

## Chapter 5

# DOE APPROVAL

## CHAPTER FIVE: FEDERAL DOE AUTHORIZATION

### Background

#### What is DOE's role in authorizing the export of LNG?

As of January 2022, the U.S. Department of Energy (DOE)'s role in the LNG permitting process is largely one of a rubber stamp.<sup>468</sup> DOE is responsible for authorizing the actual export or import of gas with the powers it has from the Natural Gas Act, 15 U.S.C. § 717 *et seq.*<sup>469</sup> Note that this is different from the NGA powers of FERC, which has “the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal” located onshore or in near-shore waters.<sup>470</sup> Another way to think about it is that FERC approves the infrastructure, but DOE approves the export of the commodity.

In deciding whether to authorize the export of gas, DOE only has discretion when it comes to authorizing exports to countries that do not have a free-trade agreement with the United States requiring national treatment in gas (non-FTA countries).<sup>471</sup> For such non-FTA countries, DOE conducts a “public interest review” and authorizes the export unless the export would not be consistent with “the public interest,” a term not defined in the regulations. This is not a very substantive review in practice; DOE relies on studies and assumptions that make the authorization almost a foregone conclusion. Even NEPA provides little influence on DOE's analysis—in fact, under the Trump Administration, DOE concluded that most applications for export are categorically excluded from needing a NEPA analysis at all; it remains unclear whether this will change under the Biden Administration. For the other applications and for purposes of satisfying the public-interest review,

The first question to ask when challenging a DOE application is:

#### “WHERE IS THE GAS GOING?”

If it's going to a free-trade-agreement country: no public interest review; project is “deemed” to be in the public interest. Do not expect to gain traction here.

If it's not: public interest review required. This is the slightly more fertile ground for advocacy.

<sup>468</sup> In 2013, DOE wrote a very candid series of answers assuaging Alaska Senator Lisa Murkowski's fears that DOE had a propensity to, or would, block applications to import or export gas or start modifying or rescinding authorizations once granted. Ltr. From Paula A. Gant (Deputy Assistant Secretary, Office of Oil and Natural Gas) to Senator Murkowski. (Oct. 17, 2013) <https://www.energy.senate.gov/services/files/9E99E412-CE05-449D-8893-DC8D64C32D02>. DOE reassured her that it had “no record of having vacated or rescinded an authorization to import or export natural gas over the objections of the authorization holder” and that it “would not rescind a previously granted authorization except in the event of extraordinary circumstances.” *Id.* at 1-3. Little appears to have changed at the DOE since.

<sup>469</sup> The NGA can be confusing, because the powers it grants are to the now-defunct Federal Power Commission (FPC). Now, DOE and FERC split the NGA powers in the following manner: When the FPC was abolished, DOE inherited some of the FPC's NGA powers. DOE then delegated a portion of these powers to FERC (e.g., NGA section 3's responsibilities for permitting the infrastructure of export/import terminals) and a portion to an internal DOE office: the Assistant Secretary of Energy for Fossil Energy (FE) (e.g., NGA section 3's responsibilities for permitting the export/import of the commodity). See *Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 59, 63 (D.C. Cir. 2016) (citing Dep't of Energy, Redelegation Order No. 00-006.02, § 1.3(A) (Nov. 17, 2014)); See also Dep't of Energy, Delegation Order No. 00-004.00A, § 1.21(A) (May 16, 2006); 42 U.S.C. § 7172(f); Department of Energy Organization Act, §§ 301(b), 401(a), 402(a), Pub. L. No. 95-91, 91 Stat. 565, 578, 582-84 (codified at 42 U.S.C. §§ 7151(b), 7171(a), 7172(a)).

<sup>470</sup> 15 U.S.C. § 717b(e)(1). DOE delegated to FERC the authority under Natural Gas Act § 3(e), 15 U.S.C. § 717b(e), to license LNG terminals. Also see 42 U.S.C. § 7172(e) and DOE Delegation Order No. 0204-112, 49 Fed. Reg. 6684, 6690 (Feb. 22, 1984).

<sup>471</sup> As of January 2022, there are less than two dozen countries with which the United States has free trade agreements that receive preferential treatment under the NGA: Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore. See <https://www.energy.gov/fecm/how-obtain-authorization-import-and-export-natural-gas-and-lng>. For all FTA countries, see <http://www.ustr.gov/trade-agreements/free-trade-agreements>.

DOE simply cites to FERC’s NEPA analysis, but it has little substantive effect on DOE’s ultimate decision—which invariably is to authorize export of the gas. (for more details on FERC’s NEPA review, see Chapter 4 Sections B.2–B.7). And for exports to countries with gas free-trade agreements with the United States (FTA countries), DOE must approve those applications “without modification or delay”—in other words, with no public-interest review at all.

### Who is DOE and what are the relevant offices involved in authorizing LNG exports?

The Department of Energy is the vast federal agency concerned with energy and safety in handling nuclear material. Its mission is “is to ensure America’s security and prosperity by addressing its energy, environmental and nuclear challenges through transformative science and technology solutions.”<sup>472</sup> DOE and its numerous offices are led by political appointees hired and fired by the current presidential administration; because of this, DOE is more responsive to the political desires of an administration than FERC, whose Commissioners cannot be fired at will.<sup>473</sup>



One of the many offices within the DOE is the newly renamed Office of The Assistant Secretary for Fossil Energy and Carbon Management (“FECM”), which oversees export and import authorizations of liquefied gas. The Assistant Secretary of this office has ultimate decision-making authority on the applications for export and import authorization.<sup>474</sup>

Within the FECM is the Office of Regulation, Analysis, and Engagement.<sup>475</sup> The Division of Natural Gas Regulation, which is housed in the Office of Regulation, Analysis, and Engagement, contains the staff that is responsible for processing LNG export authorizations.<sup>476</sup> The organizational chart for the FECM as of November 3, 2021 is shown here:<sup>477</sup>

#### TERMINOLOGY NOTE:

This guide refers to “DOE” as the entity authorizing exports and imports of gas (as opposed to “DOE/FE,” “FE” or “FECM”). This matches DOE’s usual terminology; however, some government documents and applications may not follow this convention. Don’t be intimidated by the different acronyms; it is the same process.

<sup>472</sup> “Mission.” DOE. <https://www.energy.gov/mission>.

<sup>473</sup> Of course, FERC Commissioners are not completely immune to presidential influence or opinion. For example, in 2020, then-chairman Neil Chatterjee was abruptly demoted after supporting climate-friendly policies. Gearino, Dan. “Trump Demoted FERC Chairman Chatterjee After He Expressed Support for Carbon Pricing.” Inside Climate News. (Nov. 6, 2020). <https://insideclimatenews.org/news/06112020/trump-ferc-chairman-neil-chatterjee/>. Chatterjee continued as a commissioner and the other Republican appointee, James Danly, was prompted in his place. *Id.*

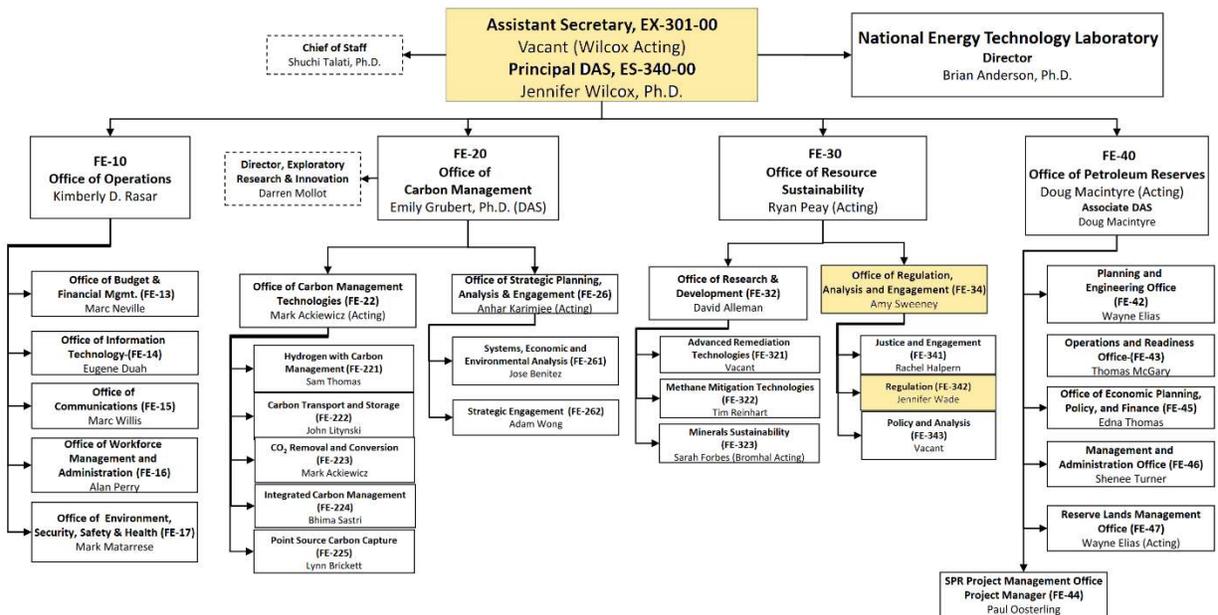
<sup>474</sup> Unless a different employee is delegated this authority, for example when the position of assistant secretary is vacant. 10 C.F.R. § 590.102(a).

<sup>475</sup> “Our Organization and Employees.” FECM. <https://www.energy.gov/fecm/our-organization-and-employees>.

<sup>476</sup> Division of Natural Gas Regulation. FECM. <https://www.energy.gov/fecm/division-natural-gas-regulation>. For the staff contact information, see “Staff Listing - Office of Regulation, Analysis, and Engagement” <https://www.energy.gov/fecm/staff-listing-office-regulation-analysis-and-engagement>.

<sup>477</sup> “Our Organization and Employees.” FECM. <https://www.energy.gov/fecm/our-organization-and-employees>. As of December 2021, the position of Assistant Secretary was still vacant; the Biden Administration’s nominee Brad Crabtree was still in the confirmation process. See “President Biden Announces Two Key Nominations.” The White House. (Sept. 2, 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/02/president-biden-announces-two-key-nominations/>.

## Office of the Assistant Secretary for Fossil Energy and Carbon Management



Note that until July 4, 2021, the FECM office was called simply “the Office of the Assistant Secretary for Fossil Energy” (“FE”).<sup>478</sup> The docket numbers and many documents, including DOE’s regulations, still refer to the office by the old name and old acronym.<sup>479</sup> It is unclear when, if at all, dockets and documents will be updated to refer to the new name—and how much the change heralds substantive improvements in the authorization process.

### What must an applicant receive from DOE before proceeding with construction?

DOE must issue a **final order** for authorization to export LNG before the applicant can begin exporting gas.<sup>480</sup> In the past, DOE has first issued a **conditional order** authorizing the export of LNG,<sup>481</sup> subject to FERC conducting a NEPA analysis and certifying the project, which are more-involved processes than DOE’s review (see Chapter 4 for details on the FERC certification process).<sup>482</sup> DOE has shifted away from granting conditional orders and now typically issues two final

<sup>478</sup> “Our New Name is also a New Vision.” FECM. <https://www.energy.gov/fecm/articles/our-new-name-also-new-vision>.

<sup>479</sup> See e.g., 10 C.F.R. § 590.102(f) (defining “FE” as the Office of The Assistant Secretary for Fossil Energy).

<sup>480</sup> 10 C.F.R. § 590.404. (“The Assistant Secretary shall issue a final opinion and order and attach such conditions thereto as may be required by the public interest after completion and review of the record. The final opinion and order shall be based solely on the official record of the proceeding and include a statement of findings and conclusions, as well as the reasons or basis for them, and the appropriate order, condition, sanction, relief or denial.”)

<sup>481</sup> For the conditional order in the Jordan Cove project, which was issued on March 24, 2014, see [https://fossil.energy.gov/ng\\_regulation/sites/default/files/programs/gasregulation/authorizations/2014/orders/ord3413.pdf](https://fossil.energy.gov/ng_regulation/sites/default/files/programs/gasregulation/authorizations/2014/orders/ord3413.pdf). Around 2014, DOE stopped its practice of issuing conditional authorizations and instead typically waits until FERC’s NEPA review had concluded to conduct its public interest review for non-FTA applications. See “Procedures for Liquefied Natural Gas Export Decisions.” 79 FR 48,132 at 48,136

[https://www.energy.gov/sites/prod/files/2014/08/f18/FR%20Procedures%20LNG%20Exports%2008\\_15\\_14.pdf](https://www.energy.gov/sites/prod/files/2014/08/f18/FR%20Procedures%20LNG%20Exports%2008_15_14.pdf) (“DOE will suspend its practice of issuing conditional decisions on applications to export LNG to non-FTA countries from the lower-48 states. DOE will no longer act in the published order of precedence, but will act on applications in the order they become ready for final action. An application is ready for final action when DOE has completed the pertinent NEPA review process and when DOE has sufficient information on which to base a public interest determination.”).

<sup>482</sup> 10 C.F.R. § 590.402 (“The conditional order shall include the basis for not issuing a final opinion and order at that time and a statement of findings and conclusions. The findings and conclusions shall be based solely on the official record of the proceeding.”) For more information about the transition away from conditional orders in 2014 and its effect on the application process, see Brookings. “Natural Gas Issue Brief #4: An Assessment of U.S. Natural Gas Exports” (July 2015) pp. 2-5 [https://www.brookings.edu/wp-content/uploads/2016/06/lng\\_markets.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/lng_markets.pdf).

orders, one relatively quickly for any requested authorization to export to FTA countries, and one after FERC's authorization issues if the applicant seeks to export to non-FTA countries. The final order(s) will almost certainly place additional terms and conditions on the applicant's export of LNG, including any conditions that FERC's order has recommended. Most LNG applicants will file for both FTA and non-FTA approval regardless of whether it has any intention to export to a FTA country, both because it provides other potential markets for gas and so it can state in marketing and advocacy that it has already been approved to export.

An example final opinion and order granting long-term authorization to export LNG to non-free trade agreement nations is attached as Appendix 23, the Jordan Cove Project Final Order (issued July 6, 2020).<sup>483</sup> Texas LNG's authorization to export to non-FTA counties is attached as Appendix 24 (issued Feb. 10, 2020).<sup>484</sup>

### **Why should I participate in the DOE process?**

Advocates should participate in the DOE process to: (1) push back on the rubber-stamp role DOE plays in authorizing gas exports; and (2) to preserve the right to challenge DOE's authorizations in case the law shifts to require DOE to take on a more rigorous oversight role, especially when it comes to greenhouse gas emissions.

Under the status quo, challenging DOE's applications will likely not be as fruitful on a case-by-case basis as challenging other approvals that a facility might need. However, the DOE process is subject to the changing political wills of a presidential administration—and it may be that the DOE becomes less willing to rubber stamp the import and export of gas under more-climate friendly presidential administrations. Indeed, two 2021 climate-change related executive orders<sup>485</sup> have already spurred DOE to reconsider its authorization of the Alaska LNG project.<sup>486</sup>

In addition, the law is arguably in flux over which agency—DOE or FERC—has responsibility for weighing the importance of greenhouse gas emissions created upstream and downstream from the LNG terminal itself. DOE has traditionally argued that consideration of upstream and downstream emissions is within its exclusive authority (not FERC's), but, despite this, DOE has avoided including a case-by-case analyses of these greenhouse gas emissions in its analyses for each application, arguing that they are not reasonably foreseeable. And a 2021 DOE rule change, begun under the Trump Administration, excluded virtually all DOE export authorization applications from needing a NEPA environmental

#### **PRACTICE TIP**

It is important to *at a minimum* intervene in every possible proceeding to preserve your legal rights. Also, in terms of encouraging public and political scrutiny of the project, advocates should seek to intervene in every process. Sections 5.C.7 – 5.C.9 describes intervention with the DOE process in more detail.

<sup>483</sup> The order is also available here: <https://www.energy.gov/sites/prod/files/2020/07/f76/3143a.pdf>.

<sup>484</sup> *Id.*

<sup>485</sup> Namely E.O. 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,"<sup>14</sup> and E.O. 14008, "Tackling the Climate Crisis at Home and Abroad." See Exec. Order 13990 of Jan. 20, 2021, 86 FR 7,037 (Jan. 25, 2021), available at: <https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis> and Exec. Order No. 14008 of Jan. 27, 2021, Tackling the Climate Crisis at Home and Abroad, 86 FR 7619 (Feb. 1, 2021), available at: <https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad>.

<sup>486</sup> <https://www.energy.gov/sites/default/files/2021-04/ord3643b.pdf>.

review.<sup>487</sup> (Note that for these projects, **FERC** must still perform a NEPA analysis for the project's **infrastructure**.) DOE's current positions may look bleak—but if they change advocates want to be at the table to help ensure all necessary reviews are carried out correctly.

### What are the primary ways an advocate can be involved in the DOE process?

There are several ways an advocate can be involved in DOE's authorization process. Advocates can:

- Intervene – Once an application is filed and up until the close of the comment period, an advocate can and should intervene in the process. An intervening advocate becomes a party to the case, with the right to appeal the authorization in federal court. This is the best way to transform the process into a contested process and require that the applicant and DOE converse on-the-record about the merits of the application.<sup>488</sup> It raises the profile of the project and can spur public and political scrutiny of the application. In the end, if no one intervenes, there is much less transparency in the whole process.
- File comments and protests – The notice of application will set a comment period during which anyone can raise issues or concerns about the application. DOE should address the comments and protests that are made, but is not required to go point by point by its regulations. Note that only intervenors will be able to raise the issues they commented on in litigation if the application is granted. For the difference between a comment and a protest, see Section C.6.
- Seek informal discovery and admissions of facts – DOE's regulations allow parties to request informal discovery (e.g., written interrogatories and requests for production of documents)<sup>489</sup> and admission of facts without awaiting a DOE order allowing such procedures. Although it is unclear whether advocates have used this strategy before, it may be a tool that would allow information about the project to be uncovered that could be useful in other challenges, not just with the DOE.
- Apply for rehearing – Before an advocate may litigate a DOE authorization, the advocate must apply for the authorization's rehearing. It is highly unlikely DOE will undo or reconsider an authorization, but it has happened (e.g., advocates' request for rehearing of the Alaska LNG



#### **WARNING: DOE'S FILING DEADLINE**

for documents is typically 4:30 PM Eastern Time. This is earlier than many other agencies! Documents that are a *single second late* will be treated as if they were filed the next day. Meaning that if you filed on the last day of the comment or intervention period, DOE will almost certainly ignore your late submission.

**Avoid issues by filing early!**

<sup>487</sup> Earley, Bud. "DOE Rule Sharply Limits Evaluation of Environmental Impacts of LNG Exports." (Dec. 10, 2020) <https://www.insideenergyandenvironment.com/2020/12/doe-rule-sharply-limits-evaluation-of-environmental-impacts-of-lng-exports/#more-7372> (explaining the new rule and DOE's position that upstream production impacts are not reasonably foreseeable and downstream emissions at the point of consumption are "too attenuated to be reasonably foreseeable and do not have a reasonably close causal relationship to the granting of an export authorization.") The final rule can be found here: "National Environmental Policy Act Implementing Procedures." 88 FR 78197-205. <https://www.govinfo.gov/content/pkg/FR-2020-12-04/pdf/2020-26459.pdf>.

<sup>488</sup> 10 C.F.R. § 590.108.

<sup>489</sup> 10 C.F.R. § 590.305 (Informal discovery); 10 C.F.R. § 590.308 (Admissions of facts).

project was granted in part in 2021). Almost more importantly, it is a necessary step before asking a court to review the DOE's work. Legal counsel should be consulted by this stage in a DOE challenge because in litigation parties are limited to the issues they raised in rehearing.

- Litigate – Appeals of DOE authorizations go to the D.C. Circuit or the place where the applicant has its principal place of business, under the Natural Gas Act.<sup>490</sup> It is imperative to seek experienced legal counsel when contemplating litigation, because the laws about what DOE must do can be quite complicated and is subject to change.
- Advocate for changes in public and political opinion - Unlike FERC, DOE is an organization run by political appointees that ultimately are hired (and fired) by each current administration. That means it can be more responsive than FERC to changing public and political opinion about which energy sources should be prioritized, especially in light of the increasing threat of climate change. If public and political opinion becomes more concerned about the footprint of gas, DOE may be persuaded to scrutinize gas applications more closely.
- Comment on foundational studies – DOE bases much of its public-interest review of a non-FTA application on economic and environmental studies it has commissioned on the costs and benefits of allowing gas export.<sup>491</sup> Every couple of years DOE updates these studies and seeks public comment. The findings in these documents largely determine whether additional exports will be authorized so it is important to comment as they are being drafted.

### **What are other resources on DOE's process permitting LNG facilities?**

Advocates have focused on challenging other aspects of LNG permitting, so there is little advocate-produced guidance material yet on DOE challenges. The DOE publishes some information about its process that an advocate may find helpful:

- Division of Natural Gas Regulation homepage. This site is the splashpage for DOE's LNG export applications. <https://www.energy.gov/fecm/division-natural-gas-regulation>.
- DOE Applications Summary Table. DOE updates a list of all LNG export applications that it has granted and publishes it approximately monthly: See *Long Term Applications Received by DOE/FE to Export* <https://www.energy.gov/fecm/articles/summary-lng-export-applications-lower-48-states>. This is a good source for the latest status for every export application that DOE has approved with the docket numbers for FTA and non-FTA applications.

### **How is this chapter organized?**

This first section is background information. Section 5.B describes the laws DOE must comply with: the Natural Gas Act, DOE regulations and two executive orders. A brief discussion of NEPA is included (an in-depth discussion of NEPA is in Chapter 4 Sections B.2-B.7). Section 5.C steps through the process of an application and identifies how and when advocates can be involved. Section 5.D

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<sup>490</sup> 15 U.S.C. § 717r(b) (“Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia.”) (emphasis added). Note that the reference to the “Commission” actually refers to the now-defunct Federal Power Commission. Since that agency was dissolved, DOE and FERC have stepped into its shoes for the purposes of implementing the different parts of the NGA and thus references to the Commission here apply to both FERC and DOE. This is why § 717r(b) governs judicial review, and not § 717r(d)(1) (providing for review of actions by federal agencies other than “the Commission”).

<sup>491</sup> <https://www.energy.gov/sites/default/files/2021-10/LNG%20Snapshot%20September%2030%202021.pdf> (“Foundational Studies for DOE's Public Interest Reviews of LNG Exports”).

identifies issues that an advocate can raise and highlights example motions and comments advocates have filed in previous challenges.

## What laws must DOE comply with?

The Natural Gas Act is the statute that describes DOE’s responsibilities in handling applications to export or import gas. DOE has enacted regulations that it must follow in complying with the NGA, which are found at 10 C.F.R. part 590 et seq. (“Administrative Procedures With Respect To The Import And Export Of Natural Gas”). DOE must also make sure that the projects it authorizes comply with NEPA when the project is not categorical excluded from NEPA review (which as of January 2022 is the case for almost all export projects, thanks to a 2020 rule change). If DOE fails to follow the NGA, its regulations, or NEPA, it is vulnerable to litigation under the Administrative Procedure Act, 5 U.S.C. 551, et seq. (the APA).

Section 5.B.1 describes the Natural Gas Act and the responsibilities it places on DOE. Section 5.B.2 explores the public interest analysis that is required when the gas is exported to certain countries. Section 5.B.3 describes DOE’s NEPA obligations. Section 5.B.4 provides an overview of other regulations and orders that are relevant for advocates. Section 5.B.5 discusses the length of authorizations that may be sought.

## What does the Natural Gas Act require of DOE when reviewing import and export applications?

Under the NGA, LNG applications are split into two categories: exports to countries with a free-trade agreement with the United States that require “national treatment for trade in natural gas”<sup>492</sup> (FTA countries) and those without such agreements (non-FTA countries). Approval for exporting to FTA countries is much easier than exporting to non-FTA countries:

The **exports to FTA countries** falls under NGA section 3(c) (15 U.S.C. § 717b(c)), which requires that FTA applications “shall be deemed to be consistent with the public interest” and granted “without modification or delay.” For these exports DOE **will not** conduct a public-interest review and “without modification or delay” authorizes the export or import requested, often within months of the application being filed. As of January 2022, there are less than two dozen countries with which the United States has free trade agreements that receive preferential treatment under the NGA: Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore.<sup>493</sup>

**Exports to non-FTA countries** do not get preferential treatment and are at least facially scrutinized. The non-FTA portion of an application falls under NGA section 3(a), 15 U.S.C. § 717b(a), which **does** require a DOE to ask whether the export is in the public interest (a “public-interest review”). For these exports, DOE/FE will issue a Federal Register Notice of application seeking comments, protests, and motions to intervene to make a public interest finding for these types of applications. Non-FTA applications are those that an advocate can intervene and comment on.

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<sup>492</sup> This is a term of art used to clarify that not all countries with FTA with the US will fall in this category of getting preferential regulatory treatment for gas imports. For example, Israel and Costa Rica have free trade agreements with the United States that do not require national treatment for trade in natural gas. Thus, exports to these two countries would be exports to non-FTA countries. <https://www.energy.gov/fecm/how-obtain-authorization-import-and-or-export-natural-gas-and-lng>.

<sup>493</sup> <https://www.energy.gov/fecm/how-obtain-authorization-import-and-or-export-natural-gas-and-lng>. For all FTA countries, see <http://www.ustr.gov/trade-agreements/free-trade-agreements>.

### What does the public interest review required for non-FTA applications include?

The public interest review required for non-FTA applications is different from the public interest reviews required by permits issued by FERC or the Army Corps.

DOE interprets NGA section 3(a) (non-FTA applications) as creating a **rebuttable presumption** that a proposed export of gas is in the public interest.<sup>494</sup> In doing so, DOE has relied on the D.C. Circuit court's statement that "there must be an affirmative showing of inconsistency with the public interest to deny the application" to export to non-FTA countries.<sup>495</sup> This step is a difficult burden that advocates have not yet succeeded in surmounting.<sup>496</sup>

It is also difficult to pin DOE to list of what must be considered in the public interest review because "public interest" is not defined in the statute or regulations, nor is there a list of criteria that must be considered (in contrast, for example, to the public interest review of the Corps' 404 permitting process). In the past, DOE has included factors such as economic impacts, international impacts, security of gas supply, and environmental impact. Courts will tend to defer to the factors DOE identifies for consideration, only large inconsistencies would likely be enough to cause a court to question DOE's decision on any given application. In 2020, it was DOE's practice to focus on "(i) the domestic need for the gas proposed to be exported, (ii) whether the proposed exports pose a threat to the security of domestic gas supplies, (iii) whether the arrangement is consistent with DOE's policy of promoting market competition, and (iv) any other factors bearing on the public interest, as determined by DOE."<sup>497</sup> In 2020 DOE also still was following guidance from 1984 policy guidelines established for the import of gas, namely that the federal government should "minimize [its] control and involvement in energy markets [while] promot[ing] a balanced and mixed energy resource system."<sup>498</sup>

DOE also relies on a number of economic and environmental studies that it has conducted on the export of gas in general.<sup>499</sup> Its public-interest review of applications relies on these studies, which as of January 2022 include two types:

- Economic Studies. DOE has commissioned a series of economic studies that were submitted for public comment. Following studies in 2012 and 2014/2015, the most recent study was conducted

<sup>494</sup> See 86 Fed. Reg. 2,243 n.6 (citing *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 203 (D.C. Cir. 2017)) ("We have construed [NGA section 3(a)] as containing a 'general presumption favoring [export] authorization.'") (quoting *W. Va. Pub. Serv. Comm'n v. U.S. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982)). Case can be found here: <https://www.leagle.com/decision/infco20170815296>.

<sup>495</sup> *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 203 (D.C. Cir. 2017) (quotations incorporated).

<sup>496</sup> Advocates tried to in *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189 (D.C. Cir. 2017). In that case, the court rejected Sierra Club's argument that environmental concerns—including impacts identified by the NEPA process as significant—could overcome the presumption in favor of exports. This case shows that simply arguing that environmental impacts can overcome this presumption is unlikely to sway the DOE or a court to deny an application.

<sup>497</sup> App. 24, Texas LNG Order on Non-FTA Application, FE Docket No. 15-62-LNG (DOE/FE Order No. 4489), Feb. 10, 2020, 20-22, <https://www.energy.gov/sites/prod/files/2020/02/f71/ord4489.pdf>.

<sup>498</sup> *Supra* (citing the Guidelines to say: "The market, not government, should determine the price and other contract terms of imported [or exported] natural gas .... The federal government's primary responsibility in authorizing imports [or exports] will be , evaluate the need for the gas and whether the import [or export] arrangement will provide the gas on a competitively priced basis for the duration of the contract while minimizing regulatory impediments to a freely operating market." (quoting U.S. Dep't of Energy, New Policy Guidelines and Delegations Order Relating to Regulation of Imported Natural Gas, 49 Fed. Reg. 6684 (Feb. 22, 1984))).

<sup>499</sup> DOE, *Liquefied Natural Gas (LNG) Exports* (Sept. 2021), <https://www.energy.gov/sites/default/files/2021-10/LNG%20Snapshot%20September%2030%202021.pdf>.

in 2018.<sup>500</sup> This 2018 study, “Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports” examined the probability and macroeconomic impact of various lower-48 sourced LNG export scenarios, with exports levels determined by market forces. It is not a case-by-case review of the economic effects for each authorization requested.

- Environmental Studies. DOE has commissioned multiple environmental studies on LNG that have been carried out by the National Energy Technology Laboratory. DOE uses them to underpin the environmental portion of its public interest review of lower-48 LNG exports. The “Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States” surveyed potential environmental impacts from unconventional gas production.<sup>501</sup> The “Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States”<sup>502</sup> and its 2019 update assessed the potential greenhouse gas (GHG) impacts of U.S. LNG exports vs. alternatives like coal (but notably not renewables).<sup>503</sup> The life cycle studies focused only on the lower 48 states—but thanks to pressure by advocates challenging the Alaska LNG project, DOE is currently conducting two Alaska-specific environmental studies: (i) a life cycle analysis calculating the GHG emissions for LNG exported from Alaska and transported by vessel to markets in Asia and potentially in other regions, and (ii) an upstream study examining aspects of gas production on the North Slope of Alaska.<sup>504</sup>

Note that none of these studies involve a case-by-case analysis of the effects for an individual project. DOE considers such analyses beyond its capabilities and too speculative to be part of the public interest determination.<sup>505</sup> Instead, it typically summarily concludes that LNG exports will not increase global greenhouse gas emissions in a “material or predictable way.” This failure to do a case-by-case analysis is something advocates should continue to challenge DOE on.

### **What are DOE’s NEPA responsibilities?**

In addition to considering environmental impacts in its public-interest review required by the NGA, DOE may need to consider environmental impacts as part of its NEPA responsibilities.

An in-depth discussion of NEPA is found in Chapter 4, Sections B.2–B.7, but to summarize, every federal agency that grants a permit or authorization to a large project like an LNG export terminal or

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<sup>500</sup> Background information for these studies (including the studies themselves, comments, and responses) are found here: *LNG Export Studies*, <https://www.energy.gov/fecm/downloads/lng-export-studies> (with links to the 2012 study and background information: <https://www.energy.gov/fecm/services/natural-gas-regulation/lng-export-study>; the 2014/2015 study: <https://fossil.energy.gov/app/docketindex/docket/index/11>; and the 2018 study: <https://fossil.energy.gov/app/docketindex/docket/index/10>).

<sup>501</sup> 2014 environmental review study and background (79 FR 48132): <https://www.energy.gov/fecm/addendum-environmental-review-documents-concerning-exports-natural-gas-united-states>.

<sup>502</sup> 2014 greenhouse gas life cycle study and background (79 FR 32260): <https://www.energy.gov/fecm/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states>.

<sup>503</sup> S. Roman-White, S. Rai, J. Littlefield, G. Cooney, T. J. Skone, “Life Cycle Greenhouse Gas Perspective On Exporting Liquefied Natural Gas From The United States: 2019 Update.” NETL (dated Sept. 12, 2019) <https://www.energy.gov/sites/prod/files/2019/09/f66/2019%20NETL%20LCA-GHG%20Report.pdf>. This study was published in the Federal Register on Sept. 19, 2019 and 84 FR 49278.

<sup>504</sup> App. 25, Alaska LNG Order on Rehearing. FE Docket No. 14-96-LNG (April 15, 2021) at 13-15 <https://www.energy.gov/sites/default/files/2021-04/ord3643b.pdf>.

<sup>505</sup> See, e.g., App. 24, Texas LNG Brownsville LLC Order Granting non-FTA Exports, FE Docket No. 15-62-LNG at 42 (Feb. 10, 2020) <https://www.energy.gov/sites/prod/files/2020/02/f71/ord4489.pdf>. (“[T]o model the effect that U.S. LNG exports would have on net global GHG emissions would require projections of how each of these fuel sources would be affected in each LNG-importing nation. Such an analysis would not only have to consider market dynamics in each of these countries over the coming decades, but also the interventions of numerous foreign governments in those markets. Moreover, the uncertainty associated with estimating each of these factors would likely render such an analysis too speculative to inform the public interest determination in DOE’s non-FTA proceedings.”).

expansion must comply with NEPA (the National Environmental Policy Act) and must review the projects for their potential environmental impacts unless the activity being permitted is categorically excluded from NEPA review.

With FERC designated as “lead agency” responsible for conducting the main NEPA review for LNG export terminals, DOE has historically just participated in FERC’s process as a consulting agency, incorporating FERC’s final NEPA analysis and conclusions into its own orders authorizing the export of gas. DOE still has the responsibility to ensure that FERC’s NEPA analysis covers its own responsibilities under NEPA (and if not it must conduct its own environmental review). However recently DOE has vastly shrunk its responsibilities to conduct **any** NEPA review for applications to export LNG: in 2021 DOE rewrote its regulations to find that exports from terminals via ship are **categorically excluded** from NEPA review.<sup>506</sup> Advocates have challenged many of the changes that the 2020 administration made to NEPA, but it does not appear that this exclusion has been challenged. Until this rule changes, DOE will still be a consulting agency for FERC’s NEPA review but may only need to rely on FERC’s review to support its public-interest determination. Despite this bleak outlook on DOE’s NEPA responsibilities, DOE still on its own may revise its regulations yet again—which is why it is so important for advocates to intervene in these applications to make sure their rights are preserved in case the legal landscape changes.

### **Other than the NGA and NEPA, what other orders or regulations are relevant for DOE’s review of LNG applications?**

Advocates challenging DOE’s authorization process should read DOE’s most current regulations implementing NGA and NEPA. These can be found here: 10 C.F.R. Part 590 et seq. (NGA); and here: 10 C.F.R. Part 1021 et seq. (NEPA) (most relevant when DOE conducts its own NEPA analysis in addition to FERC’s) and 10 C.F.R. Part 1021, Subpart D, App. B (categorical exclusions from NEPA). DOE’s NEPA regulations may be changing in 2022, given that DOE has been directed to review them and align them with the current Administration’s concerns.<sup>507</sup> Other regulations that could be of interest to an advocate are DOE’s FOIA request regulations: 10 C.F.R. Part 1004 et seq.<sup>508</sup>

Two of the Biden Administration’s executive orders have been directly relevant in DOE deciding to reconsider its authorization of some gas exports (specifically for the Alaska LNG project):

- [E.O. 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis](#). E.O. 13990 directs agencies to “immediately review” all regulations, orders, and

<sup>506</sup> Specifically, categorical exclusion B5.7: “Export of natural gas and associated transportation by marine vessel” (categorically excluding from NEPA review any: “Approvals or disapprovals of new authorizations or amendments of existing authorizations to export natural gas under section 3 of the Natural Gas Act and any associated transportation of natural gas by marine vessel.”). 10 C.F.R. Part 1021, Subpart D, App. B. Prior to Jan. 4, 2021, the exclusion only applied to authorizations that involved minor operational changes. Authorizations that would require any new construction was not excluded, and DOE would need to do its own NEPA review or rely on FERC’s. See “Categorical Exclusion Determinations: B5.7” DOE’s Office of NEPA Policy and Compliance. The final rule can also be found here:

<https://www.federalregister.gov/documents/2020/12/04/2020-26459/national-environmental-policy-act-implementing-procedures>; see also

<https://www.energy.gov/nepa/listings/categorical-exclusion-determinations-b57> (describing the change).

<sup>507</sup> See “Deadline for Agencies To Propose Updates to National Environmental Policy Act Procedures.”

86 FR 34154 (July 29, 2021) (extending the deadline for agencies to review their NEPA regulations to Sept. 14, 2023). <https://www.federalregister.gov/documents/2021/06/29/2021-13770/deadline-for-agencies-to-propose-updates-to-national-environmental-policy-act-procedures>.

<sup>508</sup> For DOE’s web portal for FOIA requests, see <https://www.energy.gov/management/freedom-information-act>.

other actions issued after January 20, 2017, that may increase GHG emissions or have other impacts on climate change.<sup>509</sup>

- **E.O. 14008, Tackling the Climate Crisis at Home and Abroad.** E.O. 14008 sets forth additional policies to address climate change—specifically to “organize and deploy the full capacity of [Federal] agencies to combat the climate crisis”—and requires the “Federal Government [to] drive assessment, disclosure, and mitigation of climate pollution and climate-related risks in every sector” of the U.S. economy.<sup>510</sup>

In part because of these orders the DOE is in the process of conducting additional studies of the lifecycle greenhouse gas emissions from exporting LNG from Alaska; as advocates challenging the Alaska LNG project pointed out, DOE’s current lifecycle studies are focused only on the lower 48 states and did not include Alaska. This outcome is a good example of why it is important for advocates to intervene in DOE proceedings and raise concerns even when the political climate is unfavorable—because it is impossible to predict when political winds might change. In the Alaska LNG project, the advocates requested rehearing on September 21, 2020, before the Biden Administration was elected and before the executive orders issued.<sup>511</sup> Had advocates confined themselves to raising more conservative arguments (or had they not been involved at all), they might never have succeeded in having their rehearing request granted.

### **What length of authorization might an export facility seek?**

As January 2022, most large-volume applicants building or expanding export terminals seek what is known as long-term authorizations for their FTA and non-FTA exports. For long-term applications the requested term can span decades, up to 2050. The process for applying for authorizations of different lengths could change if DOE reverts its regulations to previous procedures: up until January 2021, DOE had two separate tracks for approving applications relevant for large LNG export terminals, depending on whether the proposed import or export was longer or shorter than two years:

- **Short-term blanket authorization.** A blanket import and/or export authorization enables a company to import and/or export gas on a short-term or spot-market basis<sup>512</sup> under agreements with terms of no longer than two years. Gas purchase and sales contracts are not filed as part of an application, but a start date is required. The first short-term authorization was requested by and granted to Sabine Pass Liquefaction LLC in 2015 and 2016, respectively. A more recent example of a short-term authorization request is the one made by Carib Energy, LLC, in 2021, to reexport LNG via container ship carriers from an existing LNG import terminal.<sup>513</sup> Only small exporters are expected to request blanket authorizations going forward given the 2021 rule change.
- **Long-term authorization.** DOE directs applicants to apply for long-term import or export authorization if they will sign a gas purchase and/or sales contract for a period of time longer than

<sup>509</sup> Exec. Order 13990 of Jan. 20, 2021, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 FR 7037 (Jan. 25, 2021), available at: <https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis>.

<sup>510</sup> Exec. Order No. 14008 of Jan. 27, 2021, Tackling the Climate Crisis at Home and Abroad, 86 FR 7619 (Feb. 1, 2021), available at: <https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad>.

<sup>511</sup> App. 28, Sierra Club Request for Rehearing, Alaska LNG, FE Docket No. 14-96-LNG (Sept. 21, 2020).

<sup>512</sup> The spot market is a financial market in which commodities like gas are traded for immediate delivery, so the buyer is unknown at the time of DOE authorization. See “Spot Market.” Wikipedia.org [https://en.wikipedia.org/wiki/Spot\\_market](https://en.wikipedia.org/wiki/Spot_market).

<sup>513</sup> Carib Energy Application. [www.energy.gov/sites/default/files/2021-09/21-99-LNG.pdf](http://www.energy.gov/sites/default/files/2021-09/21-99-LNG.pdf).

two years. DOE’s regulations (10 C.F.R. § 590.202) require an applicant to submit in its application the contract(s) with the identity of the sellers of gas, the markets in which the gas is to be sold, and the terms of the sale agreement(s) along with a start date; however in practice DOE has allowed applicants to submit these specifics **after** DOE has authorized the total volume to be exported. Under DOE’s current rules, an applicant can request authorization to export up to 2050.

In 2021, the Trump Administration did away with the distinction between long-term and short-term authorizations for exports. With this policy, entitled “Including Short-Term Export Authority in Long-Term Authorizations for the Export of Natural Gas on a Non-Additive Basis,” DOE discontinued its practice of issuing separate long-term and short-term authorizations under NGA section 3 for exports of gas from the same facility.<sup>514</sup> DOE instead established a practice that all long-term authorizations to export domestically produced gas—including LNG, compressed gas, and compressed gas liquid—will include authority to export the same approved volume via transactions with terms of less than two years on a non-additive basis (including non-additive commissioning volumes exported prior to the start of a facility’s commercial operations). In other words, volumes sold in the short-term and long-term are bundled together in one order.

## Step-by-step, how does DOE satisfy its responsibilities and how do I participate?

### How does an applicant apply for authorization to export gas?

DOE maintains a “How to Obtain Authorization to Import and/or Export Natural Gas and LNG” webpage that is a good place to start for understanding the application process:

<https://www.energy.gov/fe/services/natural-gas-regulation/how-obtain-authorization-import-and-or-export-natural-gas-and-lng>.

The first formal step an applicant takes is to file an application with the DOE. Applicants that have not previously registered with DOE must create an account. DOE has an online portal for applicants submitting short-term blanket (2-year) authorizations.<sup>515</sup> Long-term export and import applications cannot use the Portal and must be submitted in hard copy or electronically.<sup>516</sup>

Note that before the DOE application is formally filed, the applicant may have approached DOE informally and/or as part of its FERC certification process—the applicant’s filings with FERC may reveal details about DOE and the applicant’s interactions that would not otherwise be apparent from the DOE docket.

### What must the application include?

DOE’s application process is much simpler than FERC’s, and the simplified application reflects that. The contents of an application are described in 10 C.F.R. § 590.202. If known at the time, it must identify all participants in the transaction, including the parent company and any corporate or other affiliations among the participants.<sup>517</sup> Each application “shall” contain “a statement describing the action sought from FE [now renamed DOE’s Office of Fossil Energy and Carbon Management], the

<sup>514</sup> The rule can be found here: 86 FR 2243-46 (published Jan. 12, 2021)

<https://www.federalregister.gov/documents/2021/01/12/2020-28599/including-short-term-export-authority-in-long-term-authorizations-for-the-export-of-natural-gas-on-a>.

<sup>515</sup> See “Import/Export Authorization Portal for Natural Gas User Manual,” FECM, April 2019, Version 1.2.

[https://fossil.energy.gov/fergas-fe/docs/Portal\\_User\\_Manual\\_v\\_1\\_2.pdf](https://fossil.energy.gov/fergas-fe/docs/Portal_User_Manual_v_1_2.pdf).

<sup>516</sup> FECM. “How to Obtain Authorization to Import and/or Export Natural Gas and LNG.” <https://www.energy.gov/fecm/how-obtain-authorization-import-and-or-export-natural-gas-and-lng>.

<sup>517</sup> 10 C.F.R. § 590.202(b)(3).

justification for such action, **including why the proposed action is not inconsistent with the public interest.**<sup>518</sup> The application also must address the potential environmental impact of the project and, to the extent possible, list and describe any environmental assessments or studies being performed on the proposed gas project. The application must be updated as the status of any environmental assessments change.<sup>519</sup>

Each application filed with DOE must be accompanied by a \$50 filing fee.<sup>520</sup> Applications must be filed at least 90 days before the proposed import or export—an applicant that wishes to obtain faster authorization must show good cause for why the process should be expedited.<sup>521</sup>

Once DOE receives an application, it assigns the project a docket number (e.g., 21-98-LNG is the Freeport LNG expansion docket number). Any additional information submitted to DOE related to this project (e.g., intervention motions, comments) must reference this docket number.

### Where can I find the docket information for an applicant’s DOE filings?

The docket information for an applicant’s DOE filings is available here, searchable by year application filed and year application granted: <https://www.energy.gov/fe/articles/electronic-docket-room-e-docket-room>. Bookmark this page if you will be challenging multiple projects.

To find a specific project, it is probably easiest to use the first section of the database to search by the year the application was filed.<sup>522</sup>

First expand the date range of interest:

**E-DOCKET DATABASE**

Please note, to begin your search using the [database](#), select the 'Show' dropdown tab beside "Search Criteria", in order to show your search options. If you need any additional assistance with navigating this database, [email](#) the docket room. ([Click](#) to view information on how to obtain an authorization.)

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**APPLICATIONS, INCLUDING LNG EXPORT, COMPRESSED NATURAL GAS (CNG); RE-EXPORTS & LONG-TERM NATURAL GAS, SUBMITTED TO THE DOE BY YEAR**

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2021 - 2020 —

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- 2021
- 2020

As of January 2022, clicking on a year (e.g., 2021) navigates to a new screen listing the applications that have been filed thus far this year (two, as of Nov. 2, 2021). Clicking on “Docket Index” opens a new webpage with the docket information for each project.<sup>523</sup>

<sup>518</sup> 10 C.F.R. § 590.202(a) (emphasis added).

<sup>519</sup> 10 C.F.R. § 590.202(b)(7).

<sup>520</sup> 10 C.F.R. § 590.207.

<sup>521</sup> 10 C.F.R. § 590.201(b).

<sup>522</sup> <https://www.energy.gov/fecm/articles/electronic-docket-room-e-docket-room>.

<sup>523</sup> “2021 LNG Export, Compressed Natural Gas (CNG), Re-Exports & Long Term -LNG”

<https://www.energy.gov/fecm/articles/2021-lng-export-compressed-natural-gas-cng-re-exports-long-term-lng>.

Office of Fossil Energy and Carbon Management »

2021 LNG Export, Compressed Natural Gas (CNG), Re-Exports & Long Term -LNG

Please note: To view the complete docket listing, please click the 'Docket Index' link pertaining to a particular docket. Docket Indexes and Service Lists that are not listed can be obtained by contacting the Docket Room at 202-586-9478 or email at [fergas@hq.doe.gov](mailto:fergas@hq.doe.gov).

All application link files are in PDF format and require pdf viewer.

DOCKET NO.	DATE FILED	IMPORT/EXPORT	COUNTRY	APPLICANT	DOCKET INDEX
21-98-LNG	09/10/2021	Export	NFTA	Freeport LNG Expansion, L.P., FLNG Liquefaction, LLC, FLNG Liquefaction 2, LLC and FLNG Liquefaction 3, LLC	<a href="#">Docket Index</a>
21-99-LNG	09/14/2021	Re-export	FTA/NFTA	Carib Energy (USA) LLC	<a href="#">Docket Index</a>

After a short description of the project and the application, there will be an identification of the cumulative impact studies and environmental documents on which DOE will rely in deciding whether to grant the application.<sup>524</sup> At the end of the page will be the table with the docket entries. The docket should contain a copy of the export application<sup>525</sup> and the notice of application (if non-FTA exports are requested),<sup>526</sup> which contains important information on when and how to comment and intervene.

**How do I sign up for notifications of filings?**

As of January 2022, the only way to get automatic notifications of filings in a certain docket is to file a motion to intervene during the intervention period specified in the Notice of Application.

**When and how do I comment on an open docket?**

The comment period will be defined in the notice of application, which is published in the Federal Register and on the docket for the project. The comment period should be no less than 30 days, and has typically been 60 days.

The notice of application will also explain how to file comments. During the COVID-19 pandemic, DOE has switched to only accepting electronic submissions, unless a commentator finds this an undue hardship, at which point they are directed to reach out to DOE for alternative options. Once the

<sup>524</sup> See, e.g., “Freeport LNG Expansion, L.P., FLNG Liquefaction, LLC, FLNG Liquefaction 2, LLC and FLNG Liquefaction 3, LLC - FE Dkt. No. - 21-98-LNG” <https://www.energy.gov/fecm/articles/freeport-lng-expansion-lp-flng-liquefaction-llc-flng-liquefaction-2-llc-and-flng>.

<sup>525</sup> See e.g., “Application For Long-Term Authorization To Export Liquefied Natural Gas To Non-Free Trade Agreement Nations” FE Docket No. 21-98-LNG (Freeport LNG Expansion, L.P.) <https://www.energy.gov/sites/default/files/2021-09/21-98-LNG.pdf>.

<sup>526</sup> See e.g., “Notice of Application” 86 FR 56,258 (FE Docket No. 21-98-LNG) [https://www.energy.gov/sites/default/files/2021-10/2021-22018\\_FE\\_NOA\\_Freeport%20LNG%20Expansion%20LP.pdf](https://www.energy.gov/sites/default/files/2021-10/2021-22018_FE_NOA_Freeport%20LNG%20Expansion%20LP.pdf).

pandemic is resolved, DOE anticipates that it will again accept postal mail and hand delivery of comments.<sup>527</sup>

As for electronic submissions, unlike FERC’s process, there is no e-filing system in place as of January 2022. Instead, commentors and would-be intervenors have been directed to email all filings directly to [fergas@hq.doe.gov](mailto:fergas@hq.doe.gov) (make sure this is still the correct address to use for your project!).<sup>528</sup> All filings must include a reference to the Docket Number or the application title—the notice will describe the specific information that must be included. The notice will also describe any other rules on how to file supporting material, and whether hyperlinks in comments are allowed (which recently have **not** been permitted). To make sure that the filing has been received, it is good practice to request and receive a confirmation that it has been received. The filing should eventually be visible on the public docket, but there may be some delay before it is posted.

There may be multiple comment periods for one project. For example, if the applicant amends its application, a new notice will issue, and the comment period will reopen for comments on the requested amendment. Would-be commentors should not delay in hopes that a new comment period opens!

### WARNING

**Do not** rely on DOE’s general “Dockets Open for Public Comment” page<sup>529</sup> to check for dockets that are accepting comments—instead use the E-Docket Room<sup>530</sup> and check docket by docket. DOE does not appear to have updated the “Dockets Open for Public Comment” page since 2014!

### What is the difference between a comment and a protest?

DOE allows anyone to file a comment or a protest in response to an application. Neither will grant an advocate the same rights as an intervention, but unlike a comment, the filing of a protest is one way to convert a proceeding into a contested proceeding,<sup>531</sup> triggering the need for merits-related conversations between the applicant and DOE to go on the record.<sup>532</sup> Also unlike a comment, a protest must be served on the applicant.<sup>533</sup> Comments can simply be sent to the DOE by the means described in the notice.

An example answer and protest to the Jordan Cove application amendment filed by Sierra Club can be found in Appendix 26 and online at:

<sup>527</sup> See, e.g., Notice of Application on Docket No. 21-98-LNG. 86 FR 56,259 (Oct. 8, 2021) (“DOE is currently accepting only electronic submissions at this time. If a commenter finds that this change poses an undue hardship, please contact Office of Resource Sustainability staff at (202) 586–2627 or (202) 586–4749 to discuss the need for alternative arrangements. Once the Covid-19 pandemic health emergency is resolved, DOE anticipates resuming all of its regular options for public comment submission, including postal mail and hand delivery/courier.”).

<sup>528</sup> Sometimes comments can be filed through the project’s listing on <https://www.regulations.gov/>. (You can search by agency and name). No other motions can be submitted this way—they must be submitted in the manner described by in the notice.

<sup>529</sup> “Dockets Open for Public Comment” (April 9, 2014) <https://www.energy.gov/fecm/downloads/dockets-open-public-comment> (listing no dockets despite Freeport LNG’s export application being open at this time).

<sup>530</sup> <https://www.energy.gov/fecm/articles/electronic-docket-room-e-docket-room>.

<sup>531</sup> 10 C.F.R. § 590.102(b) (defining “contested proceeding”).

<sup>532</sup> 10 C.F.R. § 590.108.

<sup>533</sup> 10 C.F.R. § 590.107(a).

[https://fossil.energy.gov/ng\\_regulation/sites/default/files/programs/gasregulation/authorizations/2012/applications/March\\_23\\_2016\\_12-32-LNG/SC\\_MOI\\_03\\_23\\_16.pdf](https://fossil.energy.gov/ng_regulation/sites/default/files/programs/gasregulation/authorizations/2012/applications/March_23_2016_12-32-LNG/SC_MOI_03_23_16.pdf).

### How do I file a motion to intervene?

Motions to intervene may be filed at any time following the filing of an application, but no later than the date fixed for filing such motions in the notice of application (or subsequent DOE order). Late intervention motions are only granted for good cause. Advocates should intervene as soon as possible to avoid a procedural fight that they might lose for failure to show good cause for the delay. In addition, late intervenors must accept the record in the proceeding as-is before their intervention.<sup>534</sup>

The motion to intervene should include the facts supporting all rights and interests the intervenor has in the proceeding because “participation of the intervenor shall be limited to matters affecting asserted rights and interests specifically set forth in the motion to intervene.”<sup>535</sup> A motion to intervene must state, to the extent known, the position taken by the advocate (e.g., opposed to the authorization requested) and the factual and legal basis for such positions (e.g., the Natural Gas Act, the public interest review, DOE’s regulations, NEPA, and the APA) to advise the parties and the DOE as to the specific issues of policy, fact, or law to be raised or controverted.<sup>536</sup> It need not be a long document (2-3 pages), but often it is combined with comments or a protest, so previous examples may appear long at first glance. A few example motions to intervene from the Jordan Cove Project are found in the Appendix:

- Appendix 29 (Motion to Intervene, Protest, and Comment) filed by Sierra Club: [https://fossil.energy.gov/ng\\_regulation/sites/default/files/programs/gasregulation/authorization/2012/applications/sierra\\_club08\\_06\\_12.pdf](https://fossil.energy.gov/ng_regulation/sites/default/files/programs/gasregulation/authorization/2012/applications/sierra_club08_06_12.pdf). The motion to intervene is pages 1-3; the remainder is the Club’s protest and comments.
- Appendix 31 (Motion to Intervene and Protest) filed by the American Public Gas Association: [https://fossil.energy.gov/ng\\_regulation/sites/default/files/programs/gasregulation/authorizations/2012/orders/apga08\\_06\\_12.pdf](https://fossil.energy.gov/ng_regulation/sites/default/files/programs/gasregulation/authorizations/2012/orders/apga08_06_12.pdf).

Any party may file an answer to any motion (including a motion to intervene) up to 15 days after the motion is filed. Advocates should expect the applicant to file such an answer to intervention motions because DOE’s regulations state that failure to answer is deemed a waiver of any objection to the intervention.<sup>537</sup> Advocates are encouraged to request in the original motion to intervene that they be given a chance to reply if any party answers opposing the motion.<sup>538</sup> DOE is likely to grant a timely motion to intervene even if it is answered, but an untimely motion may not be so lucky.

Note that filings are typically due at DOE by **4:30 PM Eastern Time** on the date outlined in the relevant notice. This is different from at FERC, which has a 5:00 PM Eastern Time deadline. Late filings will seldom be considered. Preserve your rights; file early!



<sup>534</sup> 10 C.F.R. § 590.303(h).

<sup>535</sup> 10 C.F.R. § 590.303(g).

<sup>536</sup> 10 C.F.R. § 590.303(c).

<sup>537</sup> 10 C.F.R. § 590.303(e).

<sup>538</sup> Cf. 10 C.F.R. §§ 590.302, 590.310 (allowing for procedural motions and briefing in these cases).

### **What are my rights and responsibilities as an intervenor?**

By intervening, you become a “party” to the application process,<sup>539</sup> and you gain certain rights and responsibilities. Only parties may request additional procedures, like conferences, oral presentations, or trial-type hearings. Only parties may apply for rehearing of a DOE order on the applications. Parties may also conduct discovery (*i.e.*, get information from an applicant about their project or application beyond what they have disclosed) on other parties through the use of written interrogatories or production of documents, with the DOE being the arbitrator of discovery procedure disputes as they arise.<sup>540</sup> Parties may also seek admissions of facts from other parties. If you are contemplating using these tools to seek information from an applicant, make sure to consult legal counsel because discovery motions like this can be difficult to draft well without prior experience.

Intervenors will be added to the “service list” for the project and will be sent a copy of all documents filled in the docket. Intervenors must send (“serve”) a copy of all documents they file to everyone else on the service list. This includes the motion to intervene, comments, and the application for rehearing. People on the service list include the applicant, consulting agencies (if any) and other intervenors. The service list for each project can be found using the DOE docket number here: <https://fossil.energy.gov/fergas-fe/#/serviceList>. DOE’s regulations do not allow service by email.<sup>541</sup> Advocates are encouraged to request that DOE allow service by email.<sup>542</sup> DOE has agreed to such a request in the past,<sup>543</sup> which has saved the parties time and money.

### **How does intervention make the process more transparent?**

Intervention is the best way to convert the application process to a “contested proceeding.” In a contested proceeding, DOE may no longer keep its communications with the applicant private. Instead, it must make accessible to the public any off-the-record communication that is relevant to the merits of a proceeding.<sup>544</sup> The docket entry for these communications are normally tagged as “off-the-record.”<sup>545</sup> Off-the-record communications may also be comments received from interested parties.

If you suspect there are off-the-record conversations not being placed on the docket, a FOIA request may help. It is important to tailor the FOIA request to meet the requirements of DOE’s FOIA request regulations: 10 C.F.R. Part 1004 et seq.<sup>546</sup> (See also Chapter 6 Section C.12 (Corps FOIA requests) for general advice on drafting FOIA requests and sample FOIA requests for a variety of agencies.)

### **What’s the deadline to request that DOE conduct a conference, oral presentation, or trial-type proceeding as part of its review process, and what should that request include?**

If an advocate wants to request that DOE conduct a conference, oral presentation, or trial-type proceeding before deciding on the application, the advocate **must** do so during the comment period,

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<sup>539</sup> 10 C.F.R. § 590.102(l).

<sup>540</sup> 10 C.F.R. § 590.305.

<sup>541</sup> 10 C.F.R. § 590.107(c) (allowing for service by hand, certified mail, registered mail, or regular mail).

<sup>542</sup> As a motion or under the DOE’s own powers at 10 C.F.R. § 590.310 to provide for additional procedures.

<sup>543</sup> Order Allowing Electronic Service in Proceeding, FE Docket No. 12-32-LNG (Jordan Cove Project) (Aug. 10, 2018)

[https://fossil.energy.gov/ng\\_regulation/sites/default/files/programs/12-32-LNG\\_Jordan\\_Cove\\_081018.pdf](https://fossil.energy.gov/ng_regulation/sites/default/files/programs/12-32-LNG_Jordan_Cove_081018.pdf).

<sup>544</sup> 10 C.F.R. § 590.108 (“Off-the-record communications”).

<sup>545</sup> See e.g., <https://www.energy.gov/fecm/downloads/record-communication-jordan-cove-energy-project-lp-fe-dkt-no-12-32-lng>.

<sup>546</sup> For DOE’s web portal for FOIA requests, see <https://www.energy.gov/management/freedom-information-act>.

or risk forever waiving the option to request these additional procedures.<sup>547</sup> So that DOE does not overlook this request, advocates are encouraged to make this request in a separate motion, not the motion to intervene, and include the information required by DOE for requests for conference (10 C.F.R. § 590.311), oral presentations (10 C.F.R. § 490.312), and trial-type hearings (10 C.F.R. § 590.313). Only advocates that have intervened (thereby becoming “parties”) may request these additional procedures.

Any request for a **conference** should demonstrate why the conference would materially advance the proceeding. Any request for an **oral presentation** should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a **trial-type hearing** must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.<sup>548</sup>

DOE must rule on a motion for additional procedures like a conference, oral presentation or trial-type proceeding. Unlike for other motions, motions for additional procedures are not denied by default after a certain amount of time passes.<sup>549</sup> If DOE agrees that additional procedures are appropriate, it will file another notice in the Federal Register and the docket as to what those procedures will be.<sup>550</sup>

### **How likely is it that DOE grants additional procedures, and if it does, what should I expect?**

DOE has not granted additional procedures like a conference, oral presentation or trial-type proceeding in the past. Significant pressure would likely need to be placed on the agency to change this predilection. If a request for a conference, oral presentation, or trial-type proceeding is granted, it is very important to read 10 C.F.R. Subpart C “Procedures” and then work with an attorney experienced with advocacy in front of the DOE or other federal agency on LNG projects.<sup>551</sup> Even if the request is not granted, the making of the request itself may help elevate public and political scrutiny of the project.

However, DOE has granted other sorts of additional procedures, such as requests to allow service by email and extensions of time to file comments or answer. DOE has even allowed an answer to a request for rehearing, which isn’t normally considered.<sup>552</sup> Advocates should not hesitate to request

<sup>547</sup> 10 C.F.R. § 590.205(b) (“Failure to request additional procedures at this time **shall** be deemed a waiver of any right to additional procedures should the Assistant Secretary decide to grant the application and authorize the import or export by issuing a final opinion and order in accordance with § 590.316.”) (emphasis added).

<sup>548</sup> The Notice of Application may no longer include this detail describing what the additional procedures are and what an advocate must show to have one granted. Compare “Freeport LNG Development, L.P.; Application for Blanket Authorization To Export Previously Imported Liquefied Natural Gas on a Short-Term Basis,” 78 FR 35,263 at 65 (June 12, 2013) <https://www.govinfo.gov/content/pkg/FR-2013-06-12/pdf/2013-13944.pdf> (including these details) with “Freeport LNG Expansion, L.P.; FLNG Liquefaction, LLC; FLNG Liquefaction 2, LLC; and FLNG Liquefaction 3, LLC; Application for Long-Term Authorization To Export Liquefied Natural Gas to Non-Free Trade Agreement Nations,” 86 FR 56,258-60 [https://www.energy.gov/sites/default/files/2021-10/2021-22018\\_FE\\_NOA\\_Freeport%20LNG%20Expansion%20LP.pdf](https://www.energy.gov/sites/default/files/2021-10/2021-22018_FE_NOA_Freeport%20LNG%20Expansion%20LP.pdf) (omitting these details). This lack of transparency is another reason that it is so important to read the statute and regulations that DOE must follow, and not just rely on the case-by-case notices.

<sup>549</sup> See 10 C.F.R. § 590.302(c) (“Any motion, except for motions seeking intervention or requesting that a conference, oral presentation or trial-type hearing be held, shall be deemed to have been denied, unless the Assistant Secretary or presiding official acts within thirty (30) days after the motion is filed.”).

<sup>550</sup> 10 C.F.R. § 590.206.

<sup>551</sup> 10 C.F.R. §§ 590.301-17.

<sup>552</sup> DOE did so when ruling on Sierra Club’s rehearing request in Alaska LNG, likely because it was ruling adversely to the party requesting the answer (the applicant).

any additional procedures that would be helpful in challenging the process and increasing its transparency.

### **How do I file an application for rehearing DOE's order?**

An application for rehearing of a final opinion and order, conditional order, or emergency interim order may be filed by any party within thirty (30) days after issuance.<sup>553</sup> This request **must** be filed timely to preserve an advocate's right to later litigate the authorization, if it stands.

It is important not to delay in filing an application for rehearing—to understand how DOE computes time, see 10 C.F.R. § 590.105 (“Computation of time”). Note also that unlike other agencies, DOE's business hours end at 4:30 pm E.T.<sup>554</sup> Anything filed later than that will be deemed to have been filed on the next regular business day.

The application for rehearing must state the alleged errors in the order and must set forth specifically the ground or grounds upon which the application is based. If an order is sought to be vacated, reversed, or modified by reason of matters that have arisen since the issuance of order, the matters relied upon shall be set forth with specificity in the application. The application shall also comply with the filing requirements of § 590.103.<sup>555</sup> With very rare exceptions, only issues raised in the application for rehearing can be appealed to a federal court for review, so it is very important to consult with litigation counsel at the rehearing stage to ensure that all viable issues are preserved for the appeal.<sup>556</sup>

Two examples of applications for rehearing are in the Appendix, namely in Appendix 30 (Sierra Club's Request for Rehearing in the Jordan Cove Project)<sup>557</sup> and in Appendix 28 (Sierra Club's Request for Rehearing the Alaska LNG Project).<sup>558</sup>

The filing of an application for rehearing does not stay (i.e., pause) DOE's order,<sup>559</sup> an advocate must specifically request in the application that the order be suspended (and even if requested, is by no means guaranteed to be granted). DOE has discretion to not grant a stay of the order and may rule on the application without holding a hearing or requesting additional briefing.<sup>560</sup> No one may file an answer to a rehearing application (although a **motion** to answer would likely be allowed); however, on a case-by-case basis, DOE may allow the parties to file briefing or answers and may even order that a conference, oral presentation, or trial-type hearing be held on some or all of the issues presented by an application for rehearing.<sup>561</sup> For example, in the Alaska LNG rehearing proceeding, the applicant was allowed to file an answer, which DOE considered. But do not rely on DOE granting additional proceedings and hold back any arguments—whether DOE grants additional proceedings is up to the

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<sup>553</sup> 10 C.F.R. § 590.501(a).

<sup>554</sup> 10 C.F.R. § 590.105.

<sup>555</sup> 10 C.F.R. § 590.501(b).

<sup>556</sup> 15 U.S.C. § 717r(b) (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.”) Recall that “Commission” refers to DOE in this instance.

<sup>557</sup> [https://www.energy.gov/sites/prod/files/2020/08/f77/Rehearing%20Request\\_%20SC%208\\_5\\_20.pdf](https://www.energy.gov/sites/prod/files/2020/08/f77/Rehearing%20Request_%20SC%208_5_20.pdf).

<sup>558</sup> <https://www.energy.gov/sites/prod/files/2020/09/f79/Rehearing%20request%20-%20Alaska%20LNG%20DOE%20SC.pdf>.

<sup>559</sup> 10 C.F.R. § 590.502.

<sup>560</sup> 10 C.F.R. § 590.503.

<sup>561</sup> 10 C.F.R. § 590.505.

discretion of DOE. Don't rely on DOE exercising its discretion in your favor if there is a way to make the point in a timely filing that DOE's rules require it to consider.

If DOE does not act on the rehearing application within thirty days, the application is deemed denied.<sup>562</sup> After that point, an advocate may appeal the DOE's order in federal court: either the D.C. Circuit or, if the advocate prefers, the local circuit court of appeals presiding over the location of the applicant's principal place of business—likely the Fifth Circuit for Texas and Louisiana applicants.<sup>563</sup> Note that most appeals that have the choice of the Fifth or D.C. Circuit end up in D.C.; the Fifth Circuit has a reputation for being more conservative and less receptive to environmental advocates' concerns.

### **TIEBREAKING: WHAT IF THE CASE IS FILED IN BOTH CIRCUITS?**

If one party seeking rehearing files in one circuit and the other files in another, the case will essentially be randomly assigned to one or the other. Thus, it's possible that you'll still end up in the Fifth Circuit even if you file in D.C.

Experienced litigation counsel can help you plan for and navigate this scenario!

This right to appeal after thirty days is triggered even if DOE has indicated that it will eventually act on the rehearing request (but hasn't yet).<sup>564</sup> If this happens, it can be helpful to appeal. Appealing puts a clock on DOE to issue its order because DOE may revise its order only up until the administrative record (i.e., the documents on the project's DOE docket) must be sent to and docketed with the reviewing court. In addition, a court may be more likely to stay DOE's order pending review than DOE itself may be—it is at least one more entity involved that has that power.

<sup>562</sup> 10 C.F.R. § 590.504.

<sup>563</sup> 15 U.S.C. § 717r(b) (“Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia.”) (emphasis added). Note that the reference to the “Commission” actually refers to the now-defunct Federal Power Commission. Since that agency was dissolved, DOE and FERC have stepped into its shoes for the purposes of implementing the different parts of the NGA and thus references to the Commission here apply to both FERC and DOE. This is why § 717r(b) governs judicial review, and not § 717r(d)(1) (providing for review of actions by federal agencies other than “the Commission”).

<sup>564</sup> DOE recognized an intervenor's right to do just that in its Rehearing Order on the Alaska LNG Project. See <https://www.energy.gov/sites/default/files/2021-04/ord3643b.pdf> (“consistent with *Allegheny Defense Project* [v. FERC, 964 F.3d 1, 3, 18-19 (D.C. Cir. 2020)], Sierra Club was permitted to consider its Rehearing Request ‘deemed’ to have been denied’ for purposes of judicial review when DOE did not issue an order on the Rehearing Request within 30 days.”) (quoting 15 U.S.C. § 717r(a)).

**WARNING**

DOE has recognized that there is an avenue in the NGA that would allow *anyone* (i.e., not just a “party”) to request that an authorization be suspended or revoked *even if* that authorization is no longer subject to judicial review—i.e., if a court has upheld the authorization, or if the advocate has missed the deadline for a rehearing request and the order has become final without a judicial challenge.<sup>565</sup> **Do not rely on this avenue to challenge a terminal!** DOE has indicated that it “take[s] very seriously the investment-backed expectations of private parties and would not rescind a previously granted authorization except in the event of extraordinary circumstances.”<sup>566</sup> Nor does DOE believe it would be bound to conduct a public-interest review in deciding on such a request—indeed, it does not believe the NGA sets forth *any* specific criteria for evaluating such requests.<sup>567</sup> The conclusion here should be: intervene on-time to preserve your rights as a party.

**How do I litigate a certification after rehearing is concluded?**

As discussed in the section on rehearing above, advocates have a choice to litigate in the D.C. Circuit or in the Circuit where the applicant is located or has its principal place of business.<sup>568</sup> If parties file in both possible locations, the ultimate location will be assigned randomly.

Specific litigation strategy is beyond the scope of this guide because each case will depend on the specific facts of the application and the law in place at the time. It is imperative to seek experienced litigation counsel advice before pursuing a case to make sure the arguments you are bringing have not already been rejected by courts and will not prejudice other cases.

**What are some issues I can raise and what are example motions, comments from previous challenges?**

As of January 2022, DOE’s rules make it almost impossible to stop a project by simply commenting on and litigating a DOE authorization—but intervening and filing comments/protests are essential to preserve one’s rights in case the law becomes more favorable in the middle of the authorization process. The issues identified below are just a few of those that should also be raised politically, to convince the current Administration to revisit DOE regulations and procedures and scrutinize export applications more heavily, in a manner closer to what the Natural Gas Act and NEPA intend. Without political change, challenging the DOE authorization process will remain extremely difficult.

**Foundational Studies.**

To support its duty to conduct a public-interest review under the NGA, DOE relies heavily on the foundational economic and environmental studies it has conducted or commissioned (see Section 5.B.2). DOE is likely to update these studies in the coming years (as of January 2022, an environmental study on gas exported from Alaska is already underway<sup>569</sup>); participating in the

<sup>565</sup> Ltr. from Paula A. Gant (Deputy Assistant Secretary, Office of Oil and Natural Gas) to Senator Murkowski, Oct. 17, 2013, 2-3, <https://www.energy.senate.gov/services/files/9E99E412-CE05-449D-8893-DC8D64C32D02> (citing 10 C.F.R. § 590.501(b) and 10 C.F.R. § 590.103).

<sup>566</sup> *Supra*, 3.

<sup>567</sup> *Supra*.

<sup>568</sup> 15 U.S.C. § 717r(b).

<sup>569</sup> *Alaska LNG Project LLC - FE Dkt. No. - 14-96-LNG*, E-Docket, <https://www.energy.gov/fecm/articles/alaska-lng-project-llc-fe-dkt-no-14-96-lng> (last visited Mar. 31, 2022).

comment period for these studies will be critical. Depending on the methods and scope of these studies, advocates can help shape these studies to better reflect the true economic and environmental costs of exporting gas. For example, studies suggest that the rate of methane emissions attributable to gas production and transportation is underestimated in the 2014 and 2019 studies—to such an extent that the overseas use of United States gas may result in **higher** life cycle emissions than using local coal.<sup>570</sup>

DOE will also likely need help including the effects on environmental justice communities, who are often disproportionately negatively affected by gas development without the ability to garner some of the benefits of increased trade and the growth of the stock market, for example. DOE should also be encouraged to not simply study the lifecycle greenhouse gas footprint of gas exports compared to coal (as it has done in its prior environmental studies), but to how increased use of gas can displace cleaner energy sources, like renewables, which are increasingly the energy alternative that imported United States gas would be replacing.<sup>571</sup>

### **Upstream and downstream greenhouse gas emissions.**

Whenever possible, advocates are encouraged to ask DOE to come to a sensible conclusion on how it should weigh greenhouse gas emissions in its public interest review and in any NEPA-required environmental review. DOE has traditionally argued that consideration of upstream and downstream emissions from export terminals (*i.e.*, emissions as the gas is produced in the field and travels to the export terminal and emissions after it arrives and is used in the destination country) is within DOE's exclusive authority—and not FERC's. Based on DOE's asserted ownership of accounting for these emissions, FERC has disclaimed the responsibility to consider downstream and upstream emissions in its NEPA review of export terminals.<sup>572</sup> But despite asserting authority in this area, DOE has avoided actually including a case-by-case analyses of these greenhouse gas emissions in its analyses for each application, on the grounds that such emissions are not reasonably foreseeable and cannot be calculated. And as of a December 2020 rule, DOE announced that it will now only consider the emissions emitted during the marine vessel transport of LNG.<sup>573</sup>

In essence, DOE is trying to have it both ways—both claiming responsibility for assessing upstream and downstream emissions yet failing to conduct any meaningful case-by-case analysis of those emissions. This has been further complicated by the Categorical Exclusion (discussed below) proposed during the Trump Administration. DOE's inconsistent position could be raised in comments and public campaigns with the administration to alter DOE's practices.

### **Categorical Exclusions.**

As discussed in Section 5.B.3, in 2021 DOE broadened the projects that are categorically excluded (CatEx'd, in shorthand) from NEPA review to include all marine vessel exports from LNG terminals,

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<sup>570</sup> Sabin Center for Climate Change Law, *DOE's Proposed Revisions to its National Environmental Policy Act Implementing Procedures Regarding Natural Gas Exports*, Docket ID DOE-HQ-2020-0017, June 1, 2020, 7-8, <https://climate.law.columbia.edu/sites/default/files/content/%5BFINAL%5D%20DOE%20Comment%20Letter%20%5B6-1-20%5D.pdf> (citing Ramon A. Alvarez et al., *Assessment of Methane Emissions from the U.S. Oil and Gas Supply Chain*, 361 *SCIENCE* 186 (2018) and Yuzhong Zhang et al., *Quantifying Methane Emissions from the Largest Oil-Producing Basin in the United States from Space*, 6 *Science Advances* 1 (2020)).

<sup>571</sup> Sabin Center, *supra*, 8-9.

<sup>572</sup> Giannetti, *Hot Potato on LNG Emissions*, *supra* note 143.

<sup>573</sup> *Supra*.

even if the application would require new construction.<sup>574</sup> If DOE decides to reconsider this exclusion, advocates should be prepared to weigh in with comments and public and political pressure to reinstate NEPA review for more types of export terminals. Advocates can draw from blog posts and the comments that have already been filed during the notice of proposed rulemaking to create the categorical exclusion in the first place. Commentors also highlighted problems with DOE's use of the foundational studies and its treatment of upstream and downstream impacts:

- Appendix 32: Sabin Center for Climate Change Law, *DOE's Proposed Revisions to its National Environmental Policy Act Implementing Procedures Regarding Natural Gas Exports* (Docket ID DOE-HQ-2020-0017), June 1, 2020, <https://climate.law.columbia.edu/sites/default/files/content/%5BFINAL%5D%20DOE%20Comment%20Letter%20%5B6-1-20%5D.pdf>.
- Appendix 33: Delaware Riverkeeper Network, *DOE NEPA/NG Procedures*, RIN 1990-AA49, June 1, 2020, <https://www.delawareriverkeeper.org/sites/default/files/DOE%20Proposed%20NEPA%20Rule%20Submission.pdf>.
- Appendix 34: Sierra Club, et al., *Comments on Docket No. DOE-HQ-2020-0017*, June 1, 2020, [https://biologicaldiversity.org/programs/climate\\_law\\_institute/pdfs/20-06-01-Sierra-Club-et-all-DOE-LNG-CatEx-Comment.pdf](https://biologicaldiversity.org/programs/climate_law_institute/pdfs/20-06-01-Sierra-Club-et-all-DOE-LNG-CatEx-Comment.pdf).
- Appendix 35: Center for Biological Diversity, *Docket No. DOE-HQ-2020-0017 - DOE's Proposal to Update NEPA Implementing Procedures for Authorizations to Export Natural Gas and Associated Transportation by Marine Vessel*, June 1, 2020, <https://www.regulations.gov/comment/DOE-HQ-2020-0017-0019>.
- Gillian Giannetti, *Federal Agencies Play Hot Potato on LNG Emissions*, Dec. 8, 2020, <https://www.nrdc.org/experts/gillian-giannetti/federal-agencies-play-hot-potato-lng-emissions>.

### Example Filings.

Below are example filings that advocates may find helpful. Advocates reviewing older comments and protests should be aware that the 2020 and 2021 changes to the DOE's policies and regulations may make some arguments no longer valid.

- Appendix 27: Sierra Club's Motion to Intervene and Protest in Alaska LNG. FE Docket No. 14-96-LNG (Nov. 17, 2014) [https://www.energy.gov/sites/prod/files/2014/11/f19/Sierra\\_Club\\_11\\_17\\_14.pdf](https://www.energy.gov/sites/prod/files/2014/11/f19/Sierra_Club_11_17_14.pdf).
- Appendix 28: Sierra Club's Request for Rehearing in Alaska LNG. FE Docket No. 14-96-LNG (Sep. 21, 2020) <https://www.energy.gov/sites/prod/files/2020/09/f79/Rehearing%20request%20-%20Alaska%20LNG%20DOE%20SC.pdf>.
- Appendix 29: Sierra Club's Motion to Intervene, Protest, and Comments in Jordan Cove Energy Project. FE Docket No. 12-32-LNG (Aug. 6, 2012)

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<sup>574</sup> Bud Earley, *DOE Rule Sharply Limits Evaluation of Environmental Impacts of LNG Exports*, Dec. 10, 2020, <https://www.insideenergyandenvironment.com/2020/12/doe-rule-sharply-limits-evaluation-of-environmental-impacts-of-lng-exports/#more-7372>. (explaining the new rule and DOE's position that upstream production impacts are not reasonably foreseeable and downstream emissions at the point of consumption are "too attenuated to be reasonably foreseeable and do not have a reasonably close causal relationship to the granting of an export authorization") The final rule can be found here: *National Environmental Policy Act Implementing Procedures*, 88 Fed. Reg. 78,197-205, <https://www.govinfo.gov/content/pkg/FR-2020-12-04/pdf/2020-26459.pdf>.

[https://fossil.energy.gov/ng\\_regulation/sites/default/files/programs/gasregulation/authorizations/2012/applications/sierra\\_club08\\_06\\_12.pdf](https://fossil.energy.gov/ng_regulation/sites/default/files/programs/gasregulation/authorizations/2012/applications/sierra_club08_06_12.pdf).

- Appendix 30: Sierra Club's Request for Rehearing in Jordan Cove Energy Project, FE Docket No. 12-32-LNG, Aug. 8, 2020, [https://www.energy.gov/sites/prod/files/2020/08/f77/Rehearing%20Request\\_%20SC%208\\_5\\_20.pdf](https://www.energy.gov/sites/prod/files/2020/08/f77/Rehearing%20Request_%20SC%208_5_20.pdf).