



February 22, 2013

Director, Office of Hearings and Appeals,
Department of Energy,
1000 Independence Avenue SW.,
Washington, DC 20585

Re: Freedom of Information Appeal, re: HQ-2013-00423-F

Dear FOIA Appeals Officer:

This is an appeal, pursuant to 10 C.F.R. § 1004.8, of the Department of Energy (DOE)'s denial of expedited processing of a Sierra Club FOIA request filed on January 22, 2013. That request is attached to this appeal letter as exhibit 1. DOE granted a fee waiver for the request on January 24, 2013 but denied expedited processing. That denial letter is attached as exhibit 2. We appeal that denial.

Background

DOE's Office of Fossil Energy (DOE/FE) is considering whether to permit the export of nearly 25 billion cubic per day of natural gas as liquefied natural gas (LNG).¹ As part of that consideration, DOE/FE commissioned a macroeconomic study from NERA Economic Consulting, and sought public comments on that study, which it stated would guide its decision-making on the pending applications. *See* 77 Fed. Reg. 73,627 (Dec. 11, 2012). Sierra Club's FOIA request sought more information on the NERA study.

LNG export is a highly controversial issue because exporting LNG would increase the use of the controversial hydraulic fracturing ("fracking") process to support increased gas demands and would also increase U.S. gas and electricity prices. DOE/FE is charged with determining whether export is nonetheless in the public interest, *see* 15 U.S.C. § 717b, and, if so, how to condition any export authorizations. The NERA study was intended to inform this consideration and appears likely to be central to DOE/FE's decisionmaking process. In essence, the NERA study is shaping the LNG debate, both at DOE/FE and in the public sphere generally.

¹ *See* DOE/FE's summary of these applications:

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

Fully assessing that study thus is necessary to understand the impacts of this critical energy policy decision for the nation as a whole.

Sierra Club sought information on NERA and the study in order to ensure that its members, and the public generally, were able to fully assess this important study. Sierra Club is concerned both about the substance of the study, which was developed with a private model that has not been disclosed to the public, and the processes by which NERA was selected to perform the study and the study itself was conducted. The NERA consultancy is closely aligned with fossil fuel interests, so issues of bias in the study deserve particularly close scrutiny.

DOE has granted Sierra Club a fee waiver for this inquiry, confirming that distributing the information Sierra Club seeks is in “the public interest because it is likely to contribute significantly to the operations or activities of the government.” See 10 C.F.R. § 1004.9(a)(8). Its failure to actually provide this information on an expedited basis is, however, frustrating this public interest. Because DOE/FE is likely to begin acting upon LNG export applications within weeks or months after the February 25, 2013, closure of the NERA study comment period, delaying information effectively bars the public from fully participating in this critical debate.

Sierra Club Is Entitled to Expedited Processing

FOIA requires agencies to provide by regulation for expedited processing. 5 U.S.C. § 552(a)(6)(E). Although DOE/FE has failed to provide such regulations, the statutory mandate for expedited processing persists, and DOE’s denial letter indicates that it will expedite processing in the case of a “compelling need” as defined by the statute. DOE Denial Letter at 1-2.

The statute defines “compelling need,” relevant here, as existing where the “requester is primarily engaged in disseminating information” and there is an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II). DOE states that this determination generally requires that requestors show the “(1) request concerns a matter of current exigency to the American public; (2) whether consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.” DOE Denial Letter at 2 (citing *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001)). Sierra Club meets all these factors.² Moreover, DOE is entitled to grant expedited processing in other circumstances, as warranted, and such processing is warranted here. Expedited processing therefore should have been granted.

I. Sierra Club Is Primarily Engaged In Disseminating Information

² The undersigned certifies that the statements in this letter and the original FOIA letter are true and correct to the best of my knowledge and belief. See 5 U.S.C. § 552(a)(6)(E)(vi).

When DOE granted Sierra Club's fee waiver request, it accepted Sierra Club explanation of why it would be able to contribute to public understanding. *See* FOIA Letter at 5-6. This same information justifies the Sierra Club's status as an entity primarily engaged in disseminating information.

As the Sierra Club explained in its FOIA letter, the Sierra Club is the nation's largest and oldest grassroots environmental organization, with millions of members and supporters. To fulfill its mission of public outreach, advocacy, and education, the Sierra Club devotes millions of dollars annually to disseminating information. As the FOIA letter explains, Sierra Club's media operation includes a radio show, an extensive network of websites and email newsletters, web videos, press releases, regular report and white paper releases, and an entire book publishing arm.

These operations include the following:

- Sierra Magazine.³ Sierra is a bimonthly print and online magazine, and has a circulation of at least 600,000 to our dues-paying members, in addition to hundreds of thousands more online readers. Sierra regularly covers the work of our gas campaign, including devoting a lengthy feature article to the impacts of the drilling boom in Pennsylvania in its July/August 2012 issue.⁴ Information on LNG export, including on the NERA study, could be distributed through Sierra.
- A book publishing company, Sierra Club Books, that publishes on matters of environmental concern, including on energy and fossil fuel development issues.⁵
- An extensive network of email newsletters and blogs.⁶ One of these newsletters, the Sierra Club "Insider" is biweekly, is sent to all of our members, and recently featured an item specifically on the LNG export decision now before DOE.⁷
- A large web presence, including a website specifically on LNG export.⁸ Sierra Club websites receives thousands of pageviews each month.
- A white paper publishing and distribution effort which regularly disseminates information to the public and policymakers on these issues, including a recent paper on LNG export.⁹

³ *See* Sierra Magazine's website at <http://www.sierraclub.org/sierra/default.aspx>.

⁴ <http://www.sierraclub.org/sierra/201207/pennsylvania-fracking-shale-gas-199-2.aspx>

⁵ *See* <http://action.sierraclub.org/site/PageServer?pagename=bookshome>.

⁶ *See* <http://action.sierraclub.org/site/PageServer?pagename=EmailCentral> (listing 12 separate publications).

⁷ *See* http://action.sierraclub.org/site/MessageViewer?em_id=283745.0.

⁸ *See* <http://content.sierraclub.org/naturalgas/stop-lng-exports>

⁹ *See* <http://www.sierraclub.org/naturalgas/downloads/LOOK-BEFORE-YOU-LEAP.pdf>.

- A communications effort that regularly writes and develops columns and news releases, and also regularly forwards email information to our millions of members and supporters, including on LNG issues.

This sort of extensive media operation by a nonprofit organization has regularly qualified nonprofits for expedited processing and, indeed, even to be deemed members of the “news media.” In *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003), for instance, the District of D.C. concluded that EPIC, a small nonprofit which had published seven books¹⁰ on relevant issues and had a “biweekly electronic newsletter”), qualified as a member of the news media. *See id.* at 11-15. The court explained that this “periodical” alone qualified *EPIC* as a news media organization. *See id.* at 14-15. Such determinations are common. In *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004), the court held that the ACLU was entitled to expedited processing, along with EPIC, and explained that any organization which “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” meets this test.

The Sierra Club unquestionably does so. Its publication operation is vastly larger than that held adequate in *EPIC*, *ACLU*, and similar cases, and has already been employed to educate the public on LNG issues. Moreover, DOE itself has determined that that publishing operation is likely to significantly contribute to public understanding. Thus, Sierra Club qualifies for expedited processing as an organization primarily engaged in public education.

II. This Request Concerns a Matter of Exigency to the American Public

Sierra Club, industrial users, public gas distribution companies, and over 180,000 public commenters have raised serious concerns about LNG export in the DOE docket for the NERA study.¹¹ These concerns are well-substantiated and demonstrate that DOE’s ultimate decision on LNG export, including its assessment of the merits of the NERA study, pose an exigent and important question for the American public.

¹⁰ An earlier case held an organization which had published a *single* book was a member of the news media. *See EPIC*, 241 F. Supp.2d at 11-12 (discussing the *National Security Archive* case).

¹¹ *See* Docket Comments, compiled at http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/export_study_initial_comments.html, including Sierra Club comments at http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/Sierra_Club01_24_13.pdf, and comments of Dow Chemical and other industrial users at http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/peter_molinario_em01_24_13.pdf.

As Deputy Assistant DOE Secretary Chris Smith has explained, LNG export authorization is “a tremendously important decision” with significant public impacts.¹² These include the potential for significant gas price increases, according to the Energy Information Administration,¹³ increased methane and carbon dioxide emissions resulting from increased production for export and from increased use of coal power in response to gas price increases,¹⁴ and a multi-billion dollar shift in revenue from wage income and the industrial manufacturing sector to the owners of gas export and production efforts, as NERA itself documents.¹⁵ These impacts are sharply contested, resulting in Congressional hearings and an ongoing, vigorous debate in the media, in the public square, and among policymakers.¹⁶ DOE/FE’s decisions on LNG, in short, have significant implications for the nation as a whole – among the most significant of any energy policy decision likely to be made in years.

Therefore, a full analysis of the NERA study – the model on which it is based, the methods by which it was developed, how NERA was selected in the first place, and how DOE may or may not have influenced the study – is critical to this debate. DOE has explained that the study is intended to evaluate the “cumulative economic impact” of the LNG decision before it, and that NERA was commissioned specifically to study this macroeconomic question. *See* 77 Fed. Reg. at 73,628. DOE has affirmed that it will place the NERA study, and all comments upon it, in the docket in all export proceedings, *see id.* at 73,269, and will not make final decisions on export applications until it has “received and evaluated” the study and all comments upon it. *Id.* Once DOE has finished that evaluation, it intends to move forward with its export decisions, and has already established an order of precedence with which to do so.¹⁷

¹² *See* Nick Snow, Oil and Gas Journal, *US DOE to move carefully on LNG export requests, NARUC meeting told* (Feb. 5, 2013), available at <http://www.ogj.com/articles/2013/02/us-doe-to-move-carefully-on-lng-export-requests--naruc-meeting-t.html>.

¹³ *See* EIA, *Effect of Increased Natural Gas Exports on Domestic Energy Markets* (2012), available at http://fossil.energy.gov/programs/gasregulation/reports/fe_eia_lng.pdf.

¹⁴ *See* Sierra Club comments, cited above.

¹⁵ *See* NERA Report at 8, documenting these shifts

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

¹⁶ *See, e.g.,* Amelia Templeton, Oregon Public Radio, *Should the US Export Natural Gas? Wyden Leads Sharp Senate Debate* (Feb. 12, 2013), available at <http://earthfix.opb.org/energy/article/should-the-us-export-natural-gas-wyden-leads-sharp/>; Keith Johnson, Wall Street Journal, *Natural-Gas Export Fight Heats Up* (Jan. 10, 2013), available at

<http://online.wsj.com/article/SB10001424127887324081704578233920061510586.html>; Oil and Gas Journal, *Dow Chemical slaps DOE LNG-export report* (Dec. 7, 2012), available at

<http://www.ogj.com/articles/2012/12/dow-chemical-slaps-doe-lng-export-report.html>; Sean Sullivan, SNL, *Analyst: ‘War is starting’ that could destroy LNG exports* (Jan. 30, 2013), available at <http://www.snl.com/InteractiveX/Article.aspx?cdid=A-16874324-12332>.

¹⁷ *See* DOE Order of Precedence,

http://fossil.energy.gov/programs/gasregulation/publications/export_applications_order_of_precedence.pdf.

The information Sierra Club requested is particularly important to this debate because there are serious questions about NERA's conclusions. An independent economic study by a senior economist at Purdue University, Dr. Wallace Tyner, also in the docket, casts significant doubt on NERA's findings.¹⁸ Dr. Tyner's study, conducted using the same general sort of macroeconomic analysis as NERA applied, finds that LNG exports would *decrease* GDP, contrary to NERA's conclusions. It also documents significant wealth transfers away from the middle class and American industry. If Dr. Tyner and his research team are correct, DOE/FE has all the more reason to doubt NERA's results – but that determination is very difficult to make without full public disclosure of NERA's underlying modeling, which Sierra Club has requested.

In short, the materials Sierra Club requested concern a vital matter of public policy, and decisions are being made in the next weeks and months. The courts have recognized that exigency exists where information germane to a critical public debate of this sort is being withheld. In *Washington Post v. Dep't of Homeland Security*, 459 F. Supp. 2d 61, 74-75 (D.D.C. 2006) for instance, the court found the plaintiff was irreparably harmed by the government's failure to release information in response to a June FOIA request that would inform the national debate in the November election. Likewise, in *Electronic Frontier Found. v. Office of the Director*, 2007 WL 4208311, *6 (N.D. Cal. 2007), the plaintiff sought to inform a debate about a bill then before Congress, and the Court found irreparable harm existed where late disclosures would impair participation in that debate. Similarly, in *EFF v. Office of the Director*, 542 F. Supp. 2d 1181, 1186-97 (N.D. Cal. 2008), which also concerned a Congressional debate, the Court found "irreparable harm exist[ed] where the government's delay in releasing information threatened to "render[] [the information] useless in the effort to educate the American public . . . if such information is produced after Congress [has already] amend[ed] the law." And, similarly, in *Electronic Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 4-42 (D.D.C. 2006), the plaintiff sought to participate in an "ongoing" debate, but the court still recognized that "time is necessarily of the essence in cases like this" and concluded that delay would cause irreparable harm.

The same sort of pressing debate is underway here, but with a much finer endpoint. DOE is already about to close the comment period on the NERA study, and will likely begin processing export applications shortly. If the information Sierra Club seeks is to be useful on this front, Sierra Club must be able to share it with the public and policymakers before DOE has already finalized its decisions.

III. Delaying a Response Would Compromise Significant, Recognized, Interests

The public interest inquiry which DOE is conducting includes economic and environmental interests. These interests are threatened by an inadequately informed consideration of the

¹⁸ See Comments of Dr. Wallace Tyner, available at: http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/30_Wallace_Tyner01_14_13.pdf

NERA study, so expedited processing is warranted lest withholding this information compromises these interests through the issuance of improper export decisions or an ill-informed endorsement of the NERA study.

Specifically, the Natural Gas Act grants DOE/FE “authority to consider conservation, environmental, and antitrust questions,” as well as economic questions. *NAACP v. Federal Power Comm’n*, 425 U.S. 662, 670 n.4 (1976) (citing 15 U.S.C. § 717b as an example of a public interest provision); *see also id.* at 670 n.6 (explaining that the public interest includes environmental considerations). In interpreting an analogous public interest provision applicable to hydroelectric power, the Court has explained that the public interest determination “can be made only after an exploration of all issues relevant to the ‘public interest,’ including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.” *Udall v. Fed. Power Comm’n*, 387 U.S. 428, 450 (1967) (interpreting § 7(b) of the Federal Water Power Act of 1920, as amended by the Federal Power Act, 49 Stat. 842, 16 U.S.C. § 800(b)). Other courts have applied *Udall’s* holding to the Natural Gas Act. *See, e.g., N. Natural Gas Co. v. Fed. Power Comm’n*, 399 F.2d 953, 973 (D.C. Cir. 1968) (interpreting section 7 of the Natural Gas Act).

DOE has also acknowledged the breadth of the public interest inquiry and recognized that it encompasses environmental concerns. In a recent letter to Senator Wyden, DOE wrote that “environmental considerations” are included in the analysis.¹⁹ Deputy Assistant Secretary Smith has likewise testified that “[a] wide range of criteria are considered as part of DOE’s public interest review process, including . . . U.S. energy security . . . [i]mpact on the U.S. economy . . . [e]nvironmental considerations . . . [and] [o]ther issues raised by commenters and/or interveners deemed relevant to the proceeding.”²⁰ DOE rules require export applicants to provide information documenting “[t]he potential environmental impact of the project.” 10 C.F.R. § 590.202(b)(7). In a previous LNG export proceeding, DOE determined that the public interest inquiry looks to “domestic need” as well as “other considerations” that specifically included the environment.²¹ FERC has also agreed that environmental issues are included in the public interest calculus. In FERC’s recent order approving siting, construction, and operation of LNG export facilities in Sabine Pass, Louisiana, FERC considered potential environmental impacts of the terminal as part of its public interest assessment, which is analogous to DOE/FE’s. 139 FERC ¶ 61,039, PP 29-30 (Apr. 14, 2012).²²

¹⁹ Letter from Daniel Poneman, DOE/FE to Senator Ron Wyden (Dec. 11, 2012) at 2.

²⁰ The Department of Energy’s Role in Liquefied Natural Gas Export Applications: Hearing Before the S. Comm. on Energy and Natural Resources, 112th Cong. 4 (2011) (testimony of Christopher Smith, Deputy Assistant Secretary of Oil and Gas).

²¹ *Phillips Alaska Natural Gas Corporation and Marathon Oil Company*, 2 FE ¶ 70,317, DOE FE Order No. 1473, 1999 WL 33714706, *22 (April 2, 1999).

²² Sierra Club contends that other aspects of this order were wrongly decided, as was FERC’s subsequent denial of Sierra Club’s petition for rehearing.

These interests, in short, are both significant, and recognized – both by DOE and as a matter of law. They will be compromised, for the reasons discussed above, if DOE moves forward without providing the critical information on the NERA study to Sierra Club and the public.

IV. The Request Concerns Federal Government Activity

There is no dispute that Sierra Club meets this prong of the test because this inquiry turns on DOE's own permitting process and a study which DOE has commissioned and sought comment upon.

V. Even if Sierra Club Did Not Meet This Test, DOE Should Still Grant Expedited Processing

Although Sierra Club is clearly entitled to expedited processing as a matter of law, DOE should exercise its discretion to expedite processing in this matter regardless. As we have explained above, the NERA study, and the LNG export decision which it is intended to inform, have far-reaching implications for the American environment and economy. Deputy Assistant Secretary Smith has made clear that DOE intends to “create a transparent process that withstands public scrutiny.”²³ If DOE is serious about this commitment, it must provide information on the NERA study to the public in order to keep the process fair, transparent, and open.

Conclusion

For all the reasons above, Sierra Club is entitled to expedited processing in this matter. Thank you for your prompt attention to this appeal. Please contact me with any questions or concerns.

Sincerely,

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²³ Nick Snow, Oil and Gas Journal, *US DOE to move carefully on LNG export requests, NARUC meeting told* (Feb. 5, 2013), available at <http://www.oilandgasjournal.com/articles/2013/02/us-doe-to-move-carefully-on-lng-export-requests--naruc-meeting-t.html>