulate jobs in the gas production industry, but Southern LNG concedes that these jobs are within the purview of DOE/FE's public interest analysis.

V. Public Interest

We argued that, although Southern LNG's proposed exports will harm the environment, public health, and thus the economy by imposing significant environmental impacts, Southern LNG has not demonstrated that the proposed project will have economic or other benefit capable of outweighing these harms, and thus, that the project was contrary to the public interest. Indeed, even putting environmental effects (and their attendant environmental consequences aside), the proposed project's harmful effects on jobs in energy intensive industry and imposition of costs on wage earners demonstrate that the project is contrary to the public interest.

We agree with Southern LNG and all other observers that proposed LNG exports will increase domestic gas prices. We contend that Southern LNG underestimates the magnitude of this increase, because the Navigant projections Southern LNG relies on makes several unsupported assumptions. Protest at 55-56. Even if Navigant's figures are used, however, the price increases Navigant predicts will harm domestic industry and consumers, offsetting any potential economic benefits. Protest at 54 n.186.

Additionally, as we previously explained, in assessing price impacts, DOE/FE must consider the potential impact of all pending export proposals, because doubling the volume of exports more than doubles the magnitude of price impacts. Protest at 53-55. Every single export applicant argues that its exports should be authorized and will indeed go forward, but that DOE/FE should assume that most of the other proposed facilities will not enter operation. DOE/FE cannot authorize all of these applications on the assumption that only a minority of them will actually take effect. As we suggest in our discussion of alternatives, DOE/FE should consider an alternative that would cap the total volume of exports, and if this alternative is selected, then it may be possible to limit the cumulative impacts analysis to only the effects of this limited volume of exports. But DOE/FE cannot let the cat out of the bag by granting all of the pending export applications on the assumption that only a subset of them will enter operation.

Finally, Southern LNG's arguments concerning jobs are unpersuasive. The most fundamental flaw in the Navigant analysis Southern LNG submits is the failure to consider counterfactuals, such as jobs that would exist in energy intensive industries if exports do not occur and raise gas prices. Southern LNG asserts that our criticisms should be rejected because Navigant "provided a project-specific analysis of the expected economic impacts." Answer at 28. But Southern LNG does not (and cannot) argue that Navigant's study considered these impacts on other industries. The NERA study discussed these impacts (although it understated them, as we explained previously and will explain in comments specific to the NERA study), and concluded that effects on other industries cancel out any job creation benefits of exports. Moreover, as we previously explained, NERA and Navigant ignore effects on job quality rather than quantity.⁵ Even if NERA's optimistic and simplistic job numbers are accepted, these merely show an absence of employment effects one way or another, and thereby fail to identify a public benefit capable of outweighing the harm to the public interest resulting from environmental impacts.

Southern LNG retorts that, at the bottom line, NERA predicts "net economic benefit from allowing exports," Answer at 29, but "net economic benefit" does not mean net benefit to the public interest. For example, the "economic benefit" discussed by NERA ignores the environmental and public health effects, job continuity, and the fact that exports will impose costs on wage-earners in general while delivering benefits only to shareholders in export and production companies. We will further discuss the flaws in the NERA study in comments to be submitted thereon.

VI. Conclusion

The most important issue raised in Sierra Club's protest is DOE/FE's obligation to consider the impacts of induced production. Southern LNG's answer asserts that induced production is unforeseeable, without acknowledging, much less engaging, Sierra Club's evidence regarding DOE/FE's ability to predict where this production will occur or Sierra Club's demonstrate of how impacts of induced production can be foreseen without specific information regarding the site of that production. The National Environmental Policy Act requires disclosure of such impacts, and the Natural Gas Act requires DOE/FE to weigh them. Fairly weighed, Sierra Club continues to contend, such impacts demonstrate that Southern LNG's proposal is not in the public

⁵ Southern LNG argues that concerns about boom and bust cycles in gas production are purely speculative, because Sierra Club has not specified where production will occur. Answer at 30. Because the boom-bust pervades the industry, it will occur regardless of where production takes place, so this argument is irrelevant. Moreover, as we have extensively explained, DOE/FE has tools to predict where production will occur, and an obligation to do so.

interest. This is particularly so given the project's questionable economic benefits. Whether or not these economic benefits are as large as Southern LNG contends, it would be arbitrary and capricious to weigh them without counting the environmental cost. Accordingly, as we explained in our protest, DOE/FE's public interest review must consider the environmental effects of terminal construction and operation, of induced production, and of increased domestic gas prices. To ensure that these effects are given adequate consideration, DOE/FE should deny Southern LNG's request for a conditional authorization prior to completion of environmental review.

Dated: January 17, 2013

Respectfully submitted,

/s/ Ellen Medlin

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CERTIFICATE OF SERVICE

I hereby certify that I caused the above documents to be served on the applicant and all others parties in this docket, in accordance with 10 C.F.R. § 590.017, on January 17, 2013.

Dated at San Francisco, CA, this 17th day of January, 2013.



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VERIFICATION

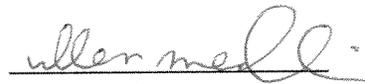
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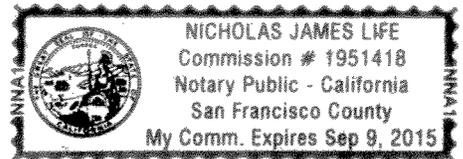
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Pursuant to C.F.R. §590.103(b), Ellen Medlin, being duly sworn, affirms that she is authorized to execute this verification, that she has read the foregoing document, and that facts stated herein are true and correct to the best of her knowledge, information, and belief.



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Subscribed and sworn to before me this 17 day of January, 2013.


Notary Public

My commission expires: 09/09/2015