

ORIGINAL

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



In the Matter of:)
GULF COAST LNG EXPORT, LLC)
)
)

Docket No. 12-05 LNG

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF GULF COAST LNG
EXPORT, LLC TO MOTION FOR LEAVE TO INTERVENE AND PROTEST OF
SIERRA CLUB**

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

Leslie E. Lo Baugh, Esq.
Brownstein Hyatt Farber Schreck, LLP
2029 Century Park East, Suite 2100
Los Angeles, CA 90067
Tel: (310) 500-4638
Fax: (310) 500-4602
llobaugh@bhfs.com

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I.

INTRODUCTION

Pursuant the Department of Energy’s (“DOE”) regulations,¹ Gulf Coast LNG Export, LLC (“Gulf Coast”), hereby submits its Response to the Motion for Leave to Intervene and Protest (“protest”), filed by Sierra Club in the above referenced docket. Sierra Club’s claimed interests are insufficient and its motion to intervene should be denied. The Sierra Club’s protest against Gulf Coast’s request to export LNG to non-Free Trade Agreement (“FTA”) countries fails to overcome the presumption that Gulf Coast’s proposed exports are in the public interest. The Sierra Club’s protest is not relevant to Gulf Coast’s proposed exports to countries with which the United States has an FTA requiring national treatment of natural gas. Therefore, Sierra Club’s protest should be denied and given no weight.

A. Description Of The Gulf Coast Application.

Gulf Coast filed an application (“Application”) in January of 2012 with the Office of

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

Fossil Energy (“FE”) of the Department of Energy (“DOE”) under section 3 of the Natural Gas Act (“NGA”), 15 U.S.C. 717b, Part 590 of the Regulations of the DOE,² and Section 201 of the Energy Policy Act of 1992.³ The Application requests authorization for long term, multi-contract exports of liquefied natural gas (“LNG”) from domestic sources to any country, both FTA and non-FTA, “that has or in the future develops the capacity to import LNG via ocean-going carrier, and with which trade is not prohibited by U.S. law or policy.”⁴ In its Application, Gulf Coast expressly states that rather than long term natural gas supply or LNG sale contracts, it will primarily utilize Liquefaction Tolling Agreements (“LTAs”) which will be filed with DOE once they have been executed. In today’s market, LTAs perform the role of long term supply and sales contracts in that they provide long term stable commercial arrangements for LNG export. (The procedure of filing contracts after DOE/FE has granted an export permit has been a long established practice.⁵) Pursuant to the LTAs, individual customers who hold title to the natural gas will have the right to deliver that natural gas to Gulf Coast. Thereafter, Gulf Coast will provide liquefaction services, and the LTA customer will then receive its natural gas as LNG. The selection of the sources of natural gas is the responsibility of the LTA customers, not Gulf Coast. Obviously the specific location of the future natural gas supply cannot now be determined. It is likely to come from a diverse mixture of sources determined once future customers of Gulf Coast enter into their purchase agreements with producers, marketers and

² 10 C.F.R. § 590 (2010).

³ Pub. L. No. 102-486, § 201, 106 Stat. 2776, 2866 (1992) (codified as amended at 15 U.S.C. § 717b(c) (2010)).

⁴ Gulf Coast Application – FE Dkt. No. 12-05-LNG, p 1.

⁵ See *Yukon Pacific Corporation*, ERA Docket No. 87–68–LNG, Order No. 350 (November 16, 1989); *Distrigas Corporation*, FE Docket No. 95–100–LNG, Order No. 1115, at p 3 (November 7, 1995); See also *Freeport LNG Expansion and FLNG Liquefaction, LLC*, FE Docket No. 10–160–LNG, Order No. 2913 at 9–10 (February 10, 2011).

others in the years to come. However, it will come from the interconnected and highly liquid domestic market for natural gas in the United States. To fully comply with the requirements of DOD/FE, Gulf Coast also requests authorization to register each LNG title holder and to provide other supporting arrangements and documentation.

Gulf Coast proposes to construct four LNG liquefaction trains capable of liquefying up to 2.8 Bcf/d of natural gas, as well as associated LNG storage tanks, a pipeline connection system to connect to natural gas transportation lines, a marine berth and associated utilities. [However, these facilities are not the subject of the Application. Instead, authorization to construct these facilities will be the subject of an application to be filed with the Federal Energy Regulatory Commission (“FERC”).] The volume requested for export is equivalent to 1,022 Bcf of natural gas per year for a term of 25 years.

The Application Gulf Coast contains two specific and separate types of export requests, namely to be granted authorization for LNG exports to: (1) any country with which the United States has now or in the future has a FTA⁶ providing for national treatment of natural gas/LNG⁷; and (2) any other country which has or in the future develops the capacity to import LNG via ocean carriage, provided trade with such country is not prohibited by U.S. law or policy.⁸ This distinction between FTA or non-FTA is important because these are two requests that are governed by two separate sections of the NGA.

⁶ Currently the countries with FTAs with the United States that require national treatment for trade in natural gas include: Australia, Bahrain, Canada, Chile, Columbia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Nicaragua, Oman, Peru, Republic of Korea and Singapore.

⁷ Section 3(c) of the NGA eliminated any public interest analysis DOE of LNG export applications to FTA countries and “required that such applications be deemed in the public interest.”

⁸ The standard of review under section 3 (a) of NGA requires that “the [secretary] shall issue such order upon application, unless after opportunity for hearing, [he] finds that the proposed exportation or importation is not consistent with the public interest.”

Concerning only the second of these requests, Gulf Coast alternatively requests that it be authorized to export LNG to non-FTA countries in either the full volume requested or alternatively in such quantity or term as DOE determines to not be inconsistent with the public interest.⁹ (Therefore, if DOE/FE were to grant authority to export LNG to non-FTA countries in volumes less than the full amount requested, the volume of exports to FTA countries would be larger than the amount authorized for export to non-FTA countries). In its Application, Gulf Coast provides substantial additional data confirming the statutory presumption that the requested exports are in the public interest and should be approved. (Please refer to the Application for additional information.)

B. Sufficiency Standards.

Upon receipt of an application for LNG exports, the DOE/FE reviews the application for sufficiency under its applicable regulations.¹⁰ Among other things, DOE requires that the applicant demonstrate that it has taken meaningful and sufficient steps to establish business relationships essential for the performance of the proposed export of LNG. If the application is deemed incomplete, the Assistant Secretary's delegate may require additional submittals or dismiss the application without prejudice.¹¹ DOE has determined that the Gulf Coast application is complete.¹² Any suggestion to the contrary is both incorrect and moot.

C. Federal Register Notice of Application.

Once an application is deemed complete, DOE/FE is required to publish a notice of the application in the Federal Register. The notice of the Gulf Coast Application was published on

⁹ Gulf Coast Application – FE Dkt. No. 12-05-LNG, p 4.

¹⁰ 10 C.F.R. § 590.201, et seq.

¹¹ 10 C.F.R. § 590.203.

¹² Federal Register, Vol. 77, No. 107.

June 4, 2012. In the notice, DOE/FE confirmed that the application had been deemed complete.¹³ The applicable DOE regulations require that a comment period be provided of not less than 30 days from the date of the notice.¹⁴ In this instance, DOE authorized a comment period of up to 60 days, that is no later than 4:30, eastern time, Friday August 3, 2012. A large number of supporting letters were thereafter filed with DOE. Apparently on the last day of the 60 day comment period, Sierra Club filed its motion for leave to intervene and protest. This submittal by Gulf Coast is in response to that Sierra Club filing.

II.

THE MOTION TO INTERVENE BY SIERRA CLUB SHOULD BE DENIED

Because it seeks to intervene as a party, Sierra Club must state clearly and concisely the facts on which its claim of interest is based.¹⁵ Sierra Club has provided a list of “economic, aesthetic, spiritual, personal, and professional interests”¹⁶ that are generic in nature and not specific to the Gulf Coast Application. This asserted litany amounts to no more and no less than a general attack on domestic natural gas production. Rather than articulate a claim of interest specific to the Gulf Coast Application, Sierra Club raises policy issues directed against U.S. produced fossil fuels irrespective of whether they are used to fuel power plants, run commercial and industrial complexes, as ingredient in chemical or plastic manufacturing, warm residential dwelling, heat water, LNG exports or any other use of the fuel. It also appears to be implicit in the filing that Sierra Club seeks to dispute the general system of regulation of the domestic natural gas industry, including the NGA and the Energy Policy Act of 2005. Clearly the filing

¹³ Federal Register, vol. 77, No. 107, p 32962.

¹⁴ 10 C.F.R. § 590.202(a).

¹⁵ 10 C.F.R. § 590.303(b).

¹⁶ Sierra Club Protest, p 2.

by Sierra Club is simply a part of its continued generic anti-fossil fuel, political campaign and its protest over the low price of natural gas: For instance, its position on fossil fuel is clearly set forth in its publication “Dirty, Dangerous, and Run Amok.”¹⁷ Robin Mann, Sierra Club’s president, clearly stated the Sierra Club position in that publication: “Fossil fuels have no part in America’s energy future – coal, oil, and natural gas are literally poisoning us. The emergence of natural gas as a significant part of our energy mix is particularly frightening because it dangerously postpones investment in clean energy at a time when we should be doubling down on wind, solar and energy efficiency.” (Presumably it is the very low price of natural gas, when compared to the unsubsidized price of wind and solar energy, that presents economic competitive challenges for such alternative energy.) The Sierra Club was a strong supporter of natural gas as a so called “bridging fuel” when it was over \$8 per mcf, but now that the price has fallen significantly because of shale gas technological improvements, it has attacked the use of natural gas in all areas. Sierra Club has named its battle plan against natural gas: “Beyond Natural Gas.” Unquestionably, Sierra Club’s interest is not in the public interest of any LNG project including Gulf Coast, but rather in shutting down the entire use of natural gas. As Michael Brune, Executive Director of Sierra Club explained the organization’s goal in an interview with the National Journal this May; “We’re going to be preventing new gas plants from being built wherever we can...The natural gas industry is dirty, dangerous and running amok...The closer we look at natural gas, the dirtier it appears; and the less of it we burn, the better off we will be.”¹⁸

Obviously the Sierra Club’s generalized attacks on natural gas have been raised in the

¹⁷ See <http://content.sierraclub.org/naturalgas>

¹⁸ National Journal, May 3, 2012.

wrong forum. Sierra Club should present such arguments to FERC, or more properly to Congress. Although its rants against natural gas might be the proper subject of legislative debate, it does not amount to the type of specific interest in the Gulf Coast Application entitling Sierra Club to the status of an intervener in this proceeding. The inescapable conclusion is that the interests asserted by Sierra Club are not legally sufficient to support its intervention. Accordingly, the motion of Sierra Club to intervene should be denied.

In a footnote Sierra Club states “[I]f any other party opposes this motion, Sierra Club respectfully requests leave to reply.”¹⁹ This footnote by Sierra Club is a blatant attempt to circumvent the procedural rules of DOE/FE which require a written motion which in turn is either approved or denied by DOE/FE before such a reply is permitted.²⁰ This clear violation of the established procedural requirements should not be permitted. If, however, DOE/FE permits such a reply then Gulf Coast as a matter of equity, does and will request permission to respond appropriately.

III.

PROTEST BY SIERRA CLUB SHOULD BE GIVEN NO WEIGHT

As discussed above, the motion of Sierra Club to intervene in this proceeding is legally insufficient and should be denied. Since its motion to intervene is legally insufficient, its protest must not be given consideration. Furthermore, the protest itself is based on irrelevant, misdirected and erroneous allegations. For instance, Sierra Club alleges that Gulf Coast’s proposed LNG exports to non-FTA countries will have significant economic and environmental harms, and erroneously asserts that DOE/FE cannot approve the request of Gulf Coast without

¹⁹ Sierra Club Protest, p. 3.

²⁰ 10 C.F.R. §§ 590.302, 590.310.

DOE/FE individually completing a separate National Environmental Policy Act (“NEPA”) analysis, including a full Environmental Impact Statement (“EIS”). For the reasons discussed below, even if given consideration, Sierra Club’s protest fails to overcome the statutory presumption in favor of granting the Gulf Coast Application.

A. Legal Standards Under the Natural Gas Act.

1. Exports to FTA Countries.

As noted above, the protest of Sierra Club has no relevance to the request by Gulf Coast for authorization for long-term exports of domestic-sourced LNG to FTA countries. Such requests are subject to the provisions of section 3(c) of the Natural Gas Act. DOE/FE is required to approve such a request without modification or delay. Sierra Club does not challenge the statutory requirement that that request by Gulf Coast must be approved without modification or delay.

2. Exports to Non-FTA Countries.

All applications for authorization to export LNG to non-FTA countries are governed by section 3(a) of the NGA which states as follows:

[N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the [Secretary] authorizing it to do so. ***The [Secretary] shall issue such order upon application, unless after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest.*** (Emphasis added.)²¹

Sierra Club conveniently ignores the requirement embodied in the second sentence of the provision quoted above.²² The process does not start with a blank slate. DOE/FE has

²¹ 15 U.S.C. § 717b. Pursuant to Redesignation Order No. 00.002.04D (Nov. 6, 2007) this authority is delegated to the Assistant Secretary for FE.

²² Sierra Club Protest, p 4.

consistently ruled that section 3(a) of the NGA²³ creates a rebuttable presumption that the proposed exports of natural gas are in the public interest.²⁴ The law requires that DOE/FE must grant the request for export authorization unless opponents of the authorization make an affirmative and persuasive showing on the record that is sufficient to overcome the legal presumption that the proposed export of natural gas is consistent with the public interest.²⁵

FERC has previously addressed the proper scope of “public interest” and concluded:

“The words “public interest” in a regulatory statute is not a broad license to promote the general public welfare, but the words take meaning from the purposes of the regulatory legislation . . . [I]n the case of NGA, the purpose is to encourage the orderly development of plentiful supplies of natural gas at reasonable prices.”²⁶

The goal of the Sierra Club, namely to shut down natural gas development, is fundamentally inconsistent with the public interest requirement of NGA to encourage the “development of plentiful supplies of natural gas.” In considering the public interest presumptively favoring the export LNG to non-FTA countries, DOE/FE considers several factors including the domestic need for the gas, the security of domestic natural gas supplies, and any other issue determined to be appropriate, including whether the arrangement is consistent with DOE/FE’s policy of promoting competition in the marketplace by allowing commercial parties

²³ 15 U.S.C. § 717b. This authority is delegated to the Assistant Secretary for FE pursuant to Redelegation Order No. 00.002.04D (November 6, 2007)

²⁴ Order No. 1473, note 42 at 13, *citing Panhandle Producers and Royalty Owners Ass'n v. ERA*, 822 F.2d 1105, 1111 (D.C. Cir. 1987).

²⁵ *Conoco Phillips Alaska Natural Gas Corporation and Marathon Oil co.*, Order No. 1473 at 13n.42; *Panhandle Producers and Royalty Owners Ass'n v ERA*, 822 F. 2d 1105, 1111 (D.C. Cir 1987); *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, FE Docket No. 10-111-LNG (May 20, 2011)

²⁶ *See North Baja Pipeline, LLC*, 123 FERC ¶ 61,073 at p 81 (2008) (citing *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132 (D.C. Cir. 1980).

to freely negotiate their own trade arrangements.²⁷ In addition, job creation, the effect on U.S. balance of payments, the generation of tax revenue and other appropriate factors are considered. The environmental benefits and impacts of exporting natural gas are among the “other issues” that DOE/FE may consider in its public interest analysis. For this reason, Gulf Coast’s Application also contains a discussion of several of the public interest benefits that will flow from the requested exports, including some of the environmental benefits such as those to be gained from using natural gas as a substitute for coal or petroleum products. However, the entire process commences with the statutory presumption that the export requested by Gulf Coast is in the public interest.

B. Sierra Club’s NEPA Protest Has No Merit.

Sierra Club argues that DOE may not grant a conditional or final approval of the Gulf Coast Application without first complying with the procedural requirements of the National Environmental Policy Act, 42 U.S.C. § (“NEPA”).²⁸ As discussed below, however, such conditional authorizations are routinely issued by DOE and do not trigger the need for a NEPA review. After issuing a conditional authorization for export to non-FTA countries, DOE will conduct its NEPA analysis concurrent with the Federal Energy Regulatory Commission’s (“FERC”) review under NEPA. In that process, DOE will be a cooperating agency.²⁹ During the FERC process, Sierra Club and other members of the public will have an ample opportunity

²⁷ *Sabine Pass Liquefaction LLC*, FE Docket No. 10-111-LNG, Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations, Order No. 2961 at p 29 (May 20, 2011). The free trade principle is in accord with DOE/FE’s Policy Guidelines, which promote free and open trade by minimizing federal control and involvement in energy markets. Policy Guidelines and Delegation Orders Relating to the Regulation of Imported Natural Gas, 49 Fed. Reg. 6,684 (Feb. 22, 1984).

²⁸ Sierra Club Protest, p 58.

²⁹ “Cooperating agency” is defined by the Council on Environmental Quality as “any federal agency other than a lead agency which has jurisdiction by law or special expertise to proposed actions for which a NEPA analysis is prepared.” See 40 C.F.R. § 1508.5 (2011).

to participate in the NEPA process. This will satisfy DOE's and FERC's NEPA obligations with respect to this project. Accordingly, Sierra Club's protest on this basis is premature and without merit. It should be disregarded.

C. DOE's Conditional Approval of the Application Does Not Require NEPA Review.

Congress enacted NEPA to ensure that certain federal actions are subject to scrutiny before implementation to better understand the impact of such actions on the human and natural environment.³⁰ NEPA requires federal agencies to prepare an environmental impact statement ("EIS") only for "*major* federal actions *significantly affecting* the quality of the human environment."³¹ Not all federal actions are subject to NEPA. In other words, before a NEPA analysis is required the federal action must satisfy two criteria: 1) it must be a major action and 2) it must "significantly" affect the "quality of the human environment." A conditional approval of the Gulf Coast export request does not rise to that level. Contrary to Sierra Clubs assertions, the conditional approval being contemplated by DOE at this time is merely the first step of many towards actualization of the proposed export of LNG from the Brownsville Terminal. A preliminary determination, such as granting Gulf Coast a conditional export authorization, does not constitute major federal action triggering NEPA.

In considering when a NEPA analysis must occur, the courts have routinely recognized that general authorizations or preliminary determinations such as the one at issue here are not the appropriate point in time to undertake NEPA, as the precise nature of the environmental and human impacts to be studied under NEPA are not known and thus too speculative to evaluate. The Supreme Court in *Andrus v. Sierra Club*, 442 US 347 (1979), considered this issue in the

³⁰ 42 U.S.C. § 4321; *see also Robertson v. Methow Valley Citizens Counsel*, 490 U.S. 332, 349 (1989).

³¹ 42 USC §4332(2)(C) (emphasis added).

context of federal budget decisions. The district court in that case had previously found that section 102(2)(C) of NEPA applied to an annual budget request prepared by the US Fish and Wildlife Service (“FWS”) and the Office of Management and Budget (“OMB”) for operation of the National Wildlife Refuge System.³² The DC Circuit had affirmed the ruling of the district court.³³ However, the Supreme Court reversed emphasizing that NEPA duties only apply to actual proposals from major federal actions, not to earlier determinations, either by the same or other agencies, even if those early determinations may influence the scope or direction of the ultimate proposal for action. *Andrus*, 442 US at 363. Specifically the Supreme Court ruled:

Even if changes in agency programs occur because of budgetary decisions, an EIS at the appropriation stage would only be repetitive. . . [S]ince the Fish and Wildlife Service could respond to OMB’s budgetary curtailments in a variety of ways. . . it is impossible to predict whether or how any particular budget cut will in fact significantly affect the quality of the human environment. OMB’s determination to cut the Service’s budget is not an EIS proposal, and therefore requiring OMB to include an EIS in its budgetary cuts would be premature.³⁴

The court also emphasized that since an “EIS must be prepared if any of the revisions the Fish and Wildlife Service proposes in its ongoing programs in response to OMB’s budget cuts would significantly effect the quality of the human environment, requiring the Fish and Wildlife Service to include an EIS with its revised appropriation request would merely be redundant.”³⁵ This is analogous to the Gulf Coast situation where it is requesting a conditional approval subject to the FERC lead NEPA determination.

The same principles apply here. Requiring DOE to perform NEPA on its initial

³² *Sierra Club v. Morten*, 395 F. Supp. 1187, 1189 (D.D.C. 1975).

³³ *Sierra Club v. Andrus*, 581 F.2d 895, 905 (D.D.C. 1978).

³⁴ *Id.*

³⁵ *Id.*

conditional approval of Gulf Coast's Application to export LNG would be both premature and redundant. As in *Andrus*, even though the conditional approval of the Application may "influence the scope or direction" of the final agency action, none of the concrete steps have been taken that are necessary to actualize the exports requested by the Application. Gulf Coast has not yet even initiated the necessary process with FERC for the approval of Brownsville terminal after which FERC is required by law to initiate the NEPA process.³⁶

Consistent with the *Andrus* rulings by the Supreme Court, other judicial decisions have reinforced the Supreme Court's reluctance to impose NEPA duties on preliminary determinations such as the one at issue here. In *Sierra Club v. FERC*, 754 F 2nd 1506, 1509 (9th Cir. 1985), Ninth Circuit found that NEPA duties did not apply to FERC's grant of a preliminary permit for a hydroelectric project on a national forest. The court found that this preliminary permit was not a commitment to any future action, and that under U.S. Forest Service regulations, the permittees "can only enter federal land and conduct groundbreaking activities after obtaining forest service and BLM's special use permits. Thus, these agencies not FERC will be responsible for evaluation the environmental impact of activities authorized by their special use permit."³⁷ Similarly, in *Conner v. Burford*, 848 F 2nd 1441, 1448-49 (9th Cir. 1988), the court found that a sale by a federal agency of leases to an oil company, where the leases contained a no surface occupancy clause, "cannot be considered the go/no-go point of commitment at which an EIS is required," since these leases do not commit the agency to any activity that could disturb the environment. The same is true with the conditional export authorization requested by Gulf Coast.

³⁶ Any evaluation of impacts associated with extraction of the actual natural gas that will be exported, would be an entirely speculative exercise, especially since such exports will not occur for several years.

³⁷ 754 F 2nd at 11509.

Clearly the requested DOE conditional approval of Gulf Coast Application does not “commit the agency to any activity that could disturb the environment.” The next steps in the process – approval of the LNG facility required for the exports --will require NEPA analysis. To require DOE to undertake such an involved analysis at this time would be an exercise into speculation contrary to the law.

D. The Energy Policy Act Establishes FERC as the Lead Agency Under NEPA.

As discussed above, section 3(a) of the NGA creates a rebuttable presumption that proposed exports of natural gas are in the public interest.³⁸ Since environmental benefits are among the factors DOE may consider as part of a public interest analysis, the Application contains a discussion of some environmental benefits to be gained from using natural gas as a substitute for coal or petroleum products.³⁹ This and similar data provided in the Application are additive to the statutory presumption that the requested export is in the public interest. Gulf Coast also recognizes, that DOE will not issue a final approval on the Application until the procedural requirements of NEPA have been satisfied. For that reason, Gulf Coast specifically requested that export authorization be granted conditioned upon the future environmental NEPA review by FERC, the designated lead agency in this matter.⁴⁰

Under the NGA, FERC has two different roles involving the Gulf Coast project. First, it is the lead federal agency under NEPA. “The [Federal Energy Regulatory] Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorization and for the purposes of complying with the National Environmental Policy Act of 1969.”⁴¹ This process

³⁸ 15 U.S.C. § 717b.

³⁹ Gulf Coast Application, pp 28-30.

⁴⁰ See 10 CFR § 590.402 (2010).

⁴¹ NGA 15(b)(1), 15 U.S.C. § 717 n(B)(1)

is mandated by the Energy Policy Act of 2005,⁴² which amended the NGA to coordinate the process of complying with NEPA by designating FERC as the lead agency.⁴³ The Energy Policy Act of 2005 also requires FERC to establish the NEPA pre-filing process, set the schedule and deadlines for all cooperating agencies, and maintain a complete consolidated record of all decisions made or actions taken by any Federal or State agency regarding any Federal authorization.⁴⁴

Furthermore, DOE/FE has adopted regulations for implementing NEPA, as published by the Council on Environmental Quality, that govern its role as a cooperating agency.⁴⁵ For DOE/FE actions involving FERC or another Federal agency, DOE/FE will cooperate with the lead agency to develop environmental information and to determine whether an EIS must be prepared.⁴⁶ As a cooperating agency, after independent review of the NEPA document, prepared by the lead agency, DOE/FE may adopt the EIS or Environmental Assessment (“EA”) prepared without recirculation if DOE/FE concludes that its comment and suggestions have been satisfied.⁴⁷

The Sierra Club’s claim that DOE/FE may not grant a conditional approval of the Gulf Coast Application because DOE is “barred from moving forward without a full EIS”⁴⁸ is a gross mistake of the law. As already noted, conditional authorizations are routinely issued by

⁴² Energy Policy Bill of 2005, Pub. L. 109-58, H.R. 6, 109th Cong. (2005).

⁴³ 15 U.S.C. § 717n(b).

⁴⁴ 15 U.S.C. § 717b-1(a), 717n(b)-(d); *See* 18 C.F.R. § 157.21(a)(2).

⁴⁵ 10 C.F.R. § 1021.103.

⁴⁶ 10 C.F.R. § 1021.342.

⁴⁷ 40 C.F.R. § 1506.3(c); *see also* Council on Environmental Quality Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34265-34266 (stating that regulations regarding adoption of an EIS also apply to an EA).

⁴⁸ Sierra Club Protest, p 58.

DOE/FE, making such authorizations conditional on FERC's review under NEPA of environmental impacts.⁴⁹ This process was recently confirmed by DOE/FE in the final decision in the Sabine Pass LNG export proceeding.⁵⁰ This process does not conflict with the NEPA regulations, rather it is required by both NEPA and the NGA. Simply put, the law requires that FERC, rather than DOE, undertake the lead agency role to perform such NEPA analysis as is required. While DOE clearly has an active role as a cooperating agency, DOE is not the lead agency. In fact the law does not allow DOE to duplicate the functions vested with FERC. Sierra Club's protestations to the contrary cannot overturn the clearly established law on this point.

The second role of FERC, pursuant to section 3(e) of the NGA, is that FERC, not DOE, has "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."⁵¹ In addition, as noted above, the Energy Policy Act of 2005 amended NEPA to add specific provisions that FERC must be the lead agency for all NEPA matters relating to all federal authorizations under section 3 of NGA, whether for permits, opinions, authorizations, certifications, or other approvals, including authorizations to construct and operate LNG terminals.⁵² FERC is therefore the lead agency for the siting, construction and operation of the LNG terminal at Brownville Port.

The separate roles of lead and cooperating agencies are well established. In *Henry v. Federal Power Commission*, 513 F.2d 395 (U.S. App. D.C. 1975), a natural gas pipeline company filed applications with the Federal Power Commission for authorization under the NGA to construct and operate certain coal gas facilities. The court explained that the

⁴⁹ See *Sabine Pass Liquefaction LLC* Order No. 2961, pp 40-41. See also *Rochester Gas and Electric Corp.*, FE Docket No. 90-05-NG, Order No. 503 (May 16, 1991).

⁵⁰ *Sabine Pass Liquefaction, LLC, DOE/FE* Order No. 2961, at 40-41; See 10 C.F.R. 590.402

⁵¹ NGA 3(e)(1), 15 U.S.C. § 717b(e)(1)

⁵² NGA 15(a)(1)-(2), 15 U.S.C. § 717n(a)(1)-(2)

Commission's duties under NEPA to evaluate the proposed project's environmental impacts did not extend to preparing a full EIS because it could rely on the one prepared by the lead agency.⁵³ The court noted that the Commission could discharge its duty by accepting, rejecting or modifying the analysis of the lead agency.⁵⁴ Later decisions have reaffirmed that cooperating agencies should not duplicate the lead agency's work preparing an EIS or EA.⁵⁵ Accordingly, it is FERC, not DOE, that must take the lead on the NEPA review of both the export Application and the LNG facilities at the Brownsville Port Terminal. Once DOE has completed its NEPA review, DOE as a cooperating agency will conduct its independent review of the results of the FERC analysis and make its determination as to whether the FERC developed record is sufficient or whether DOE needs to supplement that record to satisfy DOE's responsibilities under NEPA and section 3 of the NGA.⁵⁶ Requiring DOE to undertake a separate and independent NEPA review prior to issuing a conditional approval would violate this established division of labor between the agencies, result in unnecessary overlap and redundancy in the review and would be contrary to the law and long established practice.

Within 180 day of DOE's order conditionally approving this Application, Gulf Coast anticipates initiating the FERC review process for authorization to site, construct, and operate the Brownsville LNG Terminal. During the FERC process the required NEPA review of the terminal will occur, as required by the Energy Policy Act of 2005.⁵⁷ Therefore, the Sierra Club's demand that DOE evaluate alleged environmental impacts of the Brownville LNG terminal in

⁵³ *Id.* at 407.

⁵⁴ *Id.*

⁵⁵ See *LaFamme v FERC*, 945 F.2d 1124, 1130; *Sierra Club v. US Army Corp. of Engineers*, 295 F.3d 1209, 1215.

⁵⁶ See, *Sabine DOE/FE Order 2961-A* at p 27.

⁵⁷ 15 USC § 717(b). 10 CFR § 1021.103. 40 CFR § 1506.3(c).

this export application proceeding is contrary to law.

E. Sierra Club's Induced Production and Impacts Argument is Without Merit.

Although not entirely clear from its protest, Sierra Club appears to also argue that the conditional approval of the Application, in and of itself, results in “induced impacts” in the nature of upstream natural gas production that must be analyzed under NEPA. NEPA does require an evaluation of certain impacts arising from a proposed major federal action if they may significantly affect the human environment. However, as noted above, a conditional approval of the Application does not trigger a NEPA review. Furthermore, the statute itself does not use the term “induced impacts.” If the Sierra Club is assuming that some particular upstream natural gas production is an indirect impact stemming from the conditional approval of the Application, it is simply wrong in that assertion.

Gulf Coast acknowledges in its Application that the operation of the Brownsville LNG Terminal and export activities from this Terminal will undoubtedly support increased natural gas production. However, the location of any such upstream activity is entirely unknown. Sierra Club has shown no causal connection with any wells to be drilled in the future. Furthermore, analyzing the general impacts of natural gas production, without regard to geographic location would be pure speculation. It is not the type of indirect impact contemplated by NEPA.⁵⁸ The question of whether and to what extent future upstream natural gas development should be considered as a NEPA indirect impact presumably is a question that Sierra Club will raise before FERC during the proceeding involving the terminal. However, on several recent occasions, FERC addressed and firmly rejected that argument that generalized future increases in shale or

⁵⁸ See *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (Courts will not require the government to speculate on impacts in order to “foresee the unforeseeable.”)

other gas production must be part of a NEPA analysis.⁵⁹ FERC repeatedly concluded that such future gas production and alleged environmental impacts lack a sufficient causal connection to natural gas projects to justify the NEPA type review of alleged “induced production” that Sierra Club demands in the proceeding.⁶⁰ “NEPA requires a ‘reasonable close causal relationship’ between the environmental effect and the alleged cause. In order to be sufficiently causally connected, the environmental impact must be 1) caused by the proposed action, and 2) reasonably foreseeable.”⁶¹ In other words, LNG export projects do not require a NEPA analysis of so called “induced production,” whether that is from shale gas formations or non-shale gas formations. “To require the Commission to guess whether or when permitted wells may be drilled, when additional wells may be permitted, and where additional infrastructure such as compressor and gas processing stations, gathering lines, etc., will be placed, would at best amount to speculation as to future events and would be of little use as input in deciding whether to approve the [project].”⁶² In addition, the regulation of siting, spacing, drilling and production of natural gas wells is regulated on the state level, not by FERC or by DOE.⁶³ In spite of the assertions of Sierra Club, such alleged imputed production is not the proper subject of the NEPA review for LNG exports DOE/FE should give no consideration to such claims by Sierra Club.

Sierra Club errs in citing *Border Power Plant Working Group v. Department of Energy*,⁶⁴

⁵⁹ See *Texas Eastern Transmission, LP*, 139 FERC ¶61,138 at pp 70-73 (2012); *Sabine Pass Liquefaction, LLC*, 139 FERC ¶61,039 at pp 94-99 (2012) (“*Sabine Pass FERC Order*”); *Central N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121 at pp 81-107 (2011) (“*CYNOG*”), reh’g denied, 138 FERC ¶ 61,104 at pp 33-56 (2012), *on appeal*, *Coalition for Responsible Growth & Resource Conservation v. FERC*, 2d Cir. No. 12-566.

⁶⁰ See *Sabine Pass, FERC Order* at pp 95-96

⁶¹ *CYNOG* at pp 83-84, See also *Sabine Pass, FERC Order* at p 96; *Texas Eastern Transmission, LP*, at p 72.

⁶² *CYNOG* at p 100.

⁶³ See *CYNOG* at p 93; *Texas Eastern Transmission, LP* at p 71.

⁶⁴ *Border Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997 (S.D. CA 2003)

in support of its “induced production” (induced impact) arguments concerning future natural gas wells. The facts of that case differ substantially from the situation presented in this matter. That case does not control DOE’s course of action here. In *Border Plant Working Group*, the court considered whether, under NEPA’s indirect effects analysis, DOE must analyze the impacts of the operation of two upstream power plants – one serving exclusively the United States and the other serving both the U.S. and Mexico -- in conjunction with its review and approval of a transmission line project that would transport the power from those facilities into the U.S. The court looked at whether the two actions – the transmission line under review and the power plants – could exist without each other. In other words, was it the case that but for the power plants, the transmission line would not be built, and vice versa.⁶⁵

Using this “but for” test, the district court held that impacts associated with that portion of the plants serving the United States via the transmission line must be analyzed as impacts associated with the transmission line, as those turbines would not have been built absent the line.⁶⁶ Impacts associated with the two turbines serving exclusively Mexico, however, did not meet the “but for” test and did not need to be considered by DOE, as the power from these turbines was transmitted separately and thus operated independent of the transmission line at issue.⁶⁷

Unlike the circumstances in the Gulf Coast Application, the power plants at issue in *Border Plant Working Group* were already sited and under construction. Here, the location and associated impacts of any future natural gas production, are entirely unknown and purely speculative. Moreover, natural gas production, unlike the construction of the power plants in

⁶⁵ *Id.* at 1014.

⁶⁶ *Id.* at 1015-1017.

⁶⁷ *Id.* at 1017.

Border Plant Working Group, will occur regardless of DOE's decision on the Application.

Thus, the court's holding in *Border Power Plant* is entirely inapposite to the facts presented here.

Sierra Club has failed to identify any specific future "induced production" causally related to the Gulf Coast Application for export services or even its proposed liquefaction. Undoubtedly, Sierra Club recognizes that it is impossible to determine which natural gas production wells or fields will ultimately supply the natural gas that will be purchased by future customers of Gulf Coast over the 25 year period of the project, a project which will not even commence operations for several years from now. Future suppliers of the future customers of Gulf Coast, not Gulf Coast, will be the entities to request any needed permits or authorization, state or Federal, for natural gas production. Any environmental impacts from production would be specific to the wells producing the gas, where they are located and how they are operated. If there will be any potential future impacts on the human environment, or on habitat, fauna, flora, water, etc., causally connected to such wells, that is not reasonably foreseeable. Simply put, Sierra Club has failed to specify a single, reasonably foreseeable harm that would be proximately caused by Gulf Coast's request for authorization to export LNG.⁶⁸

⁶⁸ Gulf Coast is aware that the U.S. EPA and various states have developed or are developing regulations related to the safe exploration and production of natural gas. If it chooses to do so, Sierra Club may present its "concerns," which are generic and not specific or causally related to the application of Gulf Coast, in those forums. However, it should be observed that there are innumerable activities that might affect the future demand for natural gas, including new and existing chemical plants, increases in steel production or manufacturing, policies favoring the conversion of coal plants to natural gas, the production of natural gas vehicles, the removal of hydro-electric generating facilities, policies favoring the replacement of fuel oil heaters with natural gas, the relatively low price of natural gas itself, certain states' prohibitions concerning coal plant, the retirement of nuclear plants, EPA and state air regulations concerning emissions from coal fired generation, imports of natural gas from Canada, exports of natural gas to Mexico, adoption of future anti-gas flaring policies, the continuation of policies and rates favoring the use of natural gas for residential and other uses, growth in population, improved energy efficiency measure, the addition or removal of nuclear power plants, the building of more hydroelectric generating facilities, exports of coal, modification of the corn subsidies and the funding of nitrogen based fertilizers, commercial and industrial uses, the use of the internet, inventions of new technologies, general improved economic conditions, production of plastics and fertilizer, discovery of new oil reserves with associated natural gas, improved cost for alternative energy devices, just to name a few. The list of variables is endless. It is not possible to perform a credible analysis with such a vast multitude of unknown and unknowable factors.

The type of demands that Sierra Club makes in this proceeding were recently addressed by FERC in the certificate proceeding involving the MARC 1 Project.⁶⁹ Several interveners in that FERC proceedings had protested the adequacy of the EA under NEPA. In its decision approving the project, FERC concluded that “... the EA does not include a quantitative analysis of the cumulative impacts of Marcellus Shale development in northeastern Pennsylvania and beyond. It explains that the widespread nature and under certain timing of gas well drilling relative to construction of the MARC 1 Project make it difficult to identify and quantify cumulative impacts: since the development of natural gas reserves in the formation is expected to take 20 to 40 years due to economics and other factors, the exact location, scale, and timing of future Marcellus Shale upstream facilities that could potentially contribute to cumulative impacts in the project area is unknown at this time.”⁷⁰ FERC rejected the argument that these alleged “induced” future events required a full EIS and concluded that the “...Marcellus Shale development and its associated potential environmental impacts are not sufficiently causally-related to the MARC 1 Project to warrant the more comprehensive analysis that commentators seek.”⁷¹

As in the MARC 1 project, there is not a sufficient causal connection between Sierra Club’s so called “induced production” and Gulf Coast’s request for conditional authorization to export LNG to require an environmental impact statement under NEPA by DOE/FE. A recent decision of the 2nd Circuit Court of Appeals is also illuminating. Sierra Club and others appealed the FERC decision alleging that FERC failed to conduct an adequate cumulative impact analysis and specifically that its analysis of the future development of natural gas from the

⁶⁹ 137 FERC ¶ 61, 121.

⁷⁰ 137 FERC ¶ 61, 121 at 21.

⁷¹ 137 FERC ¶ 61, 121 at 27-28.

Marcellus Shale was inadequate. In a summary order on June 12, 2012 a three judge panel of the 2nd Circuit correctly confirmed the adequacy of the FERC review under NEPA.⁷²

Sierra Club's reliance on *Phillips Alaska Natural Gas Corporation, Marathon Oil Company*, is also misplaced.⁷³ In that DOE proceeding, the specific production areas involved were well known. DOE considered the environmental concerns of that proposed export in the context of NEPA. FERC determined that it was not required to perform an analysis of the potential environmental effects of granting the export renewal.⁷⁴

The U.S. Supreme Court has repeatedly held⁷⁵ that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause," analogous to the "familiar doctrine of proximate cause from tort law."⁷⁶ If there are in fact indirect effects, they must "still be reasonably foreseeable."⁷⁷ The Supreme Court has made it clear that before alleged indirect effects are to be considered under NEPA, it must be shown that the alleged "...effect from these possible actions would be significant..."⁷⁸ As previously discussed, the arguments of the Sierra Club in this proceeding fail to satisfy that requirement, just as they fail to satisfy the "causal relationship" requirement.⁷⁹

⁷² *Coalition for Responsible Growth and Resource Conservation, Damascus Citizens for Sustainability and Sierra Club v. United States Federal Energy Regulatory Commission, 2nd Cir. Summary Order (12-556g), June 12, 2012.* (Copy attached hereto and served upon all parties in this proceeding in accordance with Local Rule 32.1.1.)

⁷³ 2 FE 7,317, DOE Order No. 1473 (April 2, 1999); See, Sierra Club Protest, p 6.

⁷⁴ *Id.* at 52.

⁷⁵ *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 744 (1983).

⁷⁶ *Id.* at 767.

⁷⁷ *Id.*, at 764.

⁷⁸ *Id.*, at 765.

⁷⁹ See also Sabine Pass, DOE/FE Order No. 2961-A pp 14-17

F. ESA Review at This Time is Not Required.

The Endangered Species Act (“ESA”)⁸⁰, requires federal agencies to ensure their covered actions are “not likely to jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of habitat of such species”⁸¹ It is clear that the conditional approval requested by Gulf Coast does not trigger ESA review. DOE/FE’s approval alone cannot possibly jeopardize any species as it does not authorize Gulf Coast to take any action on the ground. As previously described, Gulf Coast must first apply to FERC to site, construct, and operate the Brownsville LNG Terminal, which will be the facility to actualize the export of LNG. That FERC proceeding is the appropriate forum to present any alleged impacts associated with that facility that might be subject to the ESA.

In spite of this obvious fact, Sierra Club demands that DOE/FE undertake a species analysis under the ESA. Sierra Club argues that such an analysis by DOE “must be wide-ranging because Gulf Coast’s export proposal will increase gas production activities nationwide.”⁸² At best this allegation is simply erroneous. Similar to NEPA, the ESA requires a showing of “reasonable certainty” when evaluating potential indirect species impacts from a federal action.⁸³ It is impossible to know the sites where the future suppliers to future customers of Gulf Coast will produce natural gas. It is certainly not possible to legitimately ascertain impacts on any species at this juncture.

Furthermore, it is neither possible nor required for DOE to conduct a nationwide, all

⁸⁰ 16 U.S.C. § 1531(c)(1).

⁸¹ Id.

⁸² Sierra Club Protest, p 9.

⁸³ In fact, the ESA’s reasonable certainty standard is even higher than NEPA’s required showing that indirect effects be at least “reasonably foreseeable.” Compare 50 C.F.R. § 402.02 with 40 C.F.R. § 1508.8. Sierra Club has not shown, and cannot show, that specific impacts associated with upstream natural gas production are either reasonably foreseeable or reasonably certain to occur at this juncture. See 50 C.F.R. § 402.02.

species ESA analysis of unknown future potential impacts of future natural gas production over a span of three decades. The DOE authorization requested by Gulf Coast cannot justify, let alone require, such an undertaking. Sierra Club is apparently driven to make this over reaching demand because it recognizes that it is not possible to determine what current or future gas production, wells or regions will supply natural gas to future customers of Gulf Coast many years from now. There is no requirement for DOE/FE, or any federal agency, to speculate as to the location of future potential drilling, the type of extraction process that will serve future as yet undetermined customers of Gulf Coast. Sierra Club cites no legitimate authority or its voracious claim. Sierra Club's overreaching allegations regarding the ESA are unsupported by either the law or reason. Its attempt to turn this docket into a proceeding to eliminate natural gas development and use must not be permitted.

G. National Historic Preservation Act Does Not Apply.

Sierra Club argues that in addition to engaging in a nationwide NEPA and ESA reviews, DOE/FE must also conduct a similar review under the National Historic Preservation Act ("NHPA"). The NHPA includes a "series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance."⁸⁴ Generally "NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment."⁸⁵

More specifically, Sierra Club claims that DOE/FE must initiate a NHPA Section 106 consultation and analysis in order to identify historic properties that may be affected by DOE/FE's authorization, and "assess its effects and seek ways to avoid, minimize or mitigate

⁸⁴ *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093-94 (9th Cir. 2005) (internal quotation marks and citation omitted).

⁸⁵ *United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir. 1993).

any adverse effects on historic properties.”⁸⁶ Sierra Club broadly asserts that because the scope of a proper Section 106 analysis is “the geographic area...within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties,”⁸⁷ DOE/FE must understand and mitigate any impacts on historic properties that may be impacted throughout “the entire area in which [Gulf Coast’s proposal] will increase gas production.”⁸⁸ In other words, in its misdirected attempt to prevent fossil fuel production in the United States, Sierra Club has improperly demanded that DOE/FE conduct a nationwide NHPA analysis.

In its Application Gulf Coast did not identify—and no one can identify—specific existing or future wells from which the future suppliers chosen by future customers of Gulf Coast will draw natural gas for export for the 25 years of the proposed exports. (Of course, neither has Sierra Club done so.) As Gulf Coast notes in its Application, natural gas exports will come from both long-term contracts as well as the spot market.⁸⁹ In other words, the Gulf Coast project is not tied to specific wells or well sites or production areas. It is neither possible nor legally required for DOE/FE to conduct a nation wide NHPA analysis.

Concerning the prospect of a NHPA analysis directed at the proposed export terminal, DOE/FE is not the appropriate agency to conduct such an analysis under NHPA. Gulf Coast will need to obtain FERC’s environmental review in the future proceeding for authorization of the Brownsville Terminal. FERC is the agency that will oversee any NHPA review. (As noted previously, DOE/FE may conduct its public interest analysis concurrent with FERC’s review.⁹⁰)

⁸⁶ Sierra Club Protest at p 10; 36 C.F.R. § 800.1(a).

⁸⁷ 36 C.F.R. § 800.16(d).

⁸⁸ Sierra Club Protest at p 11.

⁸⁹ Gulf Coast Application at 6.

⁹⁰ See *Sabine Pass Liquefaction LLC* Order No. 2961 at 43.

Sierra Club's demand that DOE/FE perform a NHPA analysis before granting Gulf Coast request for export authorization is inconsistent with the law and must be rejected.

IV.

GULF COAST'S PROPOSED LNG EXPORTS ARE IN THE PUBLIC INTEREST.

A. Sierra Club's Misdirected Protest Against Natural Gas and Fossil Fuels.

Issues raised by Sierra Club are not specific to Gulf Coast's Application. Instead they constitute a systemic protest against fossil fuel in general and allege nation wide adverse impacts on air and water quality, landscape and habitat disruption, and adverse waste management developments. But they are not specific to Gulf Coast's project.⁹¹

Sierra Club's attack on fossil fuels, including natural gas is not a proper subject for review in this Application. FERC recently analyzed this same type of logical disconnect and concluded that "development of the Marcellus Shale and the potentially associated environmental impacts are not sufficiently causally-related to the [project] to warrant analysis."⁹² In that case, FERC concluded that because the siting, permitting, construction, and operation of shale gas wells fall within the regulatory jurisdiction of individual states, it was neither necessary nor appropriate for FERC to consider the impacts of those wells in its environmental review.⁹³ Currently DOE/FE and FERC face a similar situation with this protest by the Sierra Club. But as in the matter previously before FERC, the development of future new wells, whether shale gas or otherwise, are not sufficiently causally-related to the Application to warrant. Sierra Club's focus on generic environmental claims relating to fossil fuels, including natural gas, are not relevant to

⁹¹ See Sierra Club Protest, pp 12-36.

⁹² *Central New York Oil & Gas Co., LLC*, FERC Docket No. CP10-480-001, 137 FERC ¶ 61,121 (2011), *reh'g*, 138 FERC ¶ 61,104 (2012).

⁹³ *Id.* at 13.

DOE/FE's review of Gulf Coast's Application. Such objections are not relevant to this proceeding. As the U.S. Supreme Court has stated clearly:

“Neither the language nor history of NEPA suggest that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process and not NEPA provides the appropriate forum in which to air policy disagreements.”⁹⁴ (Emphasis added.)

B. Gulf Coast LNG Exports Will Provide Substantial Economic Benefits.

1. Economic Model is Sound.

As further discussed in Gulf Coast's Application, the proposed exports will stimulate the local, regional, and national economies by creating jobs, growing the tax base and revenues, and increasing overall economic activity.⁹⁵ In addition to jobs created by the design, engineering, and construction of the Brownsville Terminal, the proposed authorization will lead to thousands of jobs created by the increased production of natural gas. It is estimated that the proposed export authorization and the LNG terminal will result in 34,000 to 42,000 new jobs and provide a total incremental economic benefit of \$7.2 to \$10.4 billion per year.⁹⁶ These projections are based upon a number of analyses of LNG export impacts and the economic benefits of natural gas development, as well as the application of a multiplier effect ranging from 1.34 to 1.90.⁹⁷ This multiplier effect is supported by numerous studies on the multiplier effect (see footnote 24 of the Application), as well as a study of the economic impact of the Eagle Ford Shale by the University of Texas at San Antonio and a study of the economic impact of Marcellus Shale

⁹⁴ Metropolitan Edison, *supra* at p. 777.

⁹⁵ See Application at 11, 23.

⁹⁶ *Id.*

⁹⁷ See Application at 24.

development by Pennsylvania State University.⁹⁸ Gulf Coast’s projected economic impact is further supported by a National Energy Technology Laboratory study that found Marcellus Shale production in West Virginia had contributed almost 5,000 jobs and \$989 million in gross economic output.⁹⁹ These studies are just a few examples of analyses that demonstrate how increased natural gas production, such as that will follow Gulf Coast’s proposed authorization, will benefit local and regional economies, as well as the U.S. economy as a whole. Although the precise production locations that will supply the project in the decades ahead cannot be determined at this time, the beneficial economic impacts are well known.

2. Sierra Club’s Arguments Regarding Economic Benefits are Inappropriately Narrow, Myopic, and Without Merit.

Despite these findings, Sierra Club argues these economic benefits are “uncertain and overstated.”¹⁰⁰ Sierra Club asserts that “Gulf Coast’s claims of economic benefit are overblown and should be discounted by DOE/FE,” largely because Gulf Coast has allegedly overstated “the number and quality of jobs created.”¹⁰¹ (See section above.) As part of this critique, Sierra Club further argues that Gulf Coast has misapplied the “input-output” method of economic analysis.¹⁰² Nevertheless, in spite of the rhetoric, Sierra Club has not demonstrated that Gulf Coast’s proposal will not provide significant economic benefits to both the relevant local and regional economies, as well as the national economy. It has not overcome the statutory presumption that the proposed export is in the public interest.

Sierra Club does not dispute—because it cannot dispute—that the design, engineering,

⁹⁸ *Id.* at 25-26.

⁹⁹ *Id.*

¹⁰⁰ Sierra Club Protest, pp 48-56.

¹⁰¹ *Id.* at 48.

¹⁰² *Id.* at 49.

and construction of the Brownsville Terminal will have immediate and long-term beneficial impacts to the local economy. Instead, Sierra Club focuses on the appropriate multiplier to apply to gas production generally and asserts a claim that increased gas production may have development, tourism, and other consequences. These arguments are anecdotal, as they focus on the Marcellus Shale boom rather than increased production across the U.S. Sierra Club's analysis does not undercut the overarching reality that Gulf Coast's proposal will provide economic benefits in the area of the Brownsville Terminal as well as in areas of natural gas production throughout the country. Furthermore, it will also unquestionably make a very significant contribution to reducing the U.S. balance of trade deficit.

C. Natural Gas Prices and the Public Interest.

DOE/FE's public interest analysis should recognize that the proposed exports will stimulate the domestic natural gas market. Further, as the Deloitte Marketpoint LLC assessment found, "the magnitude of domestic price increase that results from export of natural gas in the form of LNG is likely quite small."¹⁰³ A key foundation of this conclusion is that the United States possesses significant natural gas resources that are be more than adequate to meet projected domestic needs as well as Gulf Coast's proposed authorization over the requested 25-year period. The EIA has found that the United States has 2,543 Tcf of total recoverable natural gas reserves, which is more than 105 times the total domestic consumption of 24.1 Tcf in 2010.¹⁰⁴ This strong supply, combined with North America's highly integrated natural gas market, will prevent material adverse increases in gas prices as a result of Gulf Coast's exports.

As Gulf Coast notes in its Application, the requested authorization of 1.02 Tcf/year

¹⁰³ See Application at 13.

¹⁰⁴ U.S. Energy Information Administration, *Annual Energy Outlook* at 79 (Apr. 26, 2011).

represents only a 3.9% increase in current projected domestic demand for 2018, when exports are anticipated to commence.¹⁰⁵ Similarly, the projected weighted average price impact of 6 Bcf/d of LNG exports is \$0.12 per MMBtu from 2016 to 2035, representing a 1.7% increase in the projected average U.S. citygate price of \$7.09 MMBtu over that time period.¹⁰⁶

Sierra Club, on the other hand, claims that a 2012 EIA report, titled “Effect of Increased Natural Gas Exports on Domestic Energy Markets” (“EIA Report”), demonstrates that LNG exports will “significantly increase demand for natural gas and thereby raise domestic gas prices.”¹⁰⁷ But Sierra Club’s conclusions are misguided. The EIA reserve adjustment made this year does not have a material affect on any legitimate analysis. As Mr. Gruenspecht, acting EIA Administrator recently testified: “Whether the U.S. has 100 years of total recoverable resources at current rates or 90 years of total recoverable resources estimated at current rates, I just don’t think it has much of an effect.”¹⁰⁸

In addition, the EIA Report acknowledges in its preamble the limitation of its study. “The projections in the report are not statements of what will happen but of what might happen, given the assumptions and methodology used.”¹⁰⁹ The report relies upon unrealistic rapid-export scenarios. More specifically, the EIA Report bases its price projections on four different export-related scenarios, ranging from 6 Bcf/d phased in over 6 years (the low/slow scenario; 6 Bcf/d phased in over 2 years (the low/rapid scenario); 12 Bcf/d phased in over 12 years (the high/slow scenario); and 12 Bcf/d phased in over 4 years (the high/rapid scenario). These scenarios all

¹⁰⁵ *Id.*, see Application.

¹⁰⁶ Application at 15; Deloitte Report at 8.

¹⁰⁷ Sierra Club Protest at p 44.

¹⁰⁸ Conway Irwin, *EIA Downplays Marcellus Reserve Revisions*, *Interfax Energy* (Feb. 1, 2012)

¹⁰⁹ EIA Report, p ii.

overlook the fact that it takes years to design and construct an LNG export terminal, negotiate supply contracts with potential buyers, and secure financing for such multi-billion dollar projects. Furthermore, it is unlikely all pending export projects will ever become operational and those that do will phase into operation over several years.

The EIA Report's economic model further assumes that investment by gas producers will lag behind demand, causing prices to peak when export capacity is filled. This assumption, however, overlooks the fact that the long timeframe associated with LNG terminal approval, construction, and ramp-up will allow the market to fully anticipate future exports and mitigate any price effect. The market will have more than adequate notice to adjust without price spikes. Unlike the EIA model, Deloitte's model recognizes this reality and assumes that producers will bring more supplies on line, intermediaries will adjust flows, and consumers will react to any price changes.¹¹⁰ As a result, any increase in prices would begin earlier and peak at a lower level than EIA and Sierra Club suggest. [Gulf Coast has already addressed in detail the limitations to the EIA Report in Gulf Coast's Response to the protest of American Public Gas Association filed in this docket. Please see that Response.]

Furthermore, it is disingenuous for Sierra Club to allege that it believes an increase in natural gas prices is inconsistent with the public interest. As noted above, in its publication "Dirty, Dangerous and Run Amok," Sierra Club asserts that abundant natural gas (with low prices) is not in the public interest because it delays the growth of renewable energy. Likewise, in the California Cap and Trade program to combat climate change, Sierra Club objects to the program design because it will not raise energy prices higher.¹¹¹ The position of Sierra Club in

¹¹⁰ Deloitte Report at 2.

¹¹¹ Sierra Club, Letter to Gov. Jerry Brown, May 9, 2011.

its publication and in the California Cap and Trade program are incompatible with Sierra Club's purported concern than upward pressure on natural gas prices is inconsistent with the public interest. But they collectively confirm that Sierra Club's protest is a protest against natural gas and its low price, not a protest about the specifics of Gulf Coast's Application.

D. Gulf Coast Exports Will Provide Significant Environmental Benefits.

As detailed in the Gulf Coast Application, the exports of LNG will have global environmental benefits, including the reduced dependence of the export countries on oil and coal and perhaps wood burning.¹¹² Sierra Club does not dispute that natural gas is a cleaner burning fuel than oil and coal, but focuses instead on so called "induced" impacts and production: allegedly associated with the extraction of natural gas in general.¹¹³

Sierra Club alleges that gas production can potentially disrupts landscapes and habitats, or impact surface and groundwater, but it does not demonstrate a reasonable, causal nexus with the Gulf Coast Application. This generic approach has apparently been adopted for two obvious reasons; because: (1) neither Sierra Club nor any other entity can predict the locations of the natural gas production that may be used by the future supplier of the future customers of Gulf Coast; and (2) the protest of Sierra Club is fundamentally a protest against fossil fuel, including natural gas in general, and not a protest against the particular request that is the subject of the Gulf Coast Application..¹¹⁴ Sierra Club devotes volumes of its protest to including almost 8000 pages of exhibits to an attack on natural gas without regard to any specific geographic location or usage. For instance, Sierra Club alleges potential air pollution impacts associated with drilling

¹¹² See Gulf Coast Application at p 28.

¹¹³ Sierra Club Protest at pp 13-36.

¹¹⁴ Sierra Club Protest at pp 26-36.

for natural gas, citing studies from Colorado to New England.¹¹⁵ But Sierra Club never ties any of these alleged impacts to the Gulf Coast Application. Its protest presents nothing that supports Sierra Club's burden of proof to show that Gulf Coast's Application for export authorization is not in the public's interest.

In reference to the LNG terminal that will be the subject of a future proceeding at FERC, to the extent Sierra Club wishes to present claims that the terminal may potentially have environmental and human impacts, they should be presented to FERC. Under the NEPA mandate, FERC will be the lead agency to review not only the direct impacts of the siting, construction or operation of the Brownsville LNG Terminal. .

V.

DOE/FE'S PENDING GENERIC ANALYSIS

Gulf Coast is aware that DOE/FE has commenced a comprehensive analysis of the public interest factors of the numerous pending LNG export applications and the recently approved Sabine proposed LNG export. Only one component or input for that analysis was made public with the release of an EIA report. However, that comprehensive analysis has yet to be made public. It is the understanding of Gulf Coast that once that analysis is released, applicants for LNG export authorizations will have an opportunity to comment on the analysis to further illuminate the record. Gulf Coast will do so at the appropriate time.

VI.

SUMMARY

A. Exports to FTA Countries.

As discussed above, applications to DOE/FE that request authority to export LNG to FTA

¹¹⁵ Sierra Club Protest at pp 15-18.

countries are governed by section 3(c) of the NGA. The law is clear on this matter. It establishes as a matter of law that such exports are consistent with the public interest. Further, it requires that such requests be granted without modification or delay. This requirement has been confirmed countless times.¹¹⁶ Sierra Club's protest does not challenge this legal requirement nor does it challenge the request of Gulf Coast for authorization to export domestic sourced LNG to FTA countries. In fact, as noted above, Sierra Club acknowledges this legal requirement in a footnote in its protest where it states: "The Natural Gas Act separately provides that DOE/FE must approve exports to nations which have signed a free trade agreement requiring national treatment of natural gas 'without modification or delay.' 15 U.S.C. 717b9(c)"¹¹⁷

B. Exports to Non-FTA Countries.

Section 3(a) of the NGA establishes a rebuttal presumption that the Application of Gulf Coast to export LNG to non-FTA countries is in the public interest. In addition, the Gulf Coast application affirmatively demonstrates that the proposed exports to non-FTA countries will generate numerous public interest benefits for United States, including but not limited to, stimulating further natural gas exploration and production by establishing a more robust, diversifying and creating a healthier natural gas market in the United States, increasing employment and investment in the United States, stimulating the economy, increasing tax revenues to all levels of government, and very significantly reducing the balance of payment deficit of the United States. In addition, it will help achieve the very important public interest goal of stabilizing natural gas prices at a level sufficient to meet replacement costs. There is nothing in the record to overcome the statutory presumption that the requested export is in the

¹¹⁶ See, DOE/FE Order in Dkt. Nos. 10-85-LNG, 10-160-LNG, 11-160-LNG, 11-59-LNG, 11-71-LNG, 11-115-LNG, 11-127-LNG, 11-145-LNG, 12-06-LNG, 12-47-LNG, 12-48-LNG, 12-50-LNG, 12-54-LNG, and 12-61-LNG.

¹¹⁷ Sierra Club Protest at p 4 fn 3

public interest. Furthermore, the Sierra Club's assertions that DOE/FE must now conduct independent reviews under NEPA, ESA and NHPA are without merit and contrary to law.

VII.

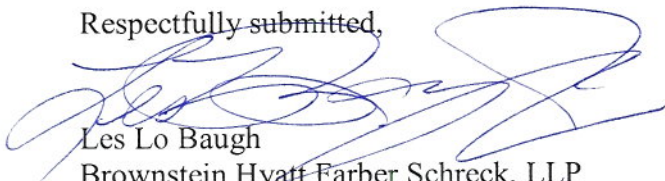
CONCLUSION

The law unequivocally establishes that the requested export to FTA countries is in the public interest. Furthermore, the law requires that DOE/FE approve that export request by Gulf Coast without delay or modification. Gulf Coast respectfully requests that DOE/FE grant such approval without delay.

Concerning Gulf Coast's request to export domestic LNG long-term to non-FTA countries, section 3(c) of NGA establishes a rebuttal presumption that the requested export is in the public interest. The Gulf Coast application provides additional affirmative evidence that confirms and supports the legal presumption that the export is in the public interest. The overall record clearly supports the legal presumption that the Gulf Coast proposal is consistent with the public interest. Sierra Club has not demonstrated that the requested Gulf Coast export is inconsistent with the public interest. It has not overcome the legal presumption established by the NGA. Sierra Club has not carried its burden of proof. Its protest must be denied.

According, for these reasons and the reasons stated above in the body of this Response, Gulf Coast's request to export LNG to FTA countries and its request to export LNG to non-FTA countries should be promptly approved by the DOE/FE.

Respectfully submitted,



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

August 30, 2012

In the Matter of:
GULF COAST LNG EXPORT, LLC

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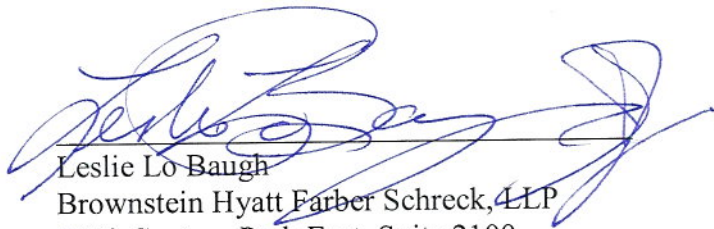
Docket No. 12-05 LNG

VERIFICATION

County of Los Angeles


State of California

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

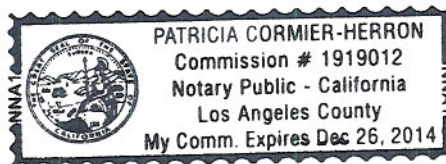


Leslie Lo Baugh
Brownstein Hyatt Farber Schreck, LLP
2029 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 500-4600
Fax: (310) 500-4602
Email: llobaugh@bhfs.com

Sworn to and subscribed before me, a Notary Public, in and for the State of California, this 30th day of August, 2012.



Patricia Cormier Herron, Notary Public



In the Matter of:
GULF COAST LNG EXPORT, LLC

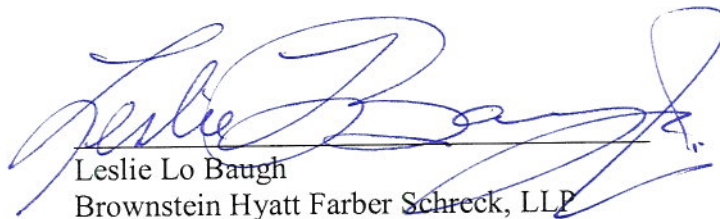
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Docket No. 12-05 LNG

CERTIFIED STATEMENT OF AUTHORIZED REPRESENTATIVE

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

Dated at Los Angeles, California, this 30th day of August, 2012.

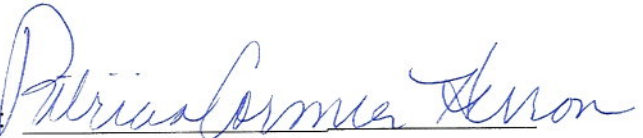


Leslie Lo Baugh
Brownstein Hyatt Farber Schreck, LLP
2029 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 500-4600
Fax: (310) 500-4602
Email: llobaugh@bhfs.com

CERTIFICATE OF SERVICE

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

Dated at Los Angeles, California, this 30th day of August, 2012.

By: 

Patricia Cormier Herron
Brownstein Hyatt Farber Schreck, LLP
2029 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 500-4600

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

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

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

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

v.

12 566-ag

UNITED STATES FEDERAL ENERGY
REGULATORY COMMISSION,
Respondent,

CENTRAL NEW YORK OIL AND GAS COMPANY,
Intervenor.

-----x
FOR PETITIONERS:

DEBORAH GOLDBERG (Hannah Chang,
Bridget Lee, on the brief),
EARTHJUSTICE, New York, New York,

FOR RESPONDENT:

KARIN L. LARSON, Attorney (Michael A.
Bardee, General Counsel, Robert H.
Solomon, Solicitor, Holly E. Cafer,
Attorney, on the brief), United States
Federal Energy Regulatory Commission,
Washington, D.C.

FOR INTERVENOR:

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk