October 16, 2017

U.S. Department of Energy (FE-34)
Office of Regulation and International Engagement
Office of Fossil Energy
Forrestal Building, Room 3E-042
1000 Independence Avenue SW.
Washington, DC 20585

To Whom it May Concern:

Sierra Club submits the below comments on the Department of Energy's proposed "Small-Scale Natural Gas Exports" rule, 82 Fed. Reg. 41,570 (Sept. 1, 2017), docket DOE-HQ-2017-0018. As a general matter, Sierra Club agrees DOE should clarify its interpretation and application of the Natural Gas Act's "public interest" standard via regulation or guidance, as explained in Sierra Club's April 8, 2013, petition for rulemaking, to which DOE has never responded.[1] However, the proposed rule violates the Natural Gas Act, is overbroad, and not supported by the analyses cited, as we explain in greater detail below. In summary, DOE cannot, under the guise of interpreting the public interest, do away with public notice and comment opportunities. Insofar as DOE seeks to offer a categorical interpretation of the public interest, the public must be provided with an opportunity to argue that application of this interpretation is inappropriate for particular individual proceedings.

Separate from the problem of curtailing notice and comment, the proposed rule is overbroad, potentially applying far beyond the cases DOE identifies as justifying the rule. DOE states that the proposed rule is intended to facilitate exports delivered via "ISO containers loaded onto container ships and barges," rather than traditional LNG tankers, to "countries in the Caribbean, Central America, and South America" that are "currently burning diesel or fuel oil for power generation." 82 Fed. Reg. at 41574. Insofar as DOE determines that a regulation or guidance concerning the described exports is appropriate, that document must be more narrowly tailored to apply to these specific circumstances, rather than to any and all exports falling below the 0.14 bcf/d threshold and not requiring an environmental assessment or environmental impact statement.

Finally, DOE has not shown that even the exports that are the purported object of this rule are in the public interest. As Sierra Club has previously explained, exports increase domestic energy prices, harming ordinary consumers and households and eliminating jobs in energy intensive industries. DOE argues that small scale exports are too small to significantly raise gas prices, but small scale is a sword that cuts both ways: these exports also provide proportionally fewer benefits. Nor does the proposed rule adequately address the environmental impacts of

[1] Attached as Exhibit 1.

export-induced gas production, such as potential exacerbation or expansion of ozone non-attainment. Thus, DOE has not shown that the balance of public interest impacts is positive. DOE has also failed to address the cumulative impact of potential small scale exports.

For these reasons, Sierra Club opposes the proposed rule. Rather than facilitating the expansion of dirty fossil fuel extraction and use in the U.S. and abroad, the Department of Energy should seek to facilitate the transition to clean, renewable energy. As Sierra Club has repeatedly explained in numerous filings regarding large scale LNG export proposals, expanding natural gas exports leads to both expanded natural gas production and higher U.S. energy prices, with severe climate, public health, and economic consequences, all of which are contrary to the public interest.

1. The Natural Gas Act Requires DOE To Provide for Public Participation Regarding Individual Non-FTA Export Proposals

DOE proposes to amend 10 C.F.R. § 590.208 to provide that "DOE's regulations regarding notice of applications, 10 CFR 590.205, and procedures applicable to application proceedings, 10 CFR part 590, subpart C (10 CFR 590.303 to 10 CFR 590.317), are not applicable to small-scale natural gas exports." Sierra Club strongly opposes this aspect of the proposed rule. The Natural Gas Act requires an opportunity for hearing on all non-FTA export proposals. *See* 15 U.S.C. §§ 717b(a), 717r(a)-(b). The opportunity to comment on the proposed small-scale natural gas export rule is not a substitute for the opportunity for hearing on individual proposals; members of the public must have the opportunity to argue that, although small scale exports in general may be consistent with the public interest, an individual proposal has adverse effects that overcome this general presumption.

Multiple provisions of the Natural Gas Act demonstrate a statutory requirement for opportunity for hearing. 15 U.S.C. § 717b(a) provides that orders on individual applications must come "after opportunity for hearing." Similarly, the rehearing and review provisions of 15 USC § 717r(a) and (b) plainly contemplate a public opportunity to present evidence and argument regarding individual proposals. Subsection (a) provides that the Natural Gas Act's judicial review provision is only available to persons who have sought rehearing from DOE. DOE regulations provide that a request for rehearing may only be filed by a party to a proceeding. 10 C.F.R. § 590.501(a). Under the proposed small scale rule, however, there would be no clear way for a member of the public to intervene in, and become a party to, a proceeding. 82 Fed. Reg. at 41573 (stating that 10 C.F.R. § 590.303, *inter alia*, would not apply). Thus, it appears that under the proposed rule, the judicial review provision provided by the Natural Gas Act would not be available to anyone other than a project applicant; absent the availability of this remedy, judicial review would be provided by the Administrative Procedure Act, *see* 5 U.S.C. § 704, and thereby lie in the first instance with the district courts, an outcome in tension with the Natural Gas Act's intent provide for direct review in the Circuit Courts.

Insofar as the Natural Gas Act's judicial review provision is available, approving small scale exports without providing for intervention and public comment before DOE would also subvert the Natural Gas Act's intention for judicial review to be based on the administrative record prepared and considered by the Department. The Natural Gas Act provides that where "there were reasonable grounds for failure to adduce [additional, non-record] evidence in the proceedings before [DOE]," such evidence may be presented in the course of judicial review. 15 U.S.C. § 717r(b). Under the proposed rule, this provision would apply to *all* evidence regarding specific future small scale export proposals, because there would be no reasonable opportunity to present this evidence to DOE.

Thus, the Natural Gas Act requires an opportunity for hearing, and plainly contemplates that members of the public will be able to present evidence regarding individual export proposals. The proposed rule would frustrate the design of the Act by doing away with this opportunity.

On the other hand, DOE has not sought to explain or justify its decision to eliminate these opportunities. Nothing indicates that, in the seven small-scale applications DOE has authorized to date, notice and other public participation opportunities have been unduly burdensome. Creating a regulatory presumption that small scale exports are in the public interest is likely to ensure that future small scale applications are resolved even more quickly than these seven proposals were. Because the rule would only apply in cases where DOE determines that a categorical exclusion is appropriate, it is likely that for covered projects, DOE could quickly act on motions to intervene, protests, etc., and reach final decision.

2. The Proposed Rule Is Overbroad, and Potentially Encompasses Proposals Unrelated to The Proposal's Justification

DOE states that the proposed rule is intended to facilitate exports delivered via "ISO containers loaded onto container ships and barges" rather than traditional LNG tankers to "countries in the Caribbean, Central America, and South America" that predominantly "burn[] diesel or fuel oil for power generation." 82 Fed. Reg. at 41574.

Insofar as DOE has concluded that exports meeting this description are, as a general matter, consistent with the public interest, DOE should adopt a rule that actually reflects these criteria. Thus, the proposed amendment to 10 CFR § 590.102(p)(1) should define small-scale exports as those meeting these criteria (use of ISO containers or other non-traditional transport, these destinations, and evidence of displacement of diesel or fuel oil),[2] in addition to a volume threshold. The proposed rule provides no facts or reasoning supporting a determination that all, or even most, future proposals to for less than 0.14 bcf/d in export volume will satisfy these criteria.

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[2] Although the proposed rule asserts that natural gas exports can facilitate transitions away from use of fuel oil or diesel, DOE provides no analysis to support this assertion. Insofar as displacing these fuels is a justification for the rule, DOE must provide some evidence that such displacement is likely to occur.

To the contrary, the proposed rule would seem to incentive applications for expansion of exports from traditional facilities, even if such exports were to be effectuated by a traditional LNG tanker and delivered to a European or Asian destination not utilizing diesel or fuel oil in any meaningful capacity. These exports share none of the characteristics of the exports projects DOE cites as providing the motivation and justification for the rule. Automatically approving such proposals would therefore be arbitrary.[3] Thus, if DOE elects to finalize the rule, the final must be tailored to the circumstances identified in the proposal. These circumstances include method of transport, geography, and nature of the importing energy market.

In addition, the volume criterion provided in the proposal is too large. DOE is proposing to adopt a rule based on DOE's experience with seven prior applications. But the proposed "small scale" threshold DOE proposes to adopt is 25% larger than the *combined total* of these seven applications: 0.14 bcf/d for a single project, as opposed to 0.112 bcf/d for the seven applications identified in the proposal. 82 Fed. Reg. at 41572. The fact that some industry documents have identified 0.14 bcf/d as the threshold for "small scale" does not support DOE's decision to categorically approve such applications, when DOE has yet to approve a single project of this scale. It is likely that, as projects approach this threshold, they are less likely to fit the mold of the projects DOE cites as motivation for this rule--exports via ISO containers to nearby countries that are otherwise reliant on more polluting liquid fuels.

3. The Proposed Rule's Public Interest Analysis Is Flawed

Finally, even as to the types of exports that are purportedly the rule's object, the analysis is flawed. First, DOE cannot argue that exports falling below the 0.14 bcf/d threshold are too small to impact national energy markets, such as by increasing gas prices, while simultaneously arguing that exports of this scale will provide economic benefits through indirect job creation. 82 Fed. Reg. at 41.754. Small scale is a sword that cuts both ways: insofar as DOE determines that small scale exports will not influence the national energy market, then that determination applies to both effects on price and effects on increasing gas supply. Sierra Club agrees that both impacts are likely to be small when measured against the national economy as a whole. But insofar as there is any economic or job-creation impact at all, these impacts are likely to be negative. Even very small increases in natural gas prices are likely to lead to loss of employment in energy intensive industries, and DOE has never provided an analysis seriously comparing these job losses with job creation in natural gas production and related industries. As Sierra Club explained in comments on DOE's earlier, 2012 macroeconomic study, that study actually indicated that increasing exports would lead to a nationwide loss of job equivalents. *See* Synapse Energy Economics, Will LNG Exports Benefit the United States Economy? at 5 (Jan. 23, 2013), attached as Exhibit 2.

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[3] In particular, it is unclear how the proposal would avoid inviting segmentation of proposed expansions, wherein an exporter submits multiple applications each below the 0.14 bcf/d threshold. Multiple applications for an individual facility are already common: DOE has approved five separate applications for export from the Sabine Pass, Louisiana, facility.

Second, DOE must account for cumulative impacts. The proposed rule argues that existing studies account for volumes of exports up to 28 bcf/d, far in excess of the non-FTA exports DOE has presently approved. 82 Fed. Reg. at 41,574. However, DOE has already received non-FTA applications totally 51.59 bcf/d, and DOE cannot contend that exports in excess of 28 bcf/d are completely unforeseeable. The proposal also fails to provide any discussion whatsoever as to the potential cumulative size of the small scale LNG export market: DOE notes that it has approved seven applications so far, but provides no discussion of the potential LNG demand in the Caribbean, Central American, and South American countries that are the purported target of this rule, other sources of supply that may compete to satisfy this demand, or the overall potential scale of the U.S. small scale export market. DOE must address potential cumulative impacts, and one aspect of this should be to provide a limit in the rule halting automatic approval of exports if and when the cumulative volume of approvals exceeds the scope of existing valid cumulative effect analyses.

4. Conclusion

For the above reasons, Sierra Club opposes the proposed rule. DOE should withdraw the proposal. Failing that, DOE should modify the proposal to simply create a presumption that small scale exports are in the public interest, eliminating automatic approval and preserving the opportunity for hearing and public participation contemplated by the Natural Gas Act, and to narrow the definition of small scale exports to comport to the exports that are the purported object of the rule.

Sincerely,

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