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

Freeport-McMoRan Energy LLC

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FE Docket No. 13-26-LNG

**ANSWER OF FREEPORT-MCMORAN ENERGY LLC TO
THE PROTESTS OF THE AMERICAN PUBLIC GAS ASSOCIATION AND
SIERRA CLUB**

Pursuant to Section 590.304(f) of the Department of Energy's ("DOE") regulations, 10 C.F.R. § 590.304(f) (2013), Freeport-McMoRan Energy LLC ("FME") hereby submits this Answer to the Motion for Leave to Intervene and Protest ("APGA Protest") filed by the American Public Gas Association ("APGA") and the Motion to Intervene, Protest, and Comments ("Sierra Club Protest") filed by Sierra Club in the above-captioned proceeding on August 5, 2013. In support of this Answer, FME states the following:

**I.
PROCEDURAL BACKGROUND**

FME is developing a project to export up to 24 million tons of LNG per annum of domestically produced natural gas as liquefied natural gas ("LNG"). Accordingly, FME filed an application on February 22, 2013, pursuant to Section 3 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717b (2006), and Part 590 of the DOE regulations, 10 C.F.R. § 590, with the DOE Office of Fossil Energy ("DOE/FE") requesting long-term authorization to export LNG to (1) any country with which the United States has, or in the future may enter into, a free trade agreement ("FTA") requiring national treatment for trade in natural gas, and (2) any country with which the United States does not have a FTA requiring national treatment for trade in natural gas and with which trade is not prohibited by United States law or policy ("Application"). On May 24, 2013, DOE/FE issued Order No. 3290 granting FME long-term authorization to export LNG

to any country that has or will enter into a FTA with the United States that requires national treatment for trade in natural gas.¹

DOE/FE gave notice of the non-FTA portion of FME's Application in the Federal Register on May 31, 2013,² and established August 5, 2013, as the deadline for comments on and protests to FME's Application. The APGA and Sierra Club filed their protests on August 5, 2013. The Industrial Energy Consumers of America ("IECA") and America's Energy Advantage, Inc. ("AEA") each filed a motion to intervene, and each stated that it would submit a more detailed position at a later date. The American Petroleum Institute filed a Motion to Intervene Out-of-Time on August 13, 2013.

DOE/FE should reject any future position statements submitted by IECA or AEA as out of time. The comment deadline was five and a half months after FME filed its application and more than two months after publication of notice in the Federal Register. IECA and AEA have already had sufficient time to develop a position on FME's Application and LNG exports generally and should not be allowed to further delay processing of the Application by introducing new arguments at an indeterminate point in the future. FME does not oppose the American Petroleum Institute's motion to intervene.

II. **ANSWER TO PROTESTS**

The APGA Protest and Sierra Club Protest largely repeat arguments made by APGA and Sierra Club in opposition to other requests for authorization to export natural gas and in opposition to the conclusions of the two-part study of the cumulative impacts of LNG exports

¹ *Freeport-McMoRan Energy LLC*, DOE/FE Order No. 3290 (May 24, 2013).

² 78 Fed. Reg. 34084 (Jun. 6, 2013).

undertaken by DOE/FE (“2012 LNG Export Study”).³ In particular, arguments from the APGA and Sierra Club against the 2012 LNG Export Study have twice been rejected by DOE/FE in orders conditionally authorizing LNG exports from the Freeport facility and Lake Charles facility,⁴ and neither APGA nor the Sierra Club appealed the *Freeport Order*. Under Section 3(a) of the NGA, a rebuttable presumption exists in favor of DOE/FE approval of applications to export natural gas. In light of this statutory presumption, DOE/FE’s prior rejection of APGA’s and Sierra Club’s arguments in the *Freeport Order* and the *Lake Charles Order* and the failure of APGA and Sierra Club to put forth the required evidence demonstrating that the requested authorization is inconsistent with the public interest, DOE/FE should grant FME’s request for authorization to export LNG to non-FTA countries.

A. APGA and Sierra Club Fail to Meet the Legal Standard Under NGA Section 3(a)

Pursuant to Section 3(a) of the NGA, DOE/FE “shall issue” an order authorizing natural gas exports unless it finds that the proposed exportation “will not be consistent with the public interest.” According to DOE/FE, “Section 3(a) of the NGA creates a rebuttable presumption that proposed exports of natural gas are in the public interest, and DOE must grant such an application unless those who oppose the application overcome that presumption.”⁵ To overcome this rebuttable presumption an opponent must affirmatively demonstrate that the proposal is

³ See, e.g., *Motion for Leave to Intervene and Protest of the American Public Gas Association*, FE Docket No. 13-04-LNG (May 20, 2013); *Sierra Club Motion to Intervene, Protest, and Comments*, FE Docket No. 13-04-LNG (May 20, 2013); *Comments of the American Public Gas Association on the NERA-Macroeconomic Impacts of LNG Exports of the United States* (Jan. 24, 2013); *NERA Study Comments from the Sierra Club* (Jan. 24, 2013).

⁴ *Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC*, DOE/FE Order No. 3282 (May 17, 2013) (“*Freeport Order*”); *Lake Charles Exports, LLC*, DOE/FE Order No. 3324 (August 7, 2013) (“*Lake Charles Order*”).

⁵ *Freeport Order* at 5-6; *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961 at 28 (“*Sabine Pass Order*”); see also *Panhandle Producers and Royalty Owners Assoc. v. ERA*, 822 F.2d 1105, 1111 (D.C. Cir. 1987) (“A presumption favoring import authorization, then, is completely consistent with, if not mandated by, the statutory directive.”).

inconsistent with the public interest.⁶ DOE/FE looks to the evidence developed in the record of each application proceeding to make its determination.⁷

APGA and Sierra Club have failed to overcome the statutory presumption in favor of applications to export natural gas. Furthermore, as detailed below, APGA and Sierra Club raised essentially the same arguments in their comments on the 2012 LNG Export Study, and, in APGA's case, the Freeport and Lake Charles proceedings, and DOE/FE rejected these arguments in the *Freeport Order* and the *Lake Charles Order*. To the extent APGA and Sierra Club renew the same arguments, their protests to FME's Application amount to a collateral attack on those prior orders.

In its Application, FME cited United States government data, government studies and publicly available third-party studies, and put forth a substantial analysis of the public interest factors weighing in favor of DOE/FE's approval of FME's proposed exports. The 2012 LNG Export Study, the most comprehensive analysis of LNG exports to date, similarly supports approval of FME's proposal. As they did in numerous other LNG export proceedings, APGA and Sierra Club have alleged a variety of generalized economic, environmental and social harms due to LNG exports without any significant arguments against FME's Application in particular.⁸ After careful consideration of these general arguments, DOE/FE determined in the *Lake Charles Order* that "the United States will experience net economic benefits from issuance of authorizations to export domestically produced LNG" and that "potential negative impacts of . . . proposed exports are outweighed by the likely net economic benefits and by other non-economic

⁶ *Freeport Order* at 6; see also *Phillips Alaska Natural Gas Corp. and Marathon Oil Co.*, DOE/FE Order No. 1473 (April 2, 1999) ("Section 3 creates a statutory presumption in favor of approval of an export application and the Department must grant the requested export [application] unless it determines the presumption is overcome by evidence in the record of the proceeding that the proposed export will not be consistent with the public interest.").

⁷ *Freeport Order* at 7.

⁸ Sierra Club briefly raises some environmental concerns regarding FME's proposed export facility that are better addressed by the U.S. Maritime Administration, which has jurisdiction over construction of FME's proposed export facility itself. Sierra Club Protest at 21-25.

or indirect benefits.”⁹ The *Freeport Order* included similar conclusions.¹⁰ APGA and Sierra Club have failed to distinguish this proceeding or the evidence presented by FME from the Freeport and Lake Charles proceedings, and thus APGA and Sierra Club have not shown why DOE/FE should reverse course in this proceeding. DOE/FE should once again find that the APGA and Sierra Club arguments in opposition to the Application fail to overcome the statutory presumption in favor of granting the requested export authorization.

B. DOE/FE Previously Considered and Rejected the Majority of APGA’s and Sierra Club’s Arguments

DOE/FE has already rejected APGA’s and Sierra Club’s arguments regarding generalized effects of natural gas exports twice. In their protests, APGA and Sierra Club repeat the standard theme that natural gas exports will lead to an increase in domestic natural gas prices which is inherently inconsistent with the public interest and will overly burden domestic consumers, including industrial consumers, of natural gas. Sierra Club also alleges that natural gas exports will drive a wide variety of social ills, from increased greenhouse gas emissions to negative impacts on the communities where natural gas production will occur. Most of these arguments relate broadly to natural gas production and exports as a whole, rather than to FME’s proposed exports in particular. The *Freeport Order* and *Lake Charles Order* rejected these arguments following careful study of the issues by DOE/FE.

APGA and Sierra Club claim that prices will rise because exports create greater demand for domestically produced natural gas, and APGA also claims that exports will link drive the convergence of prices in the United States natural gas market with international markets for natural gas.¹¹ Both APGA and Sierra Club pin these economic arguments on the assertion that

⁹ *Lake Charles Order* at 123-24.

¹⁰ *Freeport Order* at 110.

¹¹ APGA Protest at 4-6, 12-16; Sierra Club Protest at 62-64.

the effects of these higher gas prices will outweigh the benefits of LNG exports under the public interest analysis.

The 2012 LNG Export Study disproves these assertions. To study the economic impacts of natural gas exports, DOE/FE commissioned the 2012 LNG Export Study. The first part of the study, conducted by the Energy Information Administration (“EIA”), looked at the potential impacts of natural gas exports on energy prices, production, and consumption under several export scenarios (“EIA Study”). The second part of the study, conducted by NERA Economic Consulting, assessed the macroeconomic impacts of natural gas exports using its proprietary model and the results of the EIA Study (“NERA Study”). When analyzing the price impacts of LNG exports, the NERA Study concluded that the highest price impact under any scenario would be a natural gas price \$1.11 above the reference case with no LNG exports, while most scenarios saw much lower potential price increases.¹² In only three scenarios did the difference from the baseline exceed \$1.00, and in seven of the scenarios, the price difference was never over \$0.50.¹³ Moreover, the increased reserve development and infrastructure investment that will occur in response to LNG exports will help to protect against natural gas price volatility by allowing alternative supply sources or paths should severe weather or a natural disaster cause an imbalance in domestic supply and demand.

DOE/FE has also rejected claims that LNG exports would cause domestic and international natural gas prices to converge. The NERA Study determined that U.S. prices will always be lower than international prices in any scenario where LNG exports will occur.¹⁴ In the *Lake Charles Order*, DOE/FE notes that in “a competitive market . . . U.S. natural gas prices

¹² NERA Study at Figure 29.

¹³ *Id.*

¹⁴ *Lake Charles Order* at 113.

would be lower than international LNG prices” even as U.S.-sourced LNG exports “exert downward pressure” on higher-priced LNG in foreign markets.¹⁵

Consistent with the minimal impact LNG exports will have on natural gas prices, the NERA Study found that the U.S. would experience net economic benefits from natural gas exports, with the level of benefits increasing as the quantity of exports increases.¹⁶ While exports would cause some increases in natural gas prices, price increases were limited based on conditions both within the U.S. and in the broader global market.¹⁷ Most importantly, the 2012 LNG Export Study concludes that “the United States will experience net economic benefits from issuance of authorizations to export domestically produced LNG.”¹⁸ After taking comments on the 2012 LNG Export Study, DOE/FE determined that the study is “fundamentally sound” and supports natural gas exports.¹⁹

C. DOE/FE Can Issue a Conditional Order in this Proceeding.

DOE/FE has the authority to issue a conditional order in this proceeding, contrary to Sierra Club’s claims. Section 590.402 of DOE/FE’s regulations provides that “[t]he Assistant Secretary may issue a conditional order at any time during a proceeding prior to issuance of a final opinion and order.”²⁰ DOE/FE has already issued three such conditional orders regarding proposed LNG exports – the *Sabine Pass Order*, the *Freeport Order* and the *Lake Charles Order*. Despite this clear regulatory authority and historical practice, Sierra Club claims that DOE/FE may not issue a conditional order prior to completion of the National Environmental Policy Act (“NEPA”) review.²¹

¹⁵ *Id.* at 113; *Freeport Order* at 100.

¹⁶ NERA Study at 40.

¹⁷ *Id.* at 41.

¹⁸ *Freeport Order* at 110.

¹⁹ *Id.*

²⁰ 10 C.F.R. § 590.402 (2013).

²¹ Sierra Club Protest at 19-21.

Sierra Club’s entire argument is premised on its misreading of Section 1021.211 of DOE/FE’s regulations. Section 1021.211 states that DOE/FE “shall take no action” concerning a proposal “[w]hile DOE is preparing an [Environmental Impact Statement (“EIS”)]” until the EIS is completed.²² In this instance, however, any EIS necessary for FME’s proposed export terminal would be prepared by the U.S. Maritime Administration (“MARAD”), rather than DOE. Thus, DOE will never be preparing an EIS in this proceeding and will not be subject to the prohibition on interim actions contained in Section 1021.211. Moreover, the Council on Environmental Quality (“CEQ”) regulations, which are cross-referenced in Section 1021.211, permit interim actions unless those actions would “(1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives.”²³ DOE/FE’s issuance of a conditional order would have neither of those effects. Because a conditional order would be subject to the completion of NEPA review, the order would not permit any exports of LNG or construction of LNG export facilities (which must be approved by MARAD, not DOE) and would not have an adverse environmental impact. Nor would a conditional order have any impact on MARAD’s independent consideration of reasonable alternatives. Thus, the CEQ regulations would permit issuance of a conditional order even if Section 1021.211 were applicable. Sierra Club’s argument that DOE/FE may not issue a conditional order in this proceeding has no basis in law.

D. Sierra Club Misstates DOE/FE’s Obligations under NEPA.

DOE/FE need not consider the environmental effects of natural gas production as part of its analysis of FME’s Application. Under NEPA, the environmental review of a major federal action must include direct and indirect effects of those actions. Sierra Club claims that upstream natural gas production induced by LNG exports is an indirect effect of FME’s proposal that

²² 10 C.F.R. § 1021.211 (2013).

²³ 40 C.F.R. § 1506.1 (2012).

should be included in any environmental review of that project. In fact, Sierra Club spends the majority of its pleading arguing that natural gas production will harm communities and that the environmental costs of natural gas production will outweigh the benefits without establishing any sufficient tie between DOE's jurisdiction and such natural gas production or between FME's proposal and such natural gas production. As a matter of law, such considerations are beyond the scope of DOE/FE's NEPA review.

Under NEPA, the environmental review of FME's exports and export facility must consider both direct and indirect effects of the proposal. The U.S. Supreme Court has stated that "where any 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."²⁴ DOE/FE does not possess statutory authority over natural gas production or hydraulic fracturing, which is the focus of Sierra Club's arguments.²⁵ Similarly, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause," which will not be satisfied by a "but for" causal relationship.²⁶ Instead, the causal relationship is analogous to "the 'familiar doctrine of proximate cause from tort law.'"²⁷ Because the natural gas FME intends to export will come from the U.S. natural gas market – the most open and liquid natural gas market in the world with potentially hundreds of different sources – FME cannot be the proximate cause of any natural gas production for NEPA purposes. In fact, FME's

²⁴ *Dept. of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004).

²⁵ *See, e.g., Sierra Club Protest* at 33 ("Much of the induced production resulting from exports is likely to come from shale gas and other unconventional sources."). Sierra Club recognizes this but still attempts to tie FME to hydraulic fracturing by saying that offshore supplies consumed by FME would be replaced by onshore production. Surely the sources of natural gas purchased by unknown customers other than FME are beyond the scope of a NEPA review.

²⁶ *Public Citizen* at 767 (citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

²⁷ *Id.*

proposed export facility is located on the Outer Continental Shelf, a traditional natural gas supply basin.

FERC has similarly found consideration of the environmental effects of gas production to be beyond the scope of the NEPA analysis for LNG export projects. In its order approving the Sabine Pass liquefaction facilities, FERC held that its NEPA analysis cannot include the effects of shale gas development because such effects are not “reasonably foreseeable” or an “effect” of the liquefaction project under the relevant regulations.²⁸ FERC noted that Sabine Pass would receive gas at the head of its interconnected pipeline but could not estimate whether that gas had come from existing natural gas production or from new production attributable to the project.²⁹ Thus, “the factors necessary for a meaningful analysis of when, where, and how shale-gas development will occur are unknown.”³⁰ Because of the wide variety of sources for gas to feed the project, considering impacts of shale gas development was “simply impractical.”³¹

The Sierra Club, together with others, presented similar arguments in its opposition to construction of a pipeline in Pennsylvania and New York by Central New York Oil and Gas Company, LLC.³² In *CNYOGC*, Sierra Club and others argued that FERC needed to consider the environmental impacts of shale gas production as part of the NEPA assessment of an interstate pipeline project. FERC found that there was no causal relationship between the proposed gas pipeline and increased shale gas production, even for a pipeline much closer to the gas production sites than FME’s proposed export terminal will be.³³ Similar to the Sabine Pass case, FERC also held that “there is no way to relate any specific production and gathering activities”

²⁸ *Sabine Pass Liquefaction, LLC, et al.*, 139 FERC ¶ 61,039 at P 96 (2012), *reh’g denied*, 140 FERC ¶ 61,076 (2012).

²⁹ *Id.* at P 98.

³⁰ *Id.*

³¹ *Id.* at P 99.

³² *Central New York Oil and Gas Co., LLC*, 138 FERC ¶ 61,104 (2012) (“*CNYOGC*”).

³³ *Id.* at P 37.

to the pipeline project, in part because there was no way to know the extent and location of future production.³⁴ On appeal, the Second Circuit rejected Sierra Club's arguments because "FERC reasonably concluded that the impacts of that [Marcellus Shale] development are not sufficiently causally-related to the project to warrant a more in-depth analysis."³⁵

Once again in this proceeding, Sierra Club reiterates its claims that DOE/FE must consider the environmental effects of natural gas production as part of an LNG export proceeding. Just as was the case in Sabine Pass and *CNYOGC*, however, DOE/FE has no obligation to consider those effects as part of any future NEPA analysis because the timing, location, and nature of any particular gas production is too remote and difficult to predict to be "reasonably foreseeable" as having been caused by an LNG export facility. Although FME's project is subject to MARAD's jurisdiction, rather than FERC's, and MARAD will serve as the lead agency in preparing the NEPA analysis, the conclusions of the Second Circuit and FERC still apply.

Proceedings concerning LNG exports are not the appropriate venue to decide questions regarding health, safety and environmental regulation of gas production. While many other state and federal legislative and regulatory bodies may have a say in where and how natural gas is produced, DOE/FE, as part of the LNG export approval process, has no role to play in that debate. It would be inappropriate for DOE/FE to eliminate a significant market for natural gas, and to block all of the jobs and economic benefits that would result from LNG exports, because of concerns that the agencies responsible for regulation of gas production will not properly discharge their duties.

³⁴ *Id.* at PP 43, 45.

³⁵ *Coalition for Responsible Growth and Resource Conservation v. US Federal Energy Regulatory Comm'n*, No. 12-566-ag, 2012 WL 2097249 (2d Cir. June 12, 2012) (Summary Order).

III.
CONCLUSION

For the foregoing reasons, Freeport-McMoRan Energy LLC respectfully requests that DOE/FE reject the arguments set forth in the APGA Protest and Sierra Club Protest and find that granting the remaining authorization requested in the Application to enable FME to export domestically produced LNG to any country with which trade is not prohibited by U.S. law or policy is not inconsistent with the public interest.

Respectfully submitted,

/s/ John S. Decker _____

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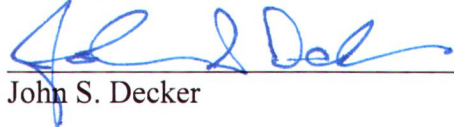
Dated: August 20, 2013

Appendix A

VERIFICATION

District of Columbia)

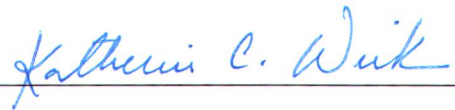
BEFORE ME, the undersigned authority, on this day personally appeared John S. Decker, who, having been by me first duly sworn, on oath says that he is an Attorney for Freeport-McMoRan Energy LLC, and is duly authorized to make this Verification on behalf of Freeport-McMoRan Energy LLC; that he has read the foregoing instrument and that the facts therein stated are true and correct to the best of his knowledge, information and belief.



John S. Decker

DISTRICT OF COLUMBIA : SS

SWORN TO AND SUBSCRIBED before me on the 20th day of August, 2013.

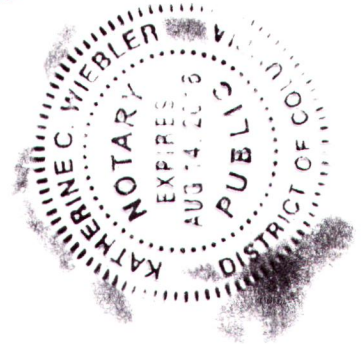


Name: Katherine C. Wiebler

Title: Notary Public

My Commission expires:

Aug. 14, 2016



CERTIFICATE OF SERVICE

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

Dated at Washington, DC this 20th day of August, 2013.

/s/ Christopher J. Terhune
Christopher J. Terhune