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

IN THE MATTER OF

Freeport-McMoRan Energy LLC

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FE DOCKET NO. 13-26-LNG

SIERRA CLUB'S MOTION TO REPLY AND REPLY

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Pursuant to sections 590.302(a) and 590.310 of the Department of Energy Office of Fossil Energy (DOE/FE)’s regulations, 10 C.F.R. §§ 590.302(a) & 590.310, Sierra Club moves for leave to reply to the answer of Freeport McMoRan Energy LLC (“McMoRan”) to Sierra Club’s motion to intervene and protest. Sierra Club’s reply is incorporated into this filing.

I. Sierra Club Should Be Granted Leave to Reply

Sierra Club respectfully requests leave to reply to McMoRan’s answer. Although a reply is not automatically provided for by DOE rules, those rules allow parties to request additional procedures. 10 C.F.R. § 590.302 & 590.310. In this case, a brief reply is appropriate to assist DOE/FE in its public interest inquiry.

The public interest test of 15 U.S.C. § 717b requires DOE/FE to conduct a searching inquiry to determine whether McMoRan’s export proposal is consistent with the public interest. As Deputy Assistant DOE Secretary Chris Smith has explained, LNG export authorization is “a tremendously important decision” with significant public impacts. *See* Nick Snow, Oil and Gas Journal, *US DOE to move carefully on LNG export requests, NARUC meeting told* (Feb. 5, 2013). Because the public interest necessarily embraces environmental concerns, *see Nat’l Ass’n for the Advancement of Colored People v. Federal Power Comm’n*, 425 U.S. 662, 670 n.4 & n.6 (1976), DOE/FE has an important obligation to fully consider the environmental issues that are the primary subject of Sierra Club’s protest. Accordingly, DOE/FE should proceed only with the benefit of a full record and complete arguments in this case. In Sierra Club’s view, the Answer of McMoRan LNG Export, LLC to the Protests of the American Public Gas Association and the Sierra Club (“Answer”) misstates important questions of fact and law that bear on the public interest. Sierra Club therefore seeks leave to reply to address these matters. DOE/FE should ensure that these important questions receive fair consideration by considering this brief reply.

II. McMoRan's Proposal Is Contrary to the Public Interest

1. DOE/FE Is Not Bound By, and Should Not Follow, its Orders in Prior LNG Export Proceedings

DOE/FE must reject McMoRan's argument that the Sierra Club's concerns have been resolved in DOE/FE's orders in the Freeport and Lake Charles LNG export proceedings ("Freeport Order" and "Lake Charles Order"). McMoRan first asserts that the Sierra Club mounts a "collateral attack on those prior orders." Answer at 4. But, as Sierra Club explained in its protest, DOE/FE is free to reconsider the analysis contained in prior orders in subsequent proceedings, including this one. Sierra Club Protest at 31 & n.87. In light of DOE/FE's ability to reconsider its prior analysis, Sierra Club seeks to persuade DOE/FE that its prior orders should not be followed; it does not aim to overturn the Freeport and Lake Charles Orders themselves.

McMoRan also criticizes Sierra Club for presenting to DOE/FE arguments that it has raised in other proceedings. Answer at 3-4. McMoRan does not provide any legal basis upon which DOE/FE should preclude Sierra Club from raising these issues in the current proceeding, however. Moreover, McMoRan fails to recognize that, in the other proceedings it mentions, DOE/FE did not analyze or account for much of the evidence that Sierra Club presented. For example, neither the Freeport Order nor the Lake Charles Order discusses Sierra Club's arguments that reliance on DOE's 1984 natural gas *import* policy is improper,¹ that DOE/FE's macroeconomic analysis overlooks important aspects of LNG transportation costs and LNG export contract structure,² or that NEPA law precludes DOE/FE from issuing conditional authorizations in LNG export proceedings.³ Nor has DOE/FE provided an adequate response to Sierra Club's concerns related to the macroeconomic analysis underlying the Freeport and Lake Charles Orders, for the reasons explained in detail in the Sierra Club's protest.⁴ Finally, DOE/FE's prior orders have not adequately addressed Sierra Club's central argument that analysis of the impacts of new gas production is required before exports can proceed.⁵ DOE/FE must address all of these concerns before determining whether to authorize additional LNG export requests, including McMoRan's.

¹ Discussed in Sierra Club's Motion to Intervene, Protest, and Comments at 7.

² See Protest at 16.

³ See Protest at 18.

⁴ See Protest at 62.

⁵ See Protest at 29-33.

2. DOE/FE Must Not Conditionally Authorize the Proposed Project Before Analyzing Its Environmental Impacts

DOE/FE regulations prohibit any action prior to completion of NEPA review. As Sierra Club's protest explained, DOE/FE's regulation at 10 C.F.R. § 1021.211 provides that "[w]hile DOE is preparing an EIS that is required under § 1021.300(a) of this part, DOE shall take no action concerning the proposal that is the subject of the EIS before issuing an ROD, except as provided at 40 C.F.R. § 1506.1." *See* Protest at 19-21. Accordingly, DOE/FE may not conditionally authorize the proposed project before the environmental impacts of the proposed exports have been analyzed fully.

McMoRan nonetheless attempts to argue that section 1021.211 applies only when the DOE/FE itself is required to prepare a NEPA Environmental Assessment or Environmental Impact Statement," because the section 1021.211 refers only to DOE and not to other agencies that may prepare the NEPA document that ultimately supports DOE's decision. Answer at 8. In this case, McMoRan argues, the U.S. Maritime Administration ("MARAD") is preparing the NEPA document underlying DOE's decision, creating an exception to section 1021.211's requirements in this instance.

McMoRan's formalistic argument ignores the underlying purposes of section 1021.211 and of NEPA as a whole. "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Regulations such as 10 C.F.R. § 1021.211 – including, for example, a Council on Environmental Quality regulation at 40 C.F.R. § 1506.1 that prohibits actions during the NEPA process – fulfill that purpose by precluding interim action while alternatives are examined. *Cf. Cmte. For Preservation of Seattle Fed. Reserve Bank Bldg. v. Fed. Reserve Bank of S.F.*, 2010 WL 1138407, at *4 (W.D. Wash. 2010) (holding, after discussing 40 C.F.R. § 1506.1 and the purposes of NEPA, that the signing of a sale agreement while NEPA review was still in progress "constitute[d] a violation of NEPA"). To read a "cooperating agency" exception to this principle into 10 C.F.R. § 1021.211 would run counter to NEPA's core purpose.

To be clear, Sierra Club does not object to MARAD's acting as lead agency for NEPA review. DOE/FE nonetheless has an independent obligation to ensure that DOE/FE and the public are adequately informed regarding (and that DOE/FE actually considers) the environmental impacts of proposed DOE/FE actions, as DOE/FE has recently recognized. *See* DOE/FE Docket No. 10-111-LNG, Order 2961-A, 27 (Aug. 7, 2012) (DOE/FE recognizes that it is "responsible for conducting an independent review" of the NEPA analysis – in that case, conducted by FERC – and determining whether "the record needs to be supplemented in order for DOE/FE to meet its statutory responsibilities under section 3 of the NGA and under NEPA."). To ensure that this obligation is adequately fulfilled, DOE/FE can and must wait until NEPA review is completed before issuing an export authorization. As explained in Sierra Club's protest, NEPA requires consideration of environmental impacts at the earliest possible time. Moreover, because environmental impacts are part of the Natural Gas Act public interest analysis, it would be nonsensical

to conduct a balancing of effects on the public interest until environmental impacts have been examined pursuant to the NEPA process.

McMoRan also argues that a Council on Environmental Quality regulation at 40 C.F.R. § 1506.1 permits certain interim actions, and that DOE/FE conditional orders on export applications may be issued under this authority. Section 1506.1 actually states, however, that an agency shall take “no action” concerning a proposal while environmental review is ongoing if the action would have an adverse environmental impact or limit the choice of reasonable alternatives. In this case, a conditional order from DOE/FE would limit MARAD’s consideration of alternatives by signaling DOE/FE’s intention of allowing McMoRan to export the full requested export volume before any analysis of alternatives – such as the limitation of exports by volume or by shale play – is undertaken. *See* Protest at 18-19 (listing these and related alternatives). McMoRan’s unsupported statement that a conditional order would not have any impact on the consideration of such alternatives must be rejected. Answer at 8. Moreover, 40 C.F.R. § 1506.1 cannot narrow the prohibition all action (without reference to consequence) contained in 10 C.F.R. § 1021.211.

III. DOE/FE Must Consider the Environmental Impacts of Additional Natural Gas Production

As explained at length in the Protest, DOE/FE is legally obligated to consider the environmental impacts of new natural gas production that will occur in response to new demands from McMoRan’s proposal. Protest at 29-33. DOE/FE must reject McMoRan’s argument that *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), relieves DOE/FE of this responsibility. Public Citizen applies only “where an agency has *no ability* to prevent a certain effect due to its *limited statutory authority* over the relevant actions.” *Id.* at 770 (emphasis added). Here, the Natural Gas Act provides DOE/FE with authority to act on the basis of, and thereby prevent, environmental effects. There are no limits on DOE/FE’s Natural Gas Act authority that would preclude it from denying export applications or limiting exports’ scope and thus preventing additional natural gas production from occurring.

DOE/FE must also reject McMoRan’s argument that demand from its new facility “cannot be the proximate cause of *any* natural gas production for NEPA purposes.” Answer at 9 (emphasis added). McMoRan does not dispute that its facility will require an increase in production, nor does it dispute that existing models can predict where production will increase in response to its demand. *See* Protest at 27-29. McMoRan’s facility can thus be traced with precision to new sources of supply. Its attempt to claim that it is a disembodied demand source that cannot be held accountable for the environmental consequences of its demand must thus be rejected.

McMoRan also cites *Central New York Oil and Gas Co., LLC*, 138 FERC 61,104 (2012) (“*CNYOGC*”), in which FERC found that it need not consider additional shale gas production resulting from the construction of a new gas pipeline. *CNYOGC*, a FERC case, is not binding on DOE/FE and is distinguishable in any event. In *CNYOGC*, the

proposed pipeline facilitated access to new gas markets by making transportation to certain markets *easier*, but its construction was not an absolute *prerequisite* for access to those markets. Here, by contrast, there is no question that McMoRan proposal to export gas to non-free trade agreement countries cannot go forward without the approval McMoRan seeks from DOE/FE. Thus, in this case, the causal relationship between the proposed agency action and the ultimate environmental effect is more direct than was true in *CNYOGC*.

IV. Conclusion

The most important issue raised in Sierra Club's protest is DOE/FE's obligation to consider the impacts of induced natural gas production. McMoRan's answer asserts that this and other issues raised by the Sierra Club have already been resolved by DOE/FE in prior orders, but the Sierra Club has provided detailed analysis explaining why these issues have not, in fact, been adequately addressed.

NEPA requires disclosure of induced production's impacts, and the Natural Gas Act requires DOE/FE to weigh them. Fairly weighed, such impacts demonstrate that McMoRan's proposal is not in the public interest. This is particularly so given the evidence that project's economic impacts on the public at large will be generally negative, as explained in the Sierra Club's comments on the NERA study. In addition, whether or not these economic benefits are as large as McMoRan contends, it would be arbitrary and capricious to weigh them without counting the environmental cost. Accordingly, as the Sierra Club explained in its protest, DOE/FE's public interest review must consider the environmental effects of terminal construction and operation, of induced production, and of increased domestic gas prices. To ensure that these effects are given adequate consideration, DOE/FE should deny McMoRan's request for a conditional authorization prior to completion of environmental review.

Dated: September 5, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused the above documents to be served on the applicant and all others parties in this docket, in accordance with 10 C.F.R. § 590.017, on September 5, 2013.

Dated at San Francisco, CA, this 5th day of September, 2013.



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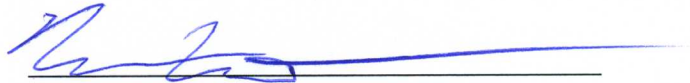
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VERIFICATION

SAN FRANCISCO §
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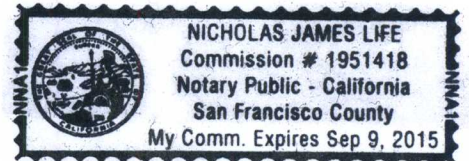
Pursuant to 10 C.F.R. §590.103(b), Nathan Matthews, being duly sworn, affirms that he is authorized to execute this verification, that he has read the foregoing document, and that facts stated herein are true and correct to the best of his knowledge, information, and belief.



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Subscribed and sworn to before me this 4th day of September, 2013.



Notary Public

My commission expires: 09/09/2015