



April 8, 2013

Secretary Steven Chu
U.S. Department of Energy
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Washington, DC, 20585
The.Secretary@doe.gov

cc:

Gregory Woods, General Counsel
Office of the General Counsel
U.S. Department of Energy
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Re: Petition for Rulemaking Regarding Natural Gas Export Policy

Dear Secretary Chu:

Pursuant to 5 U.S.C. § 553(e), the Sierra Club, Catskill Citizens for Safe Energy, Center for Biological Diversity, Delaware Riverkeeper Network, Earthworks, Environment America, Friends of the Earth, Lower Susquehanna Riverkeeper, and Rogue Riverkeeper hereby petition the Department of Energy (DOE) to promulgate new regulations or guidance defining the process by which it will consider applications to export liquefied natural gas (LNG). The current guidelines are nearly thirty years old, and were designed to implement the Reagan Administration's energy policy on natural gas *imports*. They are very ill-suited to manage the serious questions raised by large-scale LNG exports, and urgently need to be revised in a fair and open public process. Although DOE asserts that it has expanded its considerations beyond those articulated by the import guidelines, its process remains unclear and poorly equipped to manage the serious energy policy questions now before it. We therefore petition it to open a public notice and comment process by which DOE will seek comments upon its outdated policy guidelines and proposals to revise them. LNG exports pose pressing public questions; DOE

owes the public a policy discussion which recognizes the seriousness of these matters and responds to them with care.

I. Petitioning Parties

The following parties join this petition:

The Sierra Club is the nation's oldest and largest grassroots environmental organization, with more than 2 million members and supporters. Sierra Club's Beyond Natural Gas Campaign is focused on reducing natural gas demand, and on controlling the dangerous environmental impacts of gas production. As part of this work, the Sierra Club is a movant-intervenor in the majority of the LNG export dockets at DOE's Office of Fossil Energy ("DOE/FE").

Catskill Citizens for Safe Energy is an all-volunteer, grassroots organization that has been working to protect the public from dangerous hydraulic fracturing since 2008. Its website, catskillcitizens.org, is a reliable source of information about every aspect of shale gas extraction. Its Newsroom contains thousands of articles on the subject, and scores of scientific reports can be found in the Learn More section of its site. Catskill Citizens has been at the forefront of efforts to encourage the U.S. to develop a responsible energy export policy.

The Center for Biological Diversity is a non-profit corporation with offices throughout the United States and tens of thousands of members. The Center works to secure a future for all species, great and small, hovering on the brink of extinction. It does so through science, law and creative media, with a focus on protecting the lands, waters and climate that species need to survive.

Earthworks is a nonprofit organization dedicated to protecting communities and the environment from the impacts of irresponsible mineral and energy development while seeking sustainable solutions. Earthworks stands for clean water, healthy communities and corporate accountability. It works for solutions that protect both the Earth's resources as well as our communities.

Environment America is a federation of state-based, citizen-funded environmental advocacy organizations. It defends our environment with independent research, tough-minded advocacy and spirited grassroots action. Environment America, with hundreds of thousands of supporters from all walks of life, works to win tangible results for our environment.

Friends of the Earth, U.S. is a national, non-profit environmental advocacy organization founded in 1969 and incorporated in the District of Columbia, with its headquarters in Washington, D.C. and an office in Berkeley, California. Friends of the Earth's mission is to defend the environment and champion a healthy and just world. To this end, Friends of the Earth promotes policies and actions that address the climate change crisis and minimize the negative impacts of environmental pollution. Friends of the Earth has more than

150,000 members and activists in all 50 states. Friends of the Earth is a part of Friends of the Earth International, a federation of grassroots groups working in 76 countries on today's most urgent environmental and energy issues.

Lower Susquehanna Riverkeeper works on behalf of a friends, neighbors, outdoorsmen, recreationalists, and families who want safe drinking water, sustainable use of natural resources, and the ability to fish and swim in the Susquehanna River and her tributaries. Its program focuses on identifying sources of pollution and enforcing environmental laws. It actively educates the public on current issues, work with decision-makers to emphasize the economic and social benefits of protecting our watershed, and when necessary enforces laws protecting communities and natural resources of the basin.

Rogue Riverkeeper works to protect and restore water quality and fish populations in the Rogue River Basin of southern Oregon and adjacent coastal watersheds.

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II. Relief Requested

The LNG export applications now before DOE would significantly alter American energy policy if granted even in substantial part. The United States has never exported substantial quantities of natural gas beyond North America, and continental exports have always been relatively limited. The licenses before DOE would, on the other hand, give the U.S. the potential to be one of the largest gas exporters in the world. Such a shift would lead to structural changes in the national and international gas market and have important implications for climate change, manufacturing and economic policy, and issues of international trade and national security. Unfortunately, the 1984 import guidelines which now structure this consideration are not up to the task of shaping this critical analysis.

Yet those guidelines apparently continue to guide DOE's approach on LNG issues. As DOE has explained, its processes "have evolved from policy guidelines published in 1984 ..., as supplemented and refined by subsequent agency adjudications."¹ To be sure, some of these "refine[ments]" – such as analysis of "environmental considerations" and "U.S. energy security" – do, indeed, bear usefully on export in ways that the 1984 guidelines do not. But they

¹ Letter from Deputy Secretary of Energy Daniel Poneman to Senator Ron Wyden. (Dec. 11, 2012) at 1-2.

have been presented simply as a list of non-exclusive factors, of questionable significance, in letters and testimony to Congress, rather than as new guidelines or regulations. Meanwhile, DOE/FE, in its only license decision to date, *Sabine Pass*, has affirmed that the import guidelines “will be applied to natural gas export applications.”²

The result is that DOE’s decisionmaking on export still appears to be rooted in the 1980s, and a policy document designed to speed *imports*. DOE has not solicited public comments on the appropriateness of that policy, how it should be applied in export cases, or how best to amend it in light of the very different problems posed by export.

Instead, DOE is apparently planning to move forward with a series of individual export authorization proceedings. Because these are adjudicatory processes, they do not invite broad public participation and do not provide a clear venue to announce new agency-wide policy decisions. On the other hand, DOE has shown encouraging signs that it seeks some broader public participation by commissioning programmatic economic studies on some LNG issues, and inviting public comment on those studies. That process, though far from perfect, indicates that DOE is aware that the individual cases before it implicate larger public concerns, and warrant full analysis.

DOE must follow this recognition to its proper conclusion and initiate a full public notice and comment process to update its decisionmaking guidelines on these crucial matters. The policy should also articulate how DOE will monitor any approved export terminals to ensure that they continue to be in the public interest. That rulemaking process must be fully informed by the economic and environmental and public health studies which the Natural Gas Act and the National Environmental Policy Act (NEPA) require.

III. The Existing Guidelines Are Insufficient to Address the Questions Now Before DOE and Must Be Revised

DOE is now considering whether to permit all or a portion of a proposed 28.30 billion cubic feet per day (“bcf/d”) of natural gas export – the equivalent of 10,329.5 bcf per year.³ Permitting the full volume would mark an approximately ten-fold expansion of *all* U.S. gas exports (both pipeline and LNG) and expand LNG exports specifically by a factor of about 370.⁴ Indeed, the total volume proposed for export is approaching half of total marketed gas production in 2012.⁵ This substantial new source of gas demand would certainly increase gas prices with important

² DOE/FE, *Opinion and Order Conditionally Granting Long-Term Authorization to Export from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations*, Order No. 2961 (May 20, 2011) (emphasis added).

³ See DOE/FE, *Applications Received by DOE/FE to Export Domestically Produced LNG from the Lower 48 States* (Mar. 7, 2013), available at:

http://fossil.energy.gov/programs/gasregulation/reports/summary_lng_applications.pdf.

⁴ Exports in 2012 were 1,619 bcf/year, with only 28 bcf of that as LNG. See EIA, *U.S Natural Gas Exports by Country*, available at: http://www.eia.gov/dnav/ng/ng_move_expc_s1_a.htm.

⁵ Total marketed gas production in 2012 was 25,304 bcf.

implications for U.S. manufacturing and energy utilities. And because roughly two-thirds (and possibly much more) of gas for export would come from new unconventional gas production,⁶ export is also linked to intensifying environmental and public health impacts from the domestic gas boom. In short, LNG export, of any significant volume, implicates core questions of energy and environmental policy for the nation as a whole.

To be sure, the scope and magnitude of these potential impacts will vary by the amount of LNG export which DOE permits, and how DOE conditions those exports. But even smaller amounts of export would still greatly expand domestic gas demand and production, and would link the U.S. to international gas markets in novel ways. And, after all, the proper scope of export is the open question here which demands a policy response: How *will* DOE structure its decisionmaking around these potentially enormously consequential projects? Unfortunately, that question remains very much unanswered.

A. The Import Guidelines Were Created to Enhance Natural Gas Imports and Provide Little Guidance on Export

The Natural Gas Act provides that DOE may only permit LNG exports which are “not inconsistent with the public interest.”⁷ But, as Deputy Secretary Poneman has said, the Act’s text “does not prescribe what factors should go into the public interest analysis.”⁸ DOE has instead developed its own process through a series of delegation orders and policy guidelines, culminating in the 1984 import guidelines.

Those guidelines are the product of their time and are focused on streamlining gas *imports* at market-responsive prices in order to reduce consumer rates. Before their issuance, DOE operated under a delegation order which required license applicants to affirmatively demonstrate the “[n]ational need for the natural gas to be imported or exported,”⁹ and had denied several import applications that failed to make that demonstration.¹⁰ This stance differed from the view of the Reagan Administration, whose position was that “imported gas should be regulated by the market, with the government’s role limited to foreign and trade policy, broad economic considerations and national security concerns.”¹¹ Accordingly, DOE began a public process to draft new guidelines to “reflect our market-oriented position.”¹² The

⁶ See EIA, *Effects of Increased Natural Gas Exports on Domestic Energy Markets* (2012) at 6, available at http://www.eia.gov/analysis/requests/fe/pdf/fe_lng.pdf.

⁷ 15 U.S.C. § 717b(a).

⁸ Poneman-Wyden Letter, *supra* n.1, at 1.

⁹ DOE Delegation Order No. 0204-54, 44 Fed. Reg. 56,735 (Oct. 2, 1979).

¹⁰ See, e.g., *Tenneco Atlantic Pipeline Company*, Opinion and Order, 1 ERA ¶ 70,103 (Dec. 18, 1978); *El Paso Eastern Company*, Opinion and Order, 1 ERA ¶ 70,104 (Dec. 21, 1978).

¹¹ See 48 Fed. Reg. 34,501, 34,501 (July 29, 1983)

¹² *Id.*

final guidelines therefore take this view, and were designed to conform with the market orientation of “the President’s 1983 National Energy Policy Plan.”¹³

DOE’s goal at the time was chiefly to deregulate a price control system which had resulted in gas price increases in some parts of the country, and replace this system with one that made allowed more direct negotiations on price between buyers and sellers, making import more sustainable.¹⁴ Prior to the 1984 guidelines, this system of price controls, including regulatorily-approved long-term contracts, locked American buyers into a system in which they were paying above market rates for gas.¹⁵ In earlier years, import prices from Canada (the largest supplier) had been negotiated on a “cost-of-service basis,” but later negotiations between the two governments resulted in a series of agreements which supported government-determined pricing.¹⁶ But by the fall of 1982, the Canadian imports were entering the market “at a price that began to be uncompetitive in most U.S. markets” and other imported gas supplies were encountering the same problems, driving up consumer prices.¹⁷ Market participants, accordingly, argued that the price control system was not working and “a more flexible approach to pricing was needed” that would be driven by “direct buyer-seller negotiations.”¹⁸

The U.S. policy goal, in response to this problem, was to limit government interventions while maintaining enough oversight to ensure “a supply of natural gas supplemental to domestic production available on a competitive, market-responsive basis, while avoiding undue dependence on unreliable sources of supply.”¹⁹ In accordance with these goals, DOE established a three part-regulatory inquiry. It would inquire, first, into “[t]he competitiveness of the import,” meaning that the license applicants had to show that the imported gas would be governed by contracts allowing it to compete in the U.S market.²⁰ Next, DOE would consider the “[n]eed for the natural gas,” a question also focused on the “marketability” of the gas in the domestic market compared to U.S. gas.²¹ Third, DOE would look to the “[s]ecurity of supply,” meaning that importers would have to demonstrate the “historical reliability of the supplier to provide a dependable source of gas to the United States and other countries.”²²

These three primary factors, in short, are intended to allow imported gas to flow into the United States at market prices as long as there is room in the market for it and the source of supply is dependable enough to ward off supply shocks. The hope was that allowing such unrestricted import pricing systems would lower gas prices and avoid “severe economic consequences for

¹³ 49 Fed. Reg. 6,684, 6,685 (Feb. 22, 1984).

¹⁴ *Id.* at 6,687.

¹⁵ *Id.* at 6,684,

¹⁶ *Id.* at 6,686.

¹⁷ *Id.*

¹⁸ *Id.* at 6,686-87.

¹⁹ *Id.* at 6,687.

²⁰ *Id.* at 6,688.

²¹ *Id.*

²² *Id.*

the American gas consumer” by avoiding dependence on long-term expensive gas imports if the market would not accept them.²³

Because of this focus on speeding gas to American consumers, the 1984 import guidelines understandably say almost nothing about gas *export*. The delegation order based upon them, accordingly, says only that DOE shall regulate exports “based on a consideration of the domestic need for the gas to be exported and such other matters as the Administrator finds in the circumstances of a particular case to be appropriate.”²⁴ No further guidance is available.

B. The 1984 Guidelines Are Ill-Suited to Today’s Issues

The world has changed a great deal since the 1984 guidelines. The import price control issues they were designed to solve are no longer pressing, or particularly relevant. Instead, DOE must wrestle with the proper role of LNG exports in the context of a very different U.S. economy, at a time of increasingly severe climate change, and where gas is increasingly produced using potentially hazardous technologies, including hydraulic fracturing (“fracking”). These shifts, as well as the inherent differences between gas imports and gas exports, underline why a fresh policy approach is so urgently needed.

Perhaps the most obvious shift in context since 1984 is that DOE is now dealing with large-scale gas exports for the first time. As a result, the issue which animates the 1984 guidelines -- harm to U.S. consumers from overly-expensive imported gas caused by extensive domestic price controls and poorly-drawn contracts--- is simply not present here. Instead, export economics debates center on the likely impact of linking U.S. gas supplies to the hungry world market. The potential arbitrage opportunity available to exporters to send domestic gas abroad at much higher prices, and the increased demand that such exports would create both raise significant questions about price impacts on U.S. consumers – but not because of the regulatory issues germane in 1984.²⁵ No one is concerned that DOE will set export price contracts at a level which would harm U.S. citizens. Instead, the question is whether the market price increases that exports will necessarily create, if permitted, are in the public interest. Thus, while DOE, in 1984, was seeking to create a market-responsive source of additional supply, free of unnecessary regulatory constraints to lower consumer prices, the question is now how new demands will alter the picture for U.S. consumers if exports compete against U.S. needs without further oversight– a competition which will necessarily raise gas prices.

In addition to this fundamental structural shift, both the source, and the effect, of increased gas consumption raise questions which were not germane in 1984. Most exported gas would be sourced from unconventional gas plays (shales, tight sands, and the like), and would be

²³ *Id.* at 6,684.

²⁴ DOE Delegation Order No. 0204-111 (Feb. 22, 1984).

²⁵ See generally EIA, *Effects of Increased Natural Gas Exports on Domestic Energy Markets* (investigating these questions).

extracted with the fracking process.²⁶ Imported gas, obviously, does not implicate U.S. production impacts and, in any event, those unconventional plays were not available in the 1980s. Now, though, unconventional production is expanding throughout the country, raising major environmental concerns and fomenting a vigorous ongoing public debate over its wisdom and appropriate limits upon production. As a result, the environmental impacts of such production were not germane to the DOE's considerations in the way they are now.

Similarly, the effect of deepening dependence on fossil fuels in the context of global climate change was far less developed in the 1980s. Although the greenhouse effect was known, the full scope and danger of climate change was less apparent, and had not yet been recognized by the government, as it has now.²⁷ Because the government has now recognized that global warming is a pressing threat to public health and welfare, there is a real question whether LNG exports are in the public interest if they expand use of fossil fuels or increase greenhouse gas emissions. DOE was not considering that pressing global crisis in 1984, but that question is central today.

This list of differences could go on for pages. The point, though, is simply that the world has changed: DOE simply faces a different set of problems now than it did decades ago, and it needs the tools to address them. Although consumer protection remains central to DOE's charge, the policy model developed in 1984 to avoid unnecessarily high import prices has very little to do with the questions export raises. To address them, DOE must revisit its guidelines to ensure that they speak to the problems at hand.

C. DOE Must Address New Questions on Export Which the 1984 Guidelines Do Not Cover

The absence of any formal export policy, or clear guidelines, is a pressing problem in light of the scope and importance of the issues raised by the LNG export proposals. These issues span much of the American economy and bear importantly on critical energy and environmental policy questions. The import guidelines are silent on these matters but the vigorous public debate on export demonstrates the great public importance of approaching them with great care.

The questions at stake, in brief, include (but are definitely not limited to) the following:

Impacts on Domestic Consumers. Essentially all parties to this debate concede that LNG exports will raise domestic gas prices, although they differ about the magnitude and scope of these increases, and so differ on their importance. It is clear that LNG exports elevate energy prices while depressing labor income in the rest of the economy, meaning, as a DOE-

²⁶ See *id.*

²⁷ See 74 Fed. Reg. 66,496 (Dec. 15, 2009) (recognizing that greenhouse gas emissions cause climate change, which endangers public health and welfare).

commissioned macroeconomic study puts it, that “[h]ouseholds with incomes solely from wages or transfers will not share” in export revenues.²⁸

This price increase must be of central concern, given the Natural Gas Act’s core purpose of “protect[ing] consumers against exploitation at the hands of natural gas companies.”²⁹ In light of this charge, we are, to say the least, extremely skeptical that DOE can properly allow export-linked consumer price increases which will harm ordinary American wage earners while benefitting a narrow segment of the oil and gas industry. Certainly, the 1984 guidelines provide no support for this proposition: Although they favor market pricing, they do so as an alternative to a rigid price control system that had locked in above-market prices for gas companies. It would be inappropriate to uncritically assume that this market focus is still appropriate in the context of large-scale export, which would significantly raise consumer prices.

Export proponents, of course, maintain that *other* consumer benefits counter-balance these price increases (which they maintain will be minimal), but even if that contention is supportable when these proponents will reap profits at the expense of the general public, this debate is really the point. Exports, in any significant quantity, raise domestic prices, transferring wealth from wage earners to natural gas companies. If countervailing considerations nonetheless can balance these price increases – a point which we doubt in light of the Act’s consumer-protection purpose – DOE needs to explain how, and any such considerations need to be carefully weighed and documented. The 1984 import guidelines, structured simply to increase supply (and hence to lower prices) do not provide a framework to consider these matters. If DOE believes that market price increases can be balanced by other factors, it must articulate that view in a proper public proposal and seek comments from the many Americans that position would affect.

Impacts on Domestic Industry. The same price increases felt by ordinary ratepayers are felt even more acutely by energy-intensive industries and by public gas utilities. Unsurprisingly, both groups have raised serious concerns about DOE’s process. In their view, LNG export above a certain quantity could significantly impede a domestic manufacturing renaissance (and even do net harm to the U.S. trade balance as fewer of these manufactured goods are exported). That view is supported by an extensive analysis appended to recent Dow Chemical comments on the DOE-commissioned macroeconomic study.³⁰ In short, the possibility of diverting significant amounts of natural gas overseas – where gas prices are much higher – raises

²⁸ NERA Economic Consulting, *Macroeconomic Impacts of LNG Exports from the United States* (2012) at 8,

²⁹ See, e.g. *Michigan Gas Co. v. FERC*, 115 F.3d 1266, 1272 (6th Cir. 1997) (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944)).

³⁰ Charles River Associates, *U.S. Manufacturing and LNG Exports: Economic Contributions to the U.S. Economy and Impacts on U.S. Natural Gas Prices* (2013), available at:

http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/reply_comments/Peter_A_Molinero02_25_13.pdf.

economy-wide competitiveness questions that simply were not contemplated by the 1984 guidelines.

These questions are so substantial, in fact, that a serious debate continues even as to the net effect of LNG exports on U.S. GDP. Although the study DOE commissioned finds a net positive trend, an independent study in the record finds that the negative impacts on consumers and industry are enough to depress GDP as a whole.³¹ These economists therefore caution that “policy makers need to be very careful in approving U.S. gas exports.”³² Again, the 1984 guidelines offer no guidance on how DOE should weigh these competing models, or the relative importance of the domestic manufacturing sector and the natural gas export sector, or whether harm to some domestic actors can still be in the “public interest.”

Environmental and Public Health Implications. Large-scale LNG exports implicate at least four distinct sets of environmental and public health questions. First, and most obviously, LNG export requires a large, new, industrial infrastructure; this network of terminals, liquefaction plants, pipelines, and compressors requires careful environmental review. Second, exporting gas stimulates increased gas production – and most of that production will come from unconventional gas sources. According to the expert Shale Gas Production Subcommittee of DOE’s Secretary of Energy Advisory Board, a combination of absent and inadequate regulation means that that production comes with “a real risk of serious environmental consequences.”³³ The likelihood that export will exacerbate these impacts warrant careful analysis and management. Third, LNG export shifts the domestic gas market for electrical utilities, meaning that they are more likely to use coal, rather than gas, in their power plants.³⁴ As a result, LNG exports likely increase CO₂ emissions from U.S. power generation according to the EIA. Fourth, LNG itself is a carbon-intensive fuel,³⁵ with life-cycle emissions significantly greater than that of natural gas. At a minimum, the net climate and environmental impact of using this fuel is concerning. Assessing it requires a careful look at how importing nations are likely to use the fuel in their larger energy mixes. As we have noted, the pressing climate crisis (which was not clearly in view in 1984) thus raises significant questions about whether increased trade in this fossil fuel puts the public at risk.

³¹ Dr. Wallace Tyner, Purdue University, *Comparison of Analysis of Natural Gas Export Impacts from Studies Done by NERA Economic Consultants and Purdue University* (2013) at 5, available at http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/30_Wallace_Tyner01_14_13.pdf.

³² *Id.*

³³ Shale Gas Production Subcommittee of DOE’s Secretary of Energy Advisory Board, *Second Ninety-Day Report* (2011) at 10, available at: http://www.shalegas.energy.gov/resources/111811_final_report.pdf.

³⁴ See, e.g., *Effects of Increased Natural Gas Exports on Domestic Energy Markets* at 18-19.

³⁵ See Paulina Jaramillo, W. Michael Griffin, H. Scott Matthews, *Comparative Life-Cycle Air Emissions of Coal, Domestic Natural Gas, LNG, and SNG for Electricity Generation*, 41 *Environ. Sci. Technol.* 6,290 (2007), available at: http://www.ce.cmu.edu/~gdrg/readings/2007/09/13/Jaramillo_ComparativeLCACoalNG.pdf.

Importantly, the Supreme Court has repeatedly instructed that this sort of broad look at environmental considerations is required by the public interest test.³⁶ EPA has also urged that DOE (and FERC, which usually prepares NEPA documents for both agencies) consider the full scope of possible impacts.³⁷ The import guidelines, however, fail to recognize the importance and scope of these environmental obligations and DOE has, thus far, largely limited its consideration of environmental impacts in its export decisionmaking. In the recent *Sabine Pass* orders, it went so far as to assert (albeit in dicta) that many such impacts simply could not and would not be considered.³⁸

This disconnect is striking and deeply problematic. The environmental and energy issues inherent in LNG export are near the center of the policy debate, but DOE's current practice, and the old import guidelines, appear to discourage it from answering them. These questions include: Is it in the public interest to double-down on unconventional gas production or to become a major supplier of fossil fuels to the world market? What conditions, if any, should apply to any such exports to mitigate environmental impacts? How do export authorizations interact with larger U.S. environmental and energy policy? And how should DOE weigh these considerations in its larger public interest analysis? Unfortunately, the 1984 import guidelines, crafted to conform with a decades-old energy plan, do not provide meaningful guidance on these matters. That is not too surprising: Imports of pipeline natural gas in the 1980s simply raise very different (and arguably less pressing) domestic environmental questions than the wholesale export of domestically produced gas as LNG during a time of worsening climate change.

* * *

Along with these and other substantive questions, the old guidelines also fail to address important process questions. The import guidelines established a new rebuttable presumption in favor of import applicants.³⁹ Although the D.C. Circuit allowed this departure from past practice, it did not hold that DOE must take this approach, and emphasized that the presumption must be flexible—simply a starting point for analysis.⁴⁰ Although the presumption is intended to be flexible, applicants have relied on it in practice to urge that protests of export applications must carry a very high burden of proof – in essence that they

³⁶ See *Udall v. Federal Power Comm'n*, 387 U.S. 428, 450 (1967); *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 670 n.4 & 6 (1976).

³⁷ See EPA, *Scoping Comments – The Jordan Cove Energy Project LP*, FERC Dkts. PF12-7 and PF12-17 (Oct. 29, 2012); EPA, *Scoping Comments – Cove Point Liquefaction Project*, FERC Dkt. PF12-16-000 (Nov. 15, 2012) ; EPA, *Scoping Comments – The Oregon LNG Export Project and Washington Expansion Project*, FERC Dkts. PF12-18 and PF12-20.

³⁸ See Opinion and Order, *Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations*, Order No. 2961-A (Aug. 7, 2012) at 27-28.

³⁹ See, e.g., 49 Fed. Reg. at 6,688-89. More specifically, the guidelines establish a series of presumptions in favor of import within each of the three considerations they set out.

⁴⁰ *Panhandle Producers and Royalty Owners Ass'n v. Economic Regulatory Admin.*, 822 F.2d 1105, 1111 (D. C. Cir. 1987).

must not only rebut an initial presumption, but carry the case entirely. This approach is, at a minimum, in tension with the Natural Gas Act's mandate to *DOE* to protect the public interest. Because *DOE* has an independent obligation to protect the public, it has an independent duty to carefully weigh export applications on a full record – even if a given proceeding lacks an assiduous protestor. This obligation attaches with particular force here because of the exceptional public policy importance of LNG export. As such, this is also an appropriate time to reconsider the scope, application, and extent of any presumption-based approach in LNG proceedings. As *DOE* expands its consideration of substantive issues, it should also clarify how it will weigh the evidence before it, and what sorts of evidence it will require.

Export, in short, raises important, and difficult, questions which *DOE* must address if it is to credibly determine whether exports are in the public interest, and, if so, in what volume, and with what conditions. And how *DOE* weighs these sometimes-competing considerations – its policy orientation – will greatly influence the final outcome. Without conceding that all of these orientations are permitted by the Natural Gas Act, a few examples are illustrative: For instance, if *DOE* to focus simply on “protect[ing] consumers against exploitation at the hands of natural gas companies,”⁴¹ it might well disfavor any exports raising natural gas prices (perhaps above a certain amount). Or if *DOE* instead focused more on allowing the gas market to set prices, it might decide to permit all or most LNG terminals and assume that the market price (whatever it is) will be efficient and in the public interest. Or if *DOE* focused more on the effect of exports on domestic industry and employment it might seek to limit or phase in export to avoid price and supply shocks. Or if *DOE* was chiefly concerned with ensuring that export did not cause serious environmental harms, it might work to coordinate exports with the Shale Gas Production Subcommittee's recommended regulatory safeguards, or limit or bar export entirely until improved safeguards were in place. Or if *DOE* were actuated by climate change concerns, it might focus instead of limiting fossil fuel export and extraction as rapidly as possible. Or, of course, *DOE* might balance these concerns to come up with a limited export policy that attempts to serve multiple interests. The point is simply that *DOE*'s choices are ultimately based (implicitly or explicitly) in policy judgments. The question now is whether the judgments *DOE* is making under the outdated guidelines properly respond to the complex issues raised by LNG export and appropriately serve the purposes of the Natural Gas Act.

Right now, those judgments remain opaque, as do the underlying criteria which *DOE* must use to make them. The 1984 import guidelines shed very little light because they are not well-matched to the large questions now before *DOE*. Before *DOE* moves forward with its decisions, it should therefore take the time to carefully enunciate a more modern set of policy judgments, and test those with public notice and comment. That sort of transparent process is necessary to get these important decisions right.

D. *DOE*'s Practices to Date Demonstrate Why New Guidelines Are Needed

⁴¹ See, e.g. *Michigan Gas Co. v. FERC*, 115 F.3d at 1272.

To its credit, DOE has sometimes recognized that case-by-case adjudication based on the import guidelines is not sufficient. But its efforts to address the larger questions have, so far, been halting, at best. DOE officials have offered public statements indicating that the agency will look beyond the guidelines, but the only order DOE has issued on this wave of LNG export applications shows almost none of that promised broad thinking. Such orders generally provide a poor venue to enunciate and explore policy changes. And while DOE has, to its credit, requested broad public comments on an economic study it commissioned, this process's outcomes are unclear, and do not appear tethered to any particular policy proposal. These processes, in short, do not substitute for a public policymaking process.

i. Informal checklists of possible considerations are not sufficient policy statements

DOE officials have acknowledged that LNG export raises policy questions beyond the import guidelines. Those statements are welcome, but they are vague. Rather than expressing a coherent policy view, they simply list a changing collection of other factors to consider, without explaining their relative importance. This approach offers the public little guidance on DOE's decisionmaking process.

The first such list of which we are aware comes from 2011 testimony from Deputy Assistant Secretary Christopher Smith. He told a Senate Committee that "a wide range of criteria" would be considered, "including":

- Domestic need for the natural gas proposed for export
- Adequacy of domestic natural gas supply
- U.S. energy security
- Impact on the U.S. economy (GDP), consumers, and industry
- Jobs creation
- U.S. balance of trade
- International considerations
- Environmental considerations
- Consistency with DOE's long-standing policy of promoting competition in the marketplace through free negotiation of trade arrangements
- Other issues raised by commenters and/or intervenors deemed relevant to the proceeding.⁴²

In December 2012, Deputy Secretary Poneman offered a similar list in response to a request from Senator Wyden for further details on DOE's decisionmaking process.⁴³ His list, notably, adds impacts "impact on domestic natural gas prices" as a consideration, and drops

⁴² Statement of Deputy Assistant Secretary Christopher Smith Before the Committee on Energy and Natural Resources, United States Senate, *The Department of Energy's Role in Liquefied Natural Gas Export Applications* (Nov. 8, 2011) at 4.

⁴³ Poneman-Wyden Letter, *supra* n.1, at 1.

“consistency” with DOE’s market policies – suggesting something of a departure from the import guidelines’ focus on market pricing.⁴⁴

Then in March of this year, Deputy Assistant Secretary Smith offered yet another revised list to a House Subcommittee, this time omitting any reference to the “U.S. balance of trade” or to impacts on “industry.”⁴⁵

These changing and unspecified lists are unsatisfactory. While we appreciate the DOE’s efforts to broadly engage these issues, the lists offer no guidance on how DOE will weigh the many issues before it. Nor does DOE explain how it will gather and assess evidence on these issues, or even which particular points are of importance (there are, for instance, many international and environmental “considerations” which DOE might focus upon). And because the issues DOE chooses to highlight vary from time to time, it is not even clear which concerns enter into the analysis in the first place.

For this reason, the consideration lists do not substitute for a full policy statement. They do not provide meaningful guidance to applicants or to potential protestors on which arguments and information will be most useful to DOE. Nor, critically, do they provide a forum for the public, as a whole, to weigh in on this vital public policy question. They identify issues, without resolving them. In practice, as we next discuss, this has meant that DOE has fallen back on the inapposite import guidelines.

ii. DOE’s LNG Export Decisions Further Demonstrate the Need for Clear Policy Guidance

DOE has ruled on only one of the LNG export applications now before it. That ruling, *Sabine Pass*,⁴⁶ is driven by the policies of the import guidelines, despite the broader analysis which DOE’s public issue lists seem to suggest. At a time when a policy review is obviously warranted, it follows decades-old policy guidance. But even that order evinces some discomfort with continued exports, noting, for the first time, that “the cumulative impact of these export authorizations could pose a threat to the public interest.”⁴⁷ DOE should act on this concern by revisiting its export policies to ensure that they provide sufficient guidance to meet this potential threat.

The limits of *Sabine Pass*, and its earlier orders, underline why DOE needs to take a hard look at its activities. Again, the import guidelines established only one definite criterion for export: “a consideration of the domestic need for the gas to be exported,” leaving all other issues to DOE’s

⁴⁴ See *id.*

⁴⁵ Statement of Deputy Assistant Secretary Christopher Smith Before the Oversight and Government Reform Committee, United States House of Representatives, *The Department of Energy’s Program Regulating Liquefied Natural Gas Export Applications* (Mar. 19, 2013) at 3.

⁴⁶ *Sabine Pass*, Order 2961, *supra* n.2.

⁴⁷ *Id.* at 33.

discretion.⁴⁸ Although the delegation order which implemented the guidelines has been rescinded for more than a decade,⁴⁹ DOE nonetheless indicated that it would “continue[] to focus” on this consideration, along with “DOE’s policy of promoting competition in the marketplace” and the security of domestic energy supplies.⁵⁰

DOE focused accordingly. It granted an export license on the primary basis that the studies submitted by the applicant “indicate that the existing and future supply of domestic natural gas is sufficient to simultaneously support the proposed LNG export volumes as well as domestic natural gas demand” over the period of the authorization.⁵¹ Applying a particularly heavy presumption in favor of the applicant, DOE did not investigate this matter itself. Instead, it relied on the fact that two protestors in that docket had not submitted “a rebuttal study” as sufficient to support its decision.⁵² And though DOE noted that those protestors had also “alleged a variety of negative consequences,” it did not find that they outweighed the applicant’s claims of other economic benefits from its project.⁵³ Finally, as noted above, when DOE did finally (in a subsequent order) consider environmental impacts, it essentially declined to consider any impacts outside of the terminal site itself.⁵⁴

The result is that the *Sabine Pass* orders furthered a potential LNG export boom without considering almost any of the pressing public policy questions inherent in that boom. DOE did not look far beyond the strictures of the import guidelines and the (now defunct) delegation order that accompanied them. It conducted no independent studies. Instead, it relied only on those few members of the public who happened to protest the application. Because the protestors did not contest this particular license with detailed rebuttal studies, DOE felt it was appropriate to begin a seismic shift in the gas markets without any broader process. Nor did it articulate a coherent vision for export policy, or even really acknowledge that the export boom poses qualitatively different challenges than the pipeline imports which it usually considers.⁵⁵

⁴⁸ 49 Fed. Reg. at 6,690.

⁴⁹ See Redelegation Order No. 00-002.04 (Jan. 8, 2002) (rescinding earlier delegation order).

⁵⁰ *Sabine Pass*, Order 2961, at 28-29.

⁵¹ *Id.* at 31.

⁵² *See id.*

⁵³ *Id.*

⁵⁴ *See Sabine Pass*, Order 2961-A, *supra* n. 31, at 28-29.

⁵⁵ DOE’s two earlier opinions considering relatively substantial LNG exports are likewise unilluminating. Those opinions both address potential LNG exports from Alaska, and were issued more than a decade ago. Given their circumstances, they of course do not give serious attention to the implications of the nationwide shift towards gas export that is now before DOE. Nor do they seriously consider issues related to gas extraction, or to climate change – both acutely pressing in today’s carbon-constrained world. Both opinions are instead driven by the same consideration of immediate domestic need that the import guidelines impose. *See generally* DOE/FE, *Phillips Alaska, Opinion and Order Extending Authorization to Export Liquefied Natural Gas from Alaska*, Order No. 1473 (Apr. 2, 1999); DOE/FE, *Yukon Pacific, Order Granting Authorization to Export Liquefied Natural Gas from Alaska*, Order No. 350 (Nov. 16, 1989).

Thus, despite DOE's public statements, its actual decisions to date have been notably limited by the constraints of the import guidelines. The domestic supply question for a given quantity of export at a particular terminal remains the agency's focus. Other issues, no matter how practically important they are, receive short shrift. And the core pro-market program of the 1980s continues to guide DOE policy, regardless of the large, new questions which export poses.

These failings demonstrate why simply working out DOE's position in further individual proceedings is not likely to be successful. Those proceedings are inherently limited to their participants and the particular issues around particular terminals (even if considered cumulatively with others). As adjudicatory proceedings, they afford no obvious opportunity for DOE to publicly announce, and seek comment upon, a shift in policy. Nor are they open to many important interests or for general public comment. Although DOE could, in principle, nonetheless enunciate a shift in policy through an order in such a proceeding, it is, at bottom, an awkward setting, one that discourages full discussion and durable settlement of these large issues.

While we, of course, encourage DOE to think broadly in its individual cases, *Sabine Pass* provides little ground for optimism. Rather than continuing to *de facto* follow the 1984 policy (perhaps with a few additional considerations), DOE would do much better to pull back and offer a coherent policy structure for notice and comment.

iii. DOE's Economic Studies Also Show Why a Broader Process is Important

DOE has sought public comment on one aspect of its decisionmaking, an economic study which it commissioned, but that process is limited, with unclear outcomes. Although it might usefully inform new policy guidelines, it does not substitute for them.

To DOE's credit, after *Sabine Pass* it recognized that the growing demand for LNG export required additional analysis. It therefore commissioned a two-part economic study looking at the economic impacts of large-scale export; EIA conducted the first part of that study and a private contractor, NERA, conducted the second.⁵⁶ As DOE explained, "[t]he purpose to the LNG Export Study was to evaluate the cumulative economic impact of the *Sabine Pass* authorization any future requests for authority to export LNG."⁵⁷

DOE sought public comment on the study, but limited comments to the economic issues in the study, explaining that it might "disregard" other comments.⁵⁸ It also made clear that, though it intended to place the study and comments upon it in the record for individual LNG proceedings, it was "not establishing a new proceeding or docket" for the study itself.⁵⁹ DOE

⁵⁶ See 77 Fed. Reg. 73,627, 73,268 (Dec. 11, 2012).

⁵⁷ *Id.*

⁵⁸ *Id.* at 73,629.

⁵⁹ *Id.*

indicated that it would address the study and comments on a “case-by-case basis” within the LNG export process, rather than, for instance, part of a larger policy rulemaking.⁶⁰ Despite these constraints, more than 180,000 people commented on the study, indicating the exceptional breadth and intensity of public interest in DOE’s decisionmaking process.⁶¹

The trouble is that this process, despite the vociferous comment period, does not provide DOE, the public, or applicants, with any indication of how DOE proposes to *use* the information it has received. Nor does it unambiguously give the public the chance to comment upon DOE’s policy choices, or seek review of those choices in court. To be sure, DOE’s actions in individual cases will ultimately indicate a policy direction based on the study, but, at that point, it will be too late. If DOE proposes a new policy, there will be no room for public notice and comment upon it because it will appear within a narrow adjudicatory decision which is not subject to public review. Or, if DOE continues to follow the 1984 guidelines, the public will have no opportunity to comment upon DOE’s continuing application of those outdated principles in this context, and to new data. Further, because the vast majority of the commenters are not parties to those cases, most of the public will have no ability to seek review of DOE’s decisions or ensure that their comments are heeded. In essence, DOE is skipping critical steps. Rather than using the economic study, and comments thereon, to inform policy, offer that policy for comment, and then apply it to individual cases, it is simply rushing ahead to individual “case-by-case” decisions, in the absence of any policy review.

This is a mistake. The economic study itself does not clearly indicate a direction for DOE to take. It shows that exports will generally harm wage earners and benefit gas exporters. But whether DOE chooses to favor one group or another (or strike some sort of balance) as a matter of policy remains unclear. And the study, of course, does not touch on many other areas relevant to the public interest, including environmental impacts. The study, in other words, may influence policy, but it does not set policy.

iv. New Policy Guidelines Are Needed

In sum, neither DOE’s public statements, nor its sole modern LNG export decision, nor its limited comment period on economic aspects of LNG exports suffice. DOE’s progress for making export decisions is fragmented, opaque, and unduly governed by policy judgments that were never intended to address today’s situation. DOE would do well to move forward by revisiting its policy, before case-by-case export decisions create a *de facto* policy which may or may not be in the public interest.

E. Further Guidance Is Also Needed on DOE’s Public Interest Monitoring Process

⁶⁰ *Id.*

⁶¹ Sierra Club and many of the other petitioning groups, for instance, submitted extensive comments raising concerns with the study.

In the *Sabine Pass* process, DOE also articulated a “continuing duty to protect the public interest.”⁶² It indicated that changes in gas supply or demand could alter whether Sabine Pass’s exports were in the public interest by, for instance, restricting supply in response to environmental concerns, or by increasing demand in the power sector.⁶³ DOE indicated that it would “monitor these conditions” to ensure that exports “do not subsequently lead to a reduction in the supply of natural gas needed to meet essential domestic needs.”⁶⁴ It suggested that it might take appropriate action to rescind or modify export approvals, with notice and a hearing (if need be), in those circumstances.⁶⁵ This ongoing monitoring duty, too, requires clarification through a new policy process.

There are several problems with the monitoring conditions DOE has set out (though they are far better than nothing). Plainly, they are rooted, like the rest of the decision, in the 1984 import guidelines, which were designed to protect gas supply. As a result, they only obliquely touch on other possible reasons to restrict or modify exports. Such reasons might include concerns over the environmental and social impacts of large-scale gas exports and the production needed to support them, unforeseen harms to the industrial sector, or a need to curtail fossil fuel use in light of the urgent global climate crisis, which continues to intensify. Other reasons might also apply. The point here is that both the substance and structure of DOE’s continuing public interest monitoring duty turns on DOE’s policy judgments about the public interest. Accordingly, as DOE revisits those guidelines, it should also explain how any modified policy affects its monitoring and enforcement criteria.

IV. Petition for Relief

We are not the only voice calling for a more coherent policy process on LNG export. Senator Wyden has asked DOE to explain “how DOE will establish the actual decision-making criteria to be used in making the required export determinations ... and the manner in which these criteria will be promulgated.”⁶⁶ Groups as disparate as the Natural Resources Defense Council⁶⁷ and Dow Chemical⁶⁸ have made essentially the same request. The public deserves clarity, and that begins with a clear export policy.

⁶² *Sabine Pass*, Order No. 2961, *supra* n. 2, at 31-32.

⁶³ *Id.*

⁶⁴ *Id.* at 32.

⁶⁵ *Id.* at 33.

⁶⁶ Letter from Senator Ron Wyden to Secretary Steven Chu (Oct. 23, 2012). DOE, unfortunately, answered this letter only by reiterating its checklist of issues, without providing more substance.

⁶⁷ Kathleen Kennedy, NRDC, *Initial Comments on the NERA Study* (2013), available at http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/kennedy_em01_24_13.pdf.

⁶⁸ Peter Molinaro, Dow Chemical, *Reply Comments on the NERA Study* (2013), http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/reply_comments/Peter_A_Molinaro02_25_13.pdf.

DOE should pursue this policy-making process on the basis of full information. It has several channels in which to gather this information. Two are particularly important (though this list is not exclusive):

The economic studies DOE has commissioned (in addition to further work to correct deficiencies in that work noted by many commenters) provide one useful set of data once that work has been completed. DOE should open a formal docket, independent of any particular terminal, in which to consider them, and to respond to the many comments it received.

The National Environmental Policy Act (NEPA), provides another critical channel. As we have explained at length in protests and comments filed with DOE, NEPA requires an Environmental Impact Statement (EIS) for every major Federal action which could significantly affect “the quality of the human environment.”⁶⁹ NEPA’s “purpose is not to generate paperwork--even excellent paperwork--but to foster excellent action.”⁷⁰ This means that “[t]he NEPA process is intended to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”⁷¹ NEPA is often used to make programmatic decisions of this sort,⁷² and would be enormously helpful to DOE and to the public here. DOE should therefore prepare (or work with FERC to prepare) a programmatic EIS, fully considering the environmental and public health impacts of possible levels of LNG export. This document would essentially parallel the programmatic economic study which DOE is already conducting, and would be a necessary complement to it. Indeed, the EIS could directly test alternative approaches to LNG export policy for their likely environmental impacts.

These processes would provide DOE with much of the information it needs to make a coherent, well-supported decision on LNG export, as the Natural Gas Act requires, beginning by proposing modern policy guidelines. That process would be public, fair, and comprehensive. Through it, DOE could propose different emphases for U.S. policy, considering, for instance, whether the simple market need analysis of the 1984 guidelines is appropriate, or whether a broader analysis is more likely to serve the public – including, for instance, the factors that we, and DOE officials, have cited as important. The policy should also set forth the ways in which DOE will weigh evidence before it, and how it will manage the cumulative impacts of the many applications it is now considering. And it should explain how DOE will monitor any exports to ensure consistency with the public interest in the future.

In view of the potential importance of LNG exports, for both good and ill, and the extremely lively public debate surrounding the issue, this petition makes a modest request: DOE should look before it leaps. As DOE has already recognized, at least in part, these extraordinary requests require careful process. DOE has worked to include the public in its policy-making

⁶⁹ 42 U.S.C. § 4332(C).

⁷⁰ 40 C.F.R. § 1500.1(c).

⁷¹ *Id.*

⁷² *See* 40 C.F.R. § 1502.14(b)-(c).

even in less unusual times: The 1984 import guidelines themselves were developed through a public notice and comment process and a DOE-sponsored conference.⁷³ No less care is warranted here.

We therefore petition DOE to do the following:

- (1) Grant no more licenses for LNG export to non-Free Trade Agreement nations until it has completed a final revision of its policy guidelines, focusing on LNG export.
- (2) Conduct an Administrative Procedure Act compliant notice-and-comment process, including public hearings as warranted, to develop a new set of gas export policy guidelines which specifically and carefully articulate DOE's policy orientation on export, and the factors which it will primarily consider in individual export dockets.
- (3) Support the development of these guidelines with a thorough, careful, economic study and with a full programmatic Environmental Impact Statement.

V. Conclusion

LNG export is a major national policy decision, and it deserves a commensurately careful process. For the foregoing reasons, a key part of that process is a careful, public review of the dated policy guidelines which now influence the process.

Thank you for considering this petition. In view of the importance of the issues, we request a written response within 45 days of your receipt of this document.

Sincerely,



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⁷³ See 48 Fed. Reg. 34,501 (July 29, 1983) (requesting comments on proposed import/export policy and announcing a public conference).