

UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY AND CARBON MANAGEMENT

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COMMONWEALTH LNG, LLC	)	DOCKET NO. 19-134-LNG
_____	)	

NOTICE DISMISSING REQUEST FOR REHEARING

MARCH 27, 2024

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FREQUENTLY USED ACRONYMS

APA	Administrative Procedure Act
Bcf/d	Billion Cubic Feet per Day
Bcf/yr	Billion Cubic Feet per Year
DOE	U.S. Department of Energy
FECM	Office of Fossil Energy and Carbon Management
FERC	Federal Energy Regulatory Commission
FTA	Free Trade Agreement
LNG	Liquefied Natural Gas
NEPA	National Environmental Policy Act
NGA	Natural Gas Act

I. INTRODUCTION

On January 26, 2024, the U.S. Department of Energy (DOE or Department)¹ issued a statement that it is undertaking “a process to update the [economic and environmental analyses] used to inform whether additional liquefied natural gas (LNG) export authorization requests to non-Free Trade Agreement (non-FTA) countries are in the public interest” under Natural Gas Act (NGA) section 3(a) (the Update).² In the interest of transparency and to help set expectations of applicants and the public on the timing of pending decisions, DOE explained that it would temporarily defer its public interest determination of pending (and newly filed) non-FTA export applications until the Update is completed.³

DOE’s Update is now the subject of a “Request for Rehearing” (Request) filed by Commonwealth LNG, LLC (Commonwealth) in the above-captioned docket on February 26,

¹ DOE implements its natural gas regulatory program through the Office of Fossil Energy and Carbon Management (FECM). The authority to regulate the imports and exports of natural gas, including liquefied natural gas, under section 3 of the Natural Gas Act has been delegated to the Assistant Secretary for FECM in Redesignation Order No. S4-DEL-FE1-2023, issued on April 10, 2023.

² U.S. Dep’t of Energy, “DOE to Update Public Interest Analysis to Enhance National Security, Achieve Clean Energy Goals and Continue Support for Global Allies” (Jan. 26, 2024), <https://www.energy.gov/articles/doe-update-public-interest-analysis-enhance-national-security-achieve-clean-energy-goals> [hereinafter the January 26 Announcement]. Non-free trade agreement (non-FTA) countries are those with which the United States does not have a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy. The United States currently has FTAs requiring national treatment for trade in natural gas with Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea, and Singapore. FTAs with Israel and Costa Rica do not require national treatment for trade in natural gas.

³ *Id.* (noting the “exception for unanticipated and immediate national security emergencies”). The Update is not relevant to applications to export LNG previously imported from foreign sources or for qualifying applications for the following categories of exports of domestically produced LNG:

- (i) Applications to export LNG to any country with which the United States has entered into a FTA requiring national treatment for trade in natural gas (FTA countries), as DOE’s grant of FTA applications is nondiscretionary under NGA section 3(c), 15 U.S.C. § 717b(c);
- (ii) Applications for “small-scale natural gas exports” to non-FTA countries, as DOE’s grant of such applications is nondiscretionary under 10 C.F.R. § 590.208(a); and
- (iii) Applications to extend the export commencement deadline in existing non-FTA authorizations, as those applications are subject to DOE’s Policy Statement on Export Commencement Deadlines, 88 Fed. Reg. 25,272 (Apr. 26, 2023).

2024.⁴ On March 12, 2024, Sierra Club, Center for Biological Diversity, Natural Resources Defense Council, and Public Citizen (collectively, Environmental Advocates) filed a “Motion for Leave to Intervene Out of Time, Motion for Leave to Answer, and Answer to Request for Rehearing” (Motion).⁵ Subsequently, on March 27, 2024, Commonwealth filed an “Answer in Opposition to Motion to Intervene Out-of-Time of [Environmental Advocates].”⁶

Upon review of these filings, and for the reasons set forth below, DOE finds both that the Update is not an “order” and that Commonwealth has not been “aggrieved” under section 19 of the NGA⁷ and DOE’s regulations,⁸ as would be required for Commonwealth to request rehearing. Accordingly, DOE dismisses Commonwealth’s Request, including its request for DOE to finalize its review of Commonwealth’s Application⁹ during the pendency of the Update.¹⁰ Because DOE is dismissing Commonwealth’s Request, there is no basis to reach either the Environmental Advocates’ motions or Commonwealth’s Answer. Therefore, DOE

⁴ Commonwealth LNG, LLC, Request for Rehearing, Docket No. 19-134-LNG (Feb. 26, 2024), <https://www.energy.gov/sites/default/files/2024-03/Commonwealth%20Request%20for%20Rehearing%20of%20DOE%20Pause%20%28Feb.%2026%202024%29.pdf> [hereinafter Commonwealth Request]. For purposes of this Notice, there is no dispute as to whether Commonwealth’s Request was timely filed.

⁵ Sierra Club, *et al.*, Motion for Leave to Intervene Out of Time, Motion for Leave to Answer, and Answer to Request for Rehearing, Docket No. 19-134-LNG (Mar. 12, 2024), <https://www.energy.gov/sites/default/files/2024-03/Motion%20to%20Intervene%20Out%20of%20Time%20and%20Answer%20Commonwealth%20Rehearing%20Request%20on%20DOE%20Pause.pdf> [hereinafter Enviro. Advocates Motion].

⁶ Commonwealth LNG, LLC, Answer in Opposition to Motion to Intervene Out-of-Time of Sierra Club, Center for Biological Diversity, Natural Resources Defense Council, and Public Citizen, Docket No. 19-134-LNG (Mar. 27, 2024), https://www.energy.gov/sites/default/files/2024-03/Commonwealth%20LNG%20LLC%20Opposition%20and%20Answer%20to%20Late%20Intervention%20and%20Comments_032724.pdf [hereinafter Commonwealth Answer].

⁷ 15 U.S.C. § 717r(a) (as relevant here, only persons “aggrieved by *an order* issued by [DOE] in a proceeding ... may apply for a rehearing within thirty days after the issuance of such order”) (emphasis added). As discussed below, DOE also finds that Commonwealth is not “aggrieved” by the Update, as required by the NGA and DOE’s regulations. *See infra* § IV.A.2.

⁸ 10 C.F.R. § 590.501(a) (only a “party aggrieved by the issuance of [an] opinion and order” may file an application for rehearing of that order within thirty (30) days after issuance).

⁹ *See* Commonwealth LNG, LLC, Application for Long-Term Authorization to Export Liquefied Natural Gas to Free Trade Agreement Nations and Non-Free Trade Agreement Nations, Docket No. 19-134-LNG (Oct. 16, 2019), as supplemented on April 14, 2020 (providing lease agreements) and amended on Sept. 11, 2020 (requesting export term through Dec. 31, 2050) [hereinafter Commonwealth App.].

¹⁰ Commonwealth Request at 2.

dismisses both the Environmental Advocates' filing in its entirety and Commonwealth's Answer.

II. NEED FOR UPDATED ANALYSES

A. Background and Rationale

DOE reviews long-term applications requesting authority to export domestically produced LNG to non-FTA countries under section 3(a) of the NGA.¹¹ DOE issued its first final non-FTA export order to Sabine Pass Liquefaction, LLC in August 2012, authorizing an export volume of 2.2 billion cubic feet per day (Bcf/d) of natural gas.¹² Nearly 12 years later, there are currently 40 final, long-term non-FTA authorizations authorizing the export of LNG sourced from the United States. These orders authorize a cumulative volume of exports equivalent to over 48 Bcf/d of natural gas.¹³ These non-FTA export approvals equate to approximately 46% of domestic dry natural gas production.¹⁴ Although DOE has authorized exports of over 48 Bcf/d of natural gas to non-FTA countries, LNG exporters have yet to develop the operating capacity to carry out all of those authorizations. Of the over 48 Bcf/d in existing long-term non-FTA approvals from domestically sourced natural gas:

- Operating export capacity is just over 14 Bcf/d;
- Approximately 12 Bcf/d of export capacity is currently under construction after having reached a final investment decision; and

¹¹ 15 U.S.C. § 717b(a). As set forth below, NGA section 3(a) sets forth a public interest standard.

¹² *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961-A, Docket No. 10-111-LNG, Final Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations (Aug. 7, 2012), *reh'g denied*, DOE/FE Order No. 2961-B (Jan. 25, 2013).

¹³ This cumulative volume of over 48 Bcf/d includes approved exports of LNG produced in Alaska (in a volume equivalent to 2.55 Bcf/d of natural gas). The Alaska export market is considered distinct from the lower-48 export market. See U.S. Dep't of Energy, Office of Fossil Energy & Carbon Mgmt., "The Temporary Pause on Review of Pending Applications to Export Liquefied Natural Gas," at 3 (Feb. 23, 2024), https://www.energy.gov/sites/default/files/2024-02/The%20Temporary%20Pause%20on%20Review%20of%20Pending%20Applications%20to%20Export%20Liquefied%20Natural%20Gas_0.pdf [hereinafter DOE FECM Fact Sheet] (table entitled "North American Large-Scale LNG Export Projects with Non-FTA Export Authority from DOE").

¹⁴ See U.S. Energy Info. Admin., *Short-Term Energy Outlook*, at 2 (Mar. 12, 2024) (stating that domestic dry natural gas production was "just under" 104 Bcf/d in February 2024 and is expected to decline slightly through the rest of 2024).

- More than 22 Bcf/d is authorized but not yet operating or under construction.¹⁵

The United States, as of 2023, is the largest exporter of LNG in the world. Based on existing non-FTA approvals related to projects that are under construction—and that the Update does not affect—U.S. LNG export capacity is expected to nearly double by the end of this decade.¹⁶

Economic and environmental analyses have long been a critical component of DOE’s public interest determinations under NGA section 3(a).¹⁷ In 2011 and 2012, with 15 applications to export LNG from the lower-48 states to non-FTA countries then pending, DOE commissioned two studies to examine the domestic economic impacts of U.S. LNG exports.¹⁸ In December 2012, DOE published the first two economic studies collectively as the 2012 LNG Export Study. Both studies considered how levels of exports then foreseeable—in a range up to 12 Bcf/d—could affect domestic energy markets.

Not long thereafter, DOE began granting applications for greater volumes of non-FTA exports, and the U.S. LNG export market grew rapidly. Only two years later, in 2014, DOE announced plans to undertake new economic studies to gain a better understanding of how even higher levels of U.S. LNG exports—at levels between 12 and 20 Bcf/d of natural gas—would affect the public interest. In late 2015, DOE published the 2014 and 2015 LNG Export Studies to inform its public interest determinations on non-FTA applications under NGA section 3(a). By early 2018, DOE determined that a new economic study was warranted in light of both the

¹⁵ See DOE FECM Fact Sheet at 3.

¹⁶ *Id.* at 1. See also Testimony of the Honorable David M. Turk, Full Committee Hearing to Examine the Administration’s Pause on LNG Export Approvals and the Department of Energy’s Process for Assessing LNG Export Applications, United States Senate Committee on Energy and Natural Resources, Written Testimony at 2 (Feb. 8, 2024), <https://www.energy.senate.gov/services/files/12C4B00D-BFF3-4D11-9CD7-E462B156BF61> [hereinafter Deputy Secretary Turk Testimony].

¹⁷ See, e.g., *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 203 (D.C. Cir. 2017) [*Sierra Club I*] (denying petition for review of DOE’s LNG export authorization issued based in part on economic and environmental studies).

¹⁸ See U.S. Dep’t of Energy, Study on Macroeconomic Outcomes of LNG Exports; Response to Comments Received on Study, 83 Fed. Reg. 67,251, 67,254 (Dec. 28, 2018) (describing DOE’s economic studies to date).

total volume of non-FTA exports authorized at that time (equivalent to 21.35 Bcf/d of natural gas) and the additional volume of LNG requested for export in the then-pending applications.¹⁹

Accordingly, six years ago—in June 2018—DOE published its fifth and most recent economic study, entitled *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (2018 LNG Export Study).²⁰ In recognition of the sharp growth in the U.S. natural gas market and the continued demand for U.S. LNG domestically and abroad, the 2018 LNG Export Study was the first to assess different levels of “unconstrained” (or market-determined) levels of LNG exports on the U.S. natural gas market and the U.S. economy as a whole, over the 2020 to 2050 time period.²¹ These study parameters allowed DOE to rely on the 2018 LNG Export Study to inform its decision-making for a longer period of time than the prior economic studies, including in its most recent long-term non-FTA export authorization issued in March 2023.²²

Although the designs and methodologies of these economic studies have varied, they have all been informed by the U.S. Energy Information Administration’s *Annual Energy Outlook*, which provided projections of energy supply, demand, and prices in the fast-moving and sometimes volatile domestic natural gas market. The studies have also provided DOE with important analysis demonstrating whether fluctuating market conditions could accommodate increased exports of LNG—in particular, how different levels of exports may impact U.S. natural gas prices, Gross Domestic Product, household income, consumer welfare, and other metrics affecting the public interest. DOE provided notice of each of these economic studies in the *Federal Register*, and the associated public comment process has been a valuable part of DOE’s

¹⁹ *Id.* at 67,255.

²⁰ DOE responded to public comments received on the 2018 LNG Export Study on December 28, 2018, and DOE has relied on the 2018 Study since that time. *See id.* at 67,251-52.

²¹ *See id.* at 67,255.

²² *See Freeport LNG Expansion, L.P., et al.*, DOE/FECM Order No. 4961, Docket No. 21-98-LNG, Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations (Mar. 3, 2023).

decision-making.²³

Additionally, beginning in 2014, DOE undertook studies to evaluate the environmental impacts associated with LNG exports to inform its NGA section 3(a) public interest determinations in non-FTA export applications.²⁴ DOE has continued to rely on the following three environmental studies in its review of non-FTA applications, including DOE's National Environmental Policy Act (NEPA) review:²⁵

- *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States* (2014);
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States* (2014); and
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States* (2019).²⁶

Moreover, the first two studies listed above were instrumental in the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) 2017 decision to reject challenges to four non-FTA export authorizations issued by DOE under the public interest framework discussed herein.²⁷

In sum, the economic and environmental studies used to inform DOE's review of non-

²³ See, e.g., U.S. Dep't of Energy, Study on Macroeconomic Outcomes of LNG Exports; Response to Comments Received on Study, 83 Fed. Reg. at 67,260-73.

²⁴ See, e.g., *Sierra Club I*, 867 F.3d at 203.

²⁵ 42 U.S.C. § 4321 *et seq.*

²⁶ See, e.g., U.S. Dep't of Energy, Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States: 2019 Update—Response to Comments, 72 Fed. Reg. 1 (Jan. 2, 2020) (describing the 2019 Life Cycle Analysis Greenhouse Gas (GHG) Update to the 2014 Life Cycle GHG Study and responding to public comments). Since 2021, DOE also considers as part of its review the Marine Transport Technical Support Document, in which DOE evaluated the environmental impacts of the transport of natural gas by marine vessels. The Technical Support Document is not part of the environmental analyses being updated. See, e.g., U.S. Dep't of Energy, Technical Support Document, Notice of Final Rulemaking, NEPA Implementing Procedures (10 C.F.R. Part 1021) (Nov. 2020).

²⁷ See *Sierra Club I*, 867 F.3d at 195-203 (holding that DOE had “adequately considered the environmental impacts of its decisions” under the NEPA and the NGA). The D.C. Circuit rejected three other petitions for review in a consolidated decision, *Sierra Club v. U.S. Dep't of Energy*, 703 Fed. App'x 1 (D.C. Cir. 2017) [*Sierra Club II*]. Thereafter, Sierra Club withdrew its fifth and remaining petition for review. See *Sierra Club v. U.S. Dep't of Energy*, No. 16-1426, Per Curiam Order (D.C. Cir. 2018) (granting Sierra Club's unopposed motion for voluntary dismissal).

FTA applications were last updated between 2014 and 2019, when the U.S. LNG export market was in its infancy—with LNG export capacity of less than 4 Bcf/d and a DOE-approved cumulative volume for non-FTA exports totaling 21.35 Bcf/d.²⁸ At the time DOE announced the Update, operational and under-construction capacity pursuant to existing authorizations put the United States “on track to exceed the export capacity of any other country by more than 50% in 2030, even taking into account planned global LNG expansion capacity.”²⁹ This increase is due to dramatic changes in recent years in domestic and global circumstances.³⁰ The Update will ensure that DOE uses “the most complete, updated, and robust analysis possible on market, economic, national security, [and] environmental considerations” when making its public interest determinations under NGA section 3(a).³¹

In announcing the Update, DOE explained that this process “will ensure that DOE remains a responsible actor using the most up-to-date economic and environmental analyses,” which will “protect[] U.S. consumers and the Nation’s economic competitiveness,” among other considerations.³² DOE emphasized that the Update will take “months, not years,” “will not affect already authorized exports,” will result in only a “temporary” delay in acting on applications for non-FTA exports, and will be “subject to exception for unanticipated and immediate national security emergencies.”³³ DOE further stated that “[w]hen the analyses are

²⁸ See Deputy Secretary Turk Testimony, Written Testimony at 2.

²⁹ January 26 Announcement, *supra* note 2. In February 2024, Qatar announced that it was further expanding its planned LNG export capacity, which, if completed, would reduce the margin by which the United States will have the most LNG export capacity.

³⁰ See DOE FECM Fact Sheet at 2 (stating that “[o]ur world and the global natural gas sector have changed significantly in just a few years with Russia’s invasion of Ukraine and use of energy as a weapon to undermine European and global security, and we have an even greater understanding of the market need, the planned supply for years to come, and the impacts of methane and carbon dioxide emissions.”).

³¹ January 26 Announcement, *supra* note 2.

³² *Id.*

³³ *Id.* See also Deputy Secretary Turk Testimony, Archived Webcast (Feb. 8, 2024), <https://www.energy.senate.gov/hearings/2024/2/full-committee-hearing-to-examine>.

complete, they will be open for public comment and an announcement will be made in the *Federal Register*.”³⁴ Additionally, we note that this is not the first time that DOE has temporarily paused decision-making on all non-FTA applications pending the completion of an LNG export study.³⁵

B. Commonwealth’s Pending Non-FTA Application

On October 16, 2019, Commonwealth filed an application with DOE (as subsequently supplemented and amended) requesting long-term, multi-contract authorization to export domestically produced LNG in a volume equivalent to approximately 441.4 billion cubic feet per year (Bcf/yr) of natural gas (1.21 Bcf/d) from its proposed natural gas liquefaction facility (the Commonwealth LNG Project) to be located in Cameron Parish, Louisiana, to both FTA and non-FTA countries.³⁶ In 2020, DOE approved the FTA portion of the Application “without modification or delay,” as required by NGA section 3(c).³⁷ That approval remains in effect and is unaffected by the Update.

On August 20, 2019, Commonwealth filed an application with the Federal Energy Regulatory Commission (FERC) requesting authorization to site, construct, and operate the Commonwealth LNG Project.³⁸ As Commonwealth observes, its application was pending for several years at FERC. But this length of time was due, in large part, to project modifications

³⁴ DOE FECM Fact Sheet at 1.

³⁵ See U.S. Dep’t of Energy, 2012 LNG Export Study; Notice of availability and request for comments, 77 Fed. Reg. 73, 627, 73,627 (Dec. 11, 2012) (stating that “no final decisions will be issued in the 15 pending proceedings until DOE has received and evaluated the comments requested herein.”). This announced pause lasted approximately five months (until DOE issued a conditional non-FTA order to Freeport LNG Expansion, L.P., *et al.* on May 17, 2013). However, DOE had not acted on a non-FTA application following its issuance of the *Sabine Pass* authorization in August 2012—bringing the total pause associated with the 2012 LNG Export Study to approximately nine months.

³⁶ Commonwealth App., *supra* note 9.

³⁷ *Commonwealth LNG, LLC*, DOE/FE Order No. 4521, Docket No. 19-134-LNG, Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Free Trade Agreement Nations (Apr. 17, 2020) (approving FTA volume equivalent to 441.4 Bcf/yr).

³⁸ *Commonwealth LNG, LLC*, Application for Authorization Under Section 3 of the Natural Gas Act, FERC Docket No. CP19-502-000 (Aug. 20, 2019).

made by Commonwealth.³⁹ Specifically, on March 16, 2020 (approximately seven months after Commonwealth filed its application at FERC), FERC suspended the environmental review schedule for Commonwealth’s proposed Project “pending sufficient responses from Commonwealth to Commission staff data requests,” among other reasons.⁴⁰ Commonwealth did not submit an amended application until approximately 16 months later, on July 8, 2021.⁴¹ Because Commonwealth’s amendment “modified the proposed LNG storage tank design and capacities,”⁴² FERC was required to prepare a new environmental review schedule, which was published in the *Federal Register* on September 30, 2021, and which included a revised issuance date for Commonwealth’s environmental impact statement of September 9, 2022.⁴³

Consistent with longstanding practice, DOE did not deem the non-FTA portion of the Application to be ripe for consideration until after the completion of FERC’s environmental review under NEPA (in which DOE was a cooperating agency) and FERC’s issuance of an order approving the siting, construction, and operation of the Commonwealth LNG Project.⁴⁴ FERC issued its order approving Commonwealth’s application on November 17, 2022,⁴⁵ and denied rehearing on June 9, 2023.⁴⁶ That order is currently being challenged by several environmental

³⁹ *Id.* at 2.

⁴⁰ See *Commonwealth LNG, LLC*, Order Granting Authorization Under Section 3 of the Natural Gas Act, 181 FERC ¶ 61,143 at P 22 (2022) [hereinafter Commonwealth FERC Order].

⁴¹ See *Commonwealth LNG, LLC*, Application for Limited Amendment to NGA Section 3 Application to Modify LNG Storage Tank Design and Capacity, FERC Docket No. CP19-502-000 (July 8, 2021).

⁴² *Id.*

⁴³ *Id.* at P 23.

⁴⁴ See, e.g., Dep’t of Energy, Procedures for Liquefied Natural Gas Export Decisions; Final Revised Procedures, 79 Fed. Reg. 48,132, 48,135 (Aug. 15, 2014) (stating that an application is ready for final action when DOE has completed the pertinent NEPA review process and has sufficient information on which to base a public interest determination).

⁴⁵ Commonwealth FERC Order, *supra* note 40.

⁴⁶ *Commonwealth LNG, LLC*, Order Addressing Arguments Raised on Rehearing, 183 FERC ¶ 61,173 (2023) (denying rehearing following and modifying Notice of Denial of Rehearing by Operation of Law).

organizations in two consolidated lawsuits filed in the D.C. Circuit in 2023.⁴⁷

In its Request, Commonwealth states that it “does not oppose DOE’s efforts to re-visit its economic and environmental analyses”⁴⁸ Commonwealth asserts, however, that the Update “is in effect a final order of DOE staying [its] non-FTA Application, and will cause substantial harm to Commonwealth.”⁴⁹ According to Commonwealth, the Update is also “a reviewable agency action directly harming Commonwealth for which Commonwealth seeks rehearing, preserving its rights to seek review in a federal appellate court.”⁵⁰ For these reasons, Commonwealth seeks rehearing of the Update and requests that DOE “finalize its review of Commonwealth’s [non-FTA] Application while it undertakes its broader review of its economic and environmental analyses.”⁵¹

C. DOE’s Anticipated Process for the Updated Analyses

Commonwealth’s Request misperceives the function of the Update. The Update is an integral part of DOE’s process for the public interest determination required by NGA section 3(a). Before issuing an order in pending non-FTA applications, including Commonwealth’s non-FTA Application, DOE must have “sufficient information on which to base a public interest determination.”⁵² DOE has stated that the Update to the economic and environmental analyses will take several months to complete and will be informed by analysis from experts at DOE’s National Laboratories. Upon completion, and consistent with DOE’s process for developing

⁴⁷ See *Healthy Gulf, et al. v. FERC* (D.C. Cir. Nos. 23-1069 & 23-1071) (consolidated) (oral argument held on Feb. 12, 2024). On April 26, 2023, Sierra Club petitioned the United States Court of Appeals for the Fifth Circuit and filed a lawsuit in the 19th Judicial District Court for Baton Rouge Parish, Louisiana, for review of two Louisiana Department of Environmental Quality permits issued to Commonwealth on March 28, 2023. See Sierra Club, “Sierra Club Challenges Louisiana Department of Environmental Quality for Unlawfully Issuing Commonwealth LNG Air Pollution Permit” (Apr. 27, 2023), <https://www.sierraclub.org/press-releases/2023/04/sierra-club-challenges-louisiana-department-environmental-quality-unlawfully>.

⁴⁸ Commonwealth Request at 1.

⁴⁹ *Id.* at 2.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Procedures for Liquefied Natural Gas Export Decisions, 79 Fed. Reg. at 48,135.

prior studies, DOE will publish a Notice of Availability in the *Federal Register*, inviting public comment on the analyses. In addition, DOE will publish the Notice of Availability and analyses in all pending (and future) dockets involving non-FTA export applications, including Commonwealth's docket. DOE will invite public comment on the analyses from all interested stakeholders for at least 60 days. Together with the public process, DOE estimates that the Update will be completed within a year.⁵³ Thereafter, DOE will use the updated analyses, along with other information, to expeditiously issue an order on Commonwealth's non-FTA Application.

III. SUMMARY OF COMMONWEALTH'S ARGUMENTS

In its Request, Commonwealth asks DOE to grant rehearing of the Update, to withdraw any pause of DOE's review of pending non-FTA applications, and to finalize its review of Commonwealth's non-FTA Application "while [DOE] undertakes its broader review of its economic and environmental analyses."⁵⁴

Commonwealth states that its Application has been pending with DOE for "nearly 4.5 years," and notes that it has been "15 months since Commonwealth received its FERC Authorization."⁵⁵ Commonwealth states that, during this time, it "has diligently continued to develop its project,"⁵⁶ yet DOE is taking the "unprecedented step of pausing its review of all non-FTA applications" without taking into account Commonwealth's "unique position."⁵⁷

⁵³ January 26 Announcement, *supra* note 2. See also Secretary Granholm's remarks at CERAWEEK on March 18, 2024, indicating that DOE will have completed the Update by or before March 2025, <https://www.eenews.net/articles/granholm-says-lng-pause-will-end-within-a-year/>.

⁵⁴ See Commonwealth Request at 2, 14.

⁵⁵ *Id.* at 5; see also *id.* at 2.

⁵⁶ *Id.* at 4; see *id.* at 3-4 (describing engineering activities and commercial progress).

⁵⁷ *Id.* at 1-2 (emphasis in original).

Commonwealth alleges three major issues with DOE's Update. First, Commonwealth argues that DOE's Update is "final agency action."⁵⁸ Commonwealth asserts that when considering judicial review of administrative actions, courts have interpreted finality "in a pragmatic way" and have "taken a flexible view of the matter."⁵⁹ Commonwealth argues that the Update meets the definition of a final agency action because it: (i) will have an "immediate and direct negative impact on Commonwealth"; (ii) "binds staff and applicants unless and until the review process is updated at some future point and a final decision is issued to update the public interest analysis"; and (iii) is "fit for judicial resolution."⁶⁰

Next, Commonwealth argues that the Update is a substantive rule issued in violation of the Administrative Procedure Act's (APA) "mandated notice-and-comment procedures."⁶¹ Commonwealth states that, because the Update "establishe[s] a standard of conduct which has the force of law" and has "'mandatory language' rendering the [temporary deferral] binding," it is a "binding agency rule" that DOE issued without proper notice procedures in violation of the APA.⁶²

Finally, Commonwealth asserts that the Update—as it applies to Commonwealth's non-FTA Application—"violates principles of fundamental fairness."⁶³ Commonwealth argues that the Update is "patently unjust" and will have "exponentially greater impacts" on Commonwealth than on other affected applicants.⁶⁴

⁵⁸ *Id.* at 7.

⁵⁹ *Id.*

⁶⁰ Commonwealth Request at 8-9.

⁶¹ *Id.* at 11.

⁶² *Id.* (citations omitted).

⁶³ *Id.* at 12-13.

⁶⁴ *Id.* at 5, 13.

IV. DISCUSSION

Under NGA section 19(a), and as relevant here, “[a]ny person ... aggrieved by an order issued by [DOE] in a proceeding to which such person ... is a party may apply for a rehearing.”⁶⁵ The aggrieved party must seek rehearing within 30 days “after the issuance of such order.”⁶⁶ DOE’s regulations for the import and export of natural gas address rehearing in 10 C.F.R. Part 590, Subpart E. Only a “party aggrieved by the issuance” of a “final opinion and order, conditional order, or emergency interim order” may apply for rehearing.⁶⁷ Consistent with the NGA, the aggrieved party must seek rehearing within 30 days “after the issuance of such order.”⁶⁸ Thus, under both section 19 of the NGA and DOE’s regulations, only a party “aggrieved by an order” may seek rehearing.⁶⁹

A. Because DOE’s Update Is Not an “Order” and Because Commonwealth Is Not an “Aggrieved Party,” Commonwealth Has No Basis to Seek Rehearing Under the NGA and DOE’s Regulations.

1. DOE’s Update Is Not an “Order”

Both the NGA and DOE’s regulations prohibit a party from applying for rehearing until an order is issued in a proceeding.⁷⁰ An “order” must “have some substantial effect on the parties which cannot be altered by subsequent administrative action,” it must “threaten

⁶⁵ 15 U.S.C. § 717r(a).

⁶⁶ *Id.* Likewise, under the NGA’s judicial review provision—NGA section 19(b)—only a “party to a proceeding ... aggrieved by an order issued by [DOE] in such proceeding may obtain a review of such order” in court. *Id.* § 717r(b).

⁶⁷ 10 C.F.R. § 590.501(a). DOE no longer issues conditional orders on applications to export LNG to non-FTA countries from the lower-48 states. *See* Procedures for Liquefied Natural Gas Export Decisions, 79 Fed. Reg. at 48,135.

⁶⁸ 10 C.F.R. § 590.501(a).

⁶⁹ 15 U.S.C. § 717r(a) (emphasis added). *See also* 10 C.F.R. 590.501.

⁷⁰ *See* 15 U.S.C. § 717r(a); 10 C.F.R. 590.501.

‘irreparable harm,’”⁷¹ and it must be final.⁷² “An action or order is ‘final when it imposes an obligation, denies a right, or fixes some legal relationship.’”⁷³

No order has yet been issued in Commonwealth’s non-FTA proceeding.⁷⁴ And the Update is not such an order. DOE’s Update does not have a “substantial effect on the parties which cannot be altered by subsequent administrative action.”⁷⁵ The Update is a temporary step that is necessary so that DOE can avoid reliance on stale data and stale analyses in review of Commonwealth’s non-FTA Application under NGA section 3(a).⁷⁶ There has been no change in the status of Commonwealth’s non-FTA Application. It remains pending subject to DOE’s ongoing review, which (as noted above) includes taking the steps that DOE determines are necessary to assess whether Commonwealth’s proposed exports to non-FTA countries are in the public interest.

To be considered final, an action must mark the consummation of the agency’s decision-making process (*i.e.*, “it must not be of a merely tentative or interlocutory nature”), and the action must determine rights or obligations or be one from which legal consequences will flow.⁷⁷ That is not the case here. The Update is an interim step in DOE’s process for making a decision and issuing an order on Commonwealth’s non-FTA Application.⁷⁸ DOE’s Update does not

⁷¹ *Atlanta Gas Light Co. v. Fed. Power Comm’n*, 476 F.2d 142, 147 (5th Cir. 1973).

⁷² *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1092-93 (9th Cir. 2014). *See also Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134, 139 (5th Cir. 2009) (explaining when an order is final for purposes of the NGA).

⁷³ *Columbia Riverkeeper*, 761 F.3d at 1092 (quoting *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003)).

⁷⁴ *See* Commonwealth Request at 10 (noting that the relevant proceeding is “Commonwealth’s non-FTA proceeding”).

⁷⁵ *Atlanta Gas Light Co.*, 476 F.2d at 147; *Energy Transfer Partners, L.P.*, 567 F.3d at 139 (citation and internal quotation marks omitted).

⁷⁶ For a description of the completion of the process, *see supra* Section II.C.

⁷⁷ *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

⁷⁸ *See generally G. & T. Terminal Packaging Co. v. Hawman*, 870 F.2d 77, 81 (2d Cir. 1989) (finding that although a decision “had some indicia of finality,” it was not a final order because “neither ... full rights nor ... full obligations were settled by the initial order”); *see also DRG Funding Corp. v. Sec’y of Hous. & Urban Dev.*, 76 F.3d 1212, 1215 (D.C. Cir. 1996) (finding no final agency action where “the pending administrative proceedings ... will determine the corporation’s rights and obligations”).

“impose[] an obligation, den[y] a right, or fix[] some legal relationship.”⁷⁹ DOE has not modified the legal requirements applicable to this Application.

The NGA does not entitle an applicant to export to non-FTA countries unless and until DOE determines that those exports are not inconsistent with the public interest.⁸⁰ And section 3(a) of the NGA does not establish a right to a decision within a specified time.⁸¹ DOE has not and will not unreasonably postpone making this determination,⁸² but DOE is under no obligation to do so on Commonwealth’s preferred timeline or using outdated information.⁸³ As noted above, DOE’s 2014 Procedures for Liquefied Natural Gas Export Decisions, which DOE continues to follow, provide that a non-FTA export application is only “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.*”⁸⁴ This condition has, for nearly a decade, put applicants, including Commonwealth, on particularized notice that DOE will conduct a detailed assessment of the “information” or record evidence available to determine if it is sufficient for DOE to make a reasoned determination under the public interest standard. Here, DOE does not have sufficient information on which to base this determination, and as a result, Commonwealth’s non-FTA Application is not yet ready for final action.

⁷⁹ *Columbia Riverkeeper*, 761 F.3d at 1092 (quoting *City of Fremont*, 336 F.3d at 914 (internal quotation marks omitted)).

⁸⁰ 15 U.S.C. § 717b(a).

⁸¹ *Id.*

⁸² See *Telecommc’ns Research & Action Ctr. v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) (establishing factors to evaluate a claim of agency delay) [*TRAC*]. See also *Nat’l Grain & Feed Ass’n, Inc. v. Occupational Safety & Health Admin.*, 903 F.2d 308, 310 (5th Cir. 1990) (applying *TRAC* factors); *In re La. Pub. Serv. Comm’n*, 58 F.4th 191, 193-95 (5th Cir. 2023) (considering the statutory provisions, factual circumstances, and potential harm to evaluate a claim of agency delay).

⁸³ *Cf.* Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776, 2866 (Oct. 24, 1992) (amending the NGA to require that DOE approve applications for FTA exports “without ... delay,” but declining to make a corresponding amendment to the non-FTA applications provision).

⁸⁴ 79 Fed. Reg. at 48,135 (emphasis added).

The Update likewise “d[oes] not complete [DOE’s] ... proceeding, nor [is] it meant to do so.”⁸⁵ The Update also “does not recommend [a decision on the non-FTA Application], nor does it advocate any other definitive action with respect to the [Application].”⁸⁶ Instead, it reflects DOE undertaking a periodic process—in accordance with DOE’s past practice—to update the analyses that DOE has long determined are necessary to make an assessment of the public interest. Rather than “bind[] agency staff ... from fulfilling its duties,” as Commonwealth asserts,⁸⁷ the Update will help to ensure that DOE can meet its statutory and regulatory obligations. DOE presently lacks sufficient information to make the public interest determination for the non-FTA portion of Commonwealth’s Application.⁸⁸ Without taking time to update its analyses, DOE cannot reasonably fulfill its duties. DOE will expeditiously make a determination on Commonwealth’s non-FTA Application once the Update is complete.⁸⁹ Because review of the non-FTA Application remains ongoing and subject to final resolution, there is no “direct and immediate impact on [Commonwealth] that cannot be altered by subsequent [DOE] action.”⁹⁰

As detailed above, because of the profound changes in the U.S. and global natural gas markets and in the cumulative volume of approved long-term LNG exports approved for non-FTA countries since DOE’s most recent economic analysis in 2018 and environmental analyses

⁸⁵ *DRG Funding Corp.*, 76 F.3d at 1214-15.

⁸⁶ *Env’tl. Def. Fund, Inc. v. Johnson*, 629 F.2d 239, 241 (2d Cir. 1980) (concluding that case law on finality “as well as common sense, compels the conclusion that the Corps’ issuance of a report recommending a further study of the [Hudson River Skimming Project], which it is estimated will take three to five years to complete . . . cannot possibly be characterized as a ‘final agency action’” and that judicial intervention would be “an untoward interference in the administrative process”).

⁸⁷ Commonwealth Request at 8.

⁸⁸ See 79 Fed. Reg. at 48,133.

⁸⁹ *Cf. W. Va. Pub. Servs. Comm’n v. U. S. Dep’t of Energy*, 681 F.2d 847, 858 (D.C. Cir. 1982) (explaining that an agency “created to protect the public interest must be free, ‘within the ambit of [its] statutory authority, to make practical adjustments which may be called for by particular circumstances.’”) (quoting *Fed. Power Comm’n v. La. Power & Light Co.*, 406 U.S. 621, 642 (1972)).

⁹⁰ *Pennzoil Co. v. FERC*, 742 F.2d 242, 245 (5th Cir. 1984) (declining to review FERC action where the relevant proceeding was in progress, even if final resolution would be delayed).

in 2014 and 2019, DOE determined that updated analyses are necessary to provide a sufficient basis on which to make a public interest determination on Commonwealth's non-FTA Application.⁹¹ In particular, because Commonwealth seeks approval to export LNG to non-FTA countries, DOE must conduct these updated analyses to evaluate the cumulative economic and environmental effects of Commonwealth's requested export volume together with the large volume of non-FTA exports that DOE has approved since the time when the existing studies were conducted. Accordingly, to support its ability to make a reasoned determination in light of changed circumstances, DOE is updating its analyses and, consistent with the 2014 Procedures, will not act on Commonwealth's non-FTA Application under NGA section 3(a) until DOE determines it has sufficient information to do so.⁹²

2. Commonwealth Is Not "Aggrieved"

Commonwealth has likewise failed to establish that it has been "aggrieved" by DOE's Update under the legal standard in section 19 of the NGA, as Commonwealth must to seek rehearing. For purposes of that section, "[a] party is aggrieved only 'if it can establish both the constitutional and prudential requirements for standing,'"⁹³ and "[t]he order must 'definitively' affect the petitioner's rights and 'threaten the petitioner with irreparable harm,' ... which is harm that 'cannot be altered by subsequent administrative action.'"⁹⁴ The harm must be "both

⁹¹ See *supra* Section II.

⁹² Commonwealth's Request includes arguments that DOE's Update is a final agency action subject to judicial review. DOE need not address that argument because it is irrelevant to these administrative proceedings. In any event, even considering these arguments, the Update does not constitute final agency action for much the same reasons as it is not an "order" under the NGA and DOE regulations, as explained above.

⁹³ *PNGTs Shipper's Grp. v. FERC*, 592 F.3d 132, 136 (D.C. Cir. 2010) (quoting *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009)). See also *Gulfport Energy Corp. v. FERC*, 41 F.4th 667, 676 (5th Cir. 2022) ("The aggrievement requisite all but duplicates the traditional requisites for Article III standing.").

⁹⁴ *Gulfport Energy Corp.*, 41 F.4th at 676 (first quoting *Brooklyn Union Gas v. FERC*, 190 F.3d 369, 373 (5th Cir. 1999), then quoting *Energy Transfer Partners, L.P.*, 567 F.3d at 139).

‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical,’” traceable to the challenged conduct, and redressable by a favorable decision.⁹⁵

Commonwealth has made no such showing. To the contrary, the Update lacks a “definitive[]” impact that could irreparably harm Commonwealth. The NGA does not establish a right to a decision within a specified time,⁹⁶ and DOE has not denied Commonwealth’s non-FTA Application. The non-FTA portion of the Application remains pending, as it was before DOE announced the Update.⁹⁷ The Update (and associated public process) will provide DOE with the analyses and information that it needs to make a public interest determination on Commonwealth’s Application. Once the Update is completed and DOE has the necessary information to inform its public interest analysis, DOE will move expeditiously to evaluate Commonwealth’s non-FTA Application in an order issued under NGA section 3(a), consistent with DOE’s normal practice.⁹⁸

Moreover, though Commonwealth raises concerns about its ability to negotiate contracts during the Update,⁹⁹ we note that Commonwealth has successfully negotiated and secured contracts for the sale and long-term export of LNG from its proposed Project during the pendency of the permitting process, and nothing about the Update prevents Commonwealth from

⁹⁵ *PNGTS Shipper’s Grp.* at 136 (quoting *Lujan*, 504 U.S. at 559-61); *Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001).

⁹⁶ 15 U.S.C. § 717b(a).

⁹⁷ Notably, although FERC has approved Commonwealth’s application to site, construct, and operate its LNG facility, the FERC Order has been challenged and the litigation remains pending. *See supra* note 47 (noting challenge to FERC Order as well as challenges to Louisiana Department of Environmental Quality permits). Further, courts have explained that “mere delay or inconvenience from having to endure or await further proceedings generally does not aggrieve a party.” *Gulfport Energy Corp.*, 41 F.4th at 676. *Accord Pennzoil Co.*, 742 F.2d at 245 (finding “delay in the final resolution of the ... proceedings now in progress” insufficient to establish irreparable harm).

⁹⁸ *See, e.g., Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 203 (D.C. Cir. 2017) (“[T]here must be ‘an affirmative showing of inconsistency with the public interest’ to deny the application” under NGA section 3(a)) (citation omitted).

⁹⁹ *See* Commonwealth Request at 8.

continuing to do so.¹⁰⁰ These potential commercial challenges during an application’s pendency do not rise to the level of harm required¹⁰¹ to establish that Commonwealth is “aggrieved” under section 19 of the NGA for purposes of seeking rehearing.¹⁰²

For these reasons, Commonwealth has failed to establish a basis to seek rehearing under the NGA or DOE’s regulations.

B. Other Procedural Matters

In response to Commonwealth’s Request, the Environmental Advocates submitted a filing on March 12, 2024, containing two separate motions—a Motion for Leave to Intervene Out of Time and a Motion for Leave to Answer Commonwealth’s Request (together with a proposed Answer to Request).¹⁰³ On March 27, 2024, Commonwealth filed an Answer in opposition to the Environmental Advocates’ Motion to Intervene Out of Time.¹⁰⁴

DOE’s regulations at 10 C.F.R. §§ 590.303(d) and 590.304(e), respectively, provide that motions to intervene and protests may be filed at any time following the filing of an application, but not later than the date fixed for filing in the applicable FECM notice, unless a later date is permitted by the Assistant Secretary for good cause shown. The Environmental Advocates acknowledge that their motion to intervene is out of time in this docket.¹⁰⁵ Therefore, the only

¹⁰⁰ See Commonwealth LNG Terminal Long-Term Contract Information and Registrations at U.S. LNG Export Facilities, <https://www.energy.gov/fecm/articles/commonwealth-lng-terminal> (identifying Commonwealth’s existing contracts filed with FECM). Cf. *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1134 (D.C. Cir. 2017) (“[I]t is ‘well settled that economic loss does not, in and of itself, constitute irreparable harm.’” (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985))).

¹⁰¹ See, e.g., *Pennzoil Co.*, 742 F.2d at 245 n.8 (noting that courts have found no irreparable harm from “protracted adjudicatory proceedings” or “orders setting out procedural framework”).

¹⁰² We note that DOE’s regulations contemplate that additional procedures, including undertaking analysis, may be warranted, providing that “[a]t any time during a proceeding, the Assistant Secretary [for Fossil Energy and Carbon Management] ... may on his or her own initiative determine to provide additional procedures.” 10 C.F.R. § 590.310.

¹⁰³ Enviro. Advocates Motion, *supra* note 5. In the Motion, the Environmental Advocates argue both that Commonwealth’s Request is procedurally improper and that its arguments fail on the merits.

¹⁰⁴ See Commonwealth Answer, *supra* note 6 (arguing, as relevant here, that DOE “should summarily dismiss the Late Intervention and in so doing afford no weight to Environmental Litigants’ answer to the Rehearing Request”).

¹⁰⁵ Enviro. Advocates Motion at 2.

basis for DOE to grant such a motion would be for “good cause shown.”¹⁰⁶ Here, however, because DOE finds that Commonwealth’s Request is procedurally improper and is dismissing the Request—and consistent with the Environmental Advocates’ own statements¹⁰⁷—DOE finds that there is not a basis to reach either motion. Accordingly, we dismiss Environmental Advocates’ filing in its entirety, including both motions.¹⁰⁸ In light of this dismissal, we likewise have no basis to consider Commonwealth’s Answer to the Environmental Advocates’ Motion for Leave to Intervene Out of Time, and thus we dismiss Commonwealth’s Answer.

V. CONCLUSION

Under NGA section 19(a) and DOE’s regulations,¹⁰⁹ a “party” may not seek rehearing of DOE action unless there is an “order” issued in a proceeding, and unless that party is “aggrieved” by DOE’s order. Commonwealth has not established that it meets either of these prerequisites for rehearing under the NGA. Accordingly, DOE dismisses Commonwealth’s Request for Rehearing. Additionally, DOE dismisses the Environmental Advocates’ Motion for

¹⁰⁶ 10 C.F.R. § 590.303(d).

¹⁰⁷ Enviro. Advocates Motion at 1 (stating that only “[i]f DOE ... decides to entertain this flawed request, [the Environmental Advocates] hereby move for leave to intervene out of time to permit these organizations to respond, and move for leave to answer”).

¹⁰⁸ Although DOE dismisses the Environmental Advocates’ filing—including their Motion for Leave to Intervene Out of Time—based on DOE’s dismissal of Commonwealth’s Request, we note that there could be circumstances in the future, or in other proceedings, that support late intervention for good cause shown. *See, e.g., Alaska LNG Project LLC*, DOE/FECM Order No. 3643-C, Docket No. 14-96-LNG, Order Affirming and Amending DOE/FE Order No. 3643-A Following Partial Grant of Rehearing, 16-21 (Apr. 13, 2023) (granting late intervention to two environmental organizations following DOE’s issuance of a supplemental environmental impact statement during rehearing period due to “unique posture” of case and “limited additional impact” of late intervention).

¹⁰⁹ 10 C.F.R. § 590.501(a).

Leave to Intervene Out of Time and Motion for Leave to Answer (as well as the proposed Answer).



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