

January 22, 2013

Ingrid Kolb
Chief FOIA Officer, Department of Energy
FOIA Requester Service Center
1000 Independence Avenue, SW
Washington, DC 20585
By email to: FOIA-central@hq.doe.gov

RE: Freedom of Information Act Request Re: LNG Export Studies

Dear Ms. Kolb:

Thank you in advance for promptly processing this Freedom of Information Act (FOIA) request submitted on behalf the Sierra Club, pursuant to 5 U.S.C. § 552 and DOE's FOIA regulations, 10 C.F.R. Pt. 1004. This request is focused on the study DOE recently commissioned and released from NERA Economic Consulting concerning liquefied natural gas (LNG) exports from the United States. *See* 77 Fed. Reg. 73,627 (Dec. 11, 2012).

Sierra Club requests a fee waiver and expedited processing for this request.

I. Records Requested

DOE is considering multiple LNG export license applications under the Natural Gas Act, 15 U.S.C. § 717b. Those decisions are at the center of a major national policy debate on the environmental and economic impacts of LNG export. As part of that consideration, DOE is seeking to evaluate whether the economic impacts of export are in the public interest, a consideration which encompasses the "macroeconomic impacts of natural gas exports on the U.S. economy." 77 Fed. Reg. at 73,268. According to DOE, it "commissioned NERA [which is an economic consulting firm] to conduct such an analysis." *Id.* This FOIA request focuses upon the NERA study which DOE commissioned.

The NERA study has been released for public comment and has been published on DOE's website.¹ DOE affirms that it will use the study and the comments it receives upon it "to inform our determination of the public interest in each [export license] case." 77 Fed. Reg. at 73,628. DOE seeks a first round of comments by January 24, 2013,

¹ See <http://fossil.energy.gov/programs/gasregulation/LNGStudy.html>

and a round of reply comments by February 25, 2013, 77 Fed. Reg. at 73,627, after which it will move forward with the export licensing process. The time available for the public to analyze the study is short, underlining the urgency of this FOIA request.

In order to better inform its nearly 600,000 members, policymakers, and the public, Sierra Club seeks information on the NERA study in time to allow it and other members of the public to file fully-informed comments during DOE's comment period.

Pursuant to 10 C.F.R. § 1004.4(b), the Sierra Club therefore requests the following records:

- (A) DOE's contract or contracts with NERA Consulting (or any other relevant person or entity) to perform this study.
- (B) All records related to DOE's selection of NERA Consulting as the contractor for this study, including, but not limited to, records identifying DOE's reasons for selecting NERA as the contractor for this study, correspondence between DOE and NERA before and after NERA was selected, and any records related to other contractors DOE considered or which applied for consideration, to perform this study.
- (C) All records related to DOE's involvement in the preparation, release, and further consideration of the study, including, but not limited to, correspondence between DOE staff² and NERA staff concerning the study; correspondence between DOE staff and staff at any other federal agency, Congressional offices, or the Executive Office of the White House concerning the study or the issues raised therein; and correspondence between DOE staff and any members of the public (including representatives of industry and the news media) concerning the study or the issues raised therein. Note that the transmittal letter NERA sent to DOE with the study refers to the final report as a "clean copy"; this request explicitly seeks any copies of the report showing edits and comments from DOE staff or any other government staff.
- (D) A complete technical description of NERA's "NewERA" model, which was used to generate the results, fully detailing that model's inputs, equations, technical assumptions, and other relevant operating parameters, sufficient to allow an

² "Staff," here, refers to any person employed by or associated with these entities, including appointed officials and contractors.

independent expert to fully assess the model's reliability and performance.³ Please include any papers or technical reports NERA or any other entity have published describing the model.

(E) A machine-readable copy of the NewERA model, which can be run by independent experts.

Sierra Club defines "records" broadly to include all documents, email correspondence, notes, voice mail recordings, letters, computer files, and any other information bearing on Sierra Club's request.

Please produce these records as soon as they are available, on a rolling basis. DOE regulations provide that it will provide a response within 10 working days, and may only extend this period by 10 more working days under unusual circumstances. 10 C.F.R. § 1004.5.

If you have any questions or concerns about this request, please contact me immediately.

II. Form of Documents

Please provide all electronic documents in machine-readable, fully-searchable files (such as .doc, .xls, and .pdf files) organized according to the individual record requests enumerated above. Please provide paper documents in well-organized mailings, where necessary. Please include an index of documents provided. *See* 5 U.S.C. § 552(a)(3)(B) ("[A]n agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."). If, despite DOE's reasonable efforts, it cannot provide a particular record in this format, please provide the record in another machine-readable format, or in paper, but please contact me to work out the optimal format before doing so.

III. Exempt Records

If DOI determines that any records may be withheld under FOIA's narrow exemptions, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency's justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820

³ For an example of such a full description, see the publicly-available technical support documents for DOE's own models, posted at <http://www.eia.gov/reports/index.cfm?t=Model%20Documentation>.

(D.C. Cir 1973), and related cases. If a document includes both exempt and non-exempt information, please provide those portions of the document that are not specifically exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

IV. Fee Waiver

Pursuant to 10 C.F.R. §§ 1004.4(e) & 1004.9(a)(8), Sierra Club hereby requests that DOE waive all fees associated with responding to this request because Sierra Club seeks this information in the public interest and will not benefit commercially from this request. If DOE does not waive the fees entirely, Sierra Club requests that it reduce them to the extent possible.

Sierra Club meets all factors in DOE's fee waiver test, as is demonstrated below. If this information is not sufficient to justify a fee waiver, please contact me for further documentation before deciding upon the waiver request.

A. Public Interest Factor

The disclosure of this information is in the "public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." *See* 10 C.F.R. § 1004.9(a)(8)(i). Sierra Club's request complies with each of the criteria DOE weighs in this determination:

i. The request concerns the operations or activities of the government

Sierra Club's request concerns a study which DOE has commissioned to assist it in its statutorily-mandated licensing process, and which DOE has disseminated in the Federal Register. Both the study and DOE's handling of matters related to it thus bear upon the operations and activities of the government. *See* 10 C.F.R. § 1004.9(a)(8)(i)(A).

ii. The disclosure is "likely to contribute" to an understanding of government operations and activities

DOE's investigation into the economic impacts of LNG export is central to the operation of DOE's Office of Fossil Energy and its Liquid Natural Gas Regulation program. And, as DOE has explained to the Administration, Congress, and the public, the NERA study

is a key factor in DOE's decisionmaking process.⁴ DOE has refused to move forward on any LNG export licenses which it has the discretion to grant or deny until the study has been completed and reviewed. Accordingly, DOE has already placed the study in the dockets for each of its pending license processes, reaffirming that "no final decisions will be issued in the ... pending proceedings until DOE has received and evaluated the comments requested herein." 77 Fed. Reg. at 73,629.

As such, records concerning the study are of vital importance to understanding DOE's activities in the LNG export arena, and are "likely to contribute" to public understanding. *See* 10 C.F.R. § 1004.9(a)(8)(i)(B). The records Sierra Club has sought are necessary for the public to fully evaluate the study. They bear, for instance, upon how DOE selected NERA to perform the study, DOE's involvement (and the involvement of other government entities) in shaping the content of the study, and the models and other documents NERA used to reach its conclusions. These materials will allow the public to critically assess the study's provenance and conclusions, and to assess the independence and integrity of the information before DOE and DOE's own decisionmaking process. None of these materials have yet been made public. This information is thus, "likely to contribute" to the public's understanding of government activities as DOE continues to address these vital policy questions.

iii. The information will contribute to the understanding of the general public

This information will contribute to the understanding of the general public. *See* 10 C.F.R. § 1004.9(a)(8)(i)(C). The general public is already following LNG export matters, and the NERA study has been reported across the country, so records concerning the study will receive close and critical scrutiny from members of the public and the news media.

Sierra Club is particularly able to ensure that information will be disseminated to the general public. The Sierra Club is the nation's oldest and largest grassroots environmental organization, with nearly 600,000 members and hundreds of thousands more online activists and newsletter subscribers. Its website is highly trafficked and Sierra Club media and communications reach hundreds of thousands of people through a radio show, an extensive online information system, web videos, and news reports.

⁴ *See, e.g.*, Letter from Deputy Assistant Secretary Christopher Smith to Representative Edward Markey (Feb. 24, 2012) (explaining that DOE would not take final action until the NERA study had been received and reviewed).

Sierra Club has a decades-long track record of effectively communicating with the public.

The Sierra Club's Beyond Natural Gas campaign⁵ is a multi-million dollar effort to research, advocate, and publicize efforts to better regulate natural gas production and to reduce natural gas production and consumption (including via export) in favor of cleaner alternatives and to inform the public about the effects of natural gas. The campaign participates in dozens of proceedings annually, has a large communications budget, and communicates weekly with tens of thousands of citizens. Campaign experts and attorneys use available information to develop reports, media materials, and litigation briefs that further educate the public and decision-makers.

Sierra Club has prioritized its efforts on LNG export, and has an active communications, organizing, and litigation campaign on exports. Through that campaign, Sierra Club has built an extensive national network of public organizations and individuals interested in these issues, and it communicates with them regularly. These communications have, for instance, generated nearly 80,000 public letters on LNG exports and multiple editorials, letters to the editor, and reports.

In short, Sierra Club is uniquely well positioned to analyze and publicize the information it requests. Sierra Club will make all documents publicly available and will use them as the bases for reports and analysis of DOE's LNG programs.

iv. The information will contribute "significantly" to public understanding of government operations or activities

The information Sierra Club seeks will contribute "significantly" to the ongoing public conversation on LNG exports and the shale gas production needed to support them. *See* 10 C.F.R. § 1004.9(a)(8)(i)(D). None of the materials Sierra Club has requested are now widely known (if they have been made public at all), yet they are essential to evaluating the NERA study and DOE's involvement. As discussed above, these materials will allow the public and independent experts to fully assess NERA's conclusions and to provide the meaningful comments on those conclusions which DOE seeks. *See* 77 Fed. Reg. at 73,629. Without these materials, the public will not, for instance, understand how NERA was selected, the model systems and assumptions which NERA employed, or DOE's actions in the study's editing and release. Releasing this information (and doing so on a timeline which will allow the public to comment based upon these

⁵ *See* <http://content.sierraclub.org/naturalgas/content/beyond-natural-gas>.

materials) will, thus, significantly enhance public understanding and participation in the process which DOE has established.

B. Commercial Interest Factor

The Sierra Club is a non-profit organization, registered under sections 501(c)(3) and 501(c)(4) of the tax code. It has no commercial, trade, or profit interests in this information. Sierra Club seeks to use this information solely to inform the public and to support advocacy efforts around LNG exports. Thus, there is no relevant commercial interest here, *see* 10 C.F.R. § 1004.9(a)(8)(ii)(A), and thus the request is entirely in the public interest, 10 C.F.R. § 1004.9(a)(8)(ii)(B).

For all of the foregoing reasons, a fee waiver is warranted here.

V. Expedited Processing Request

FOIA provides that each agency shall provide for expedited processing of records where there is a “compelling need.” 5 U.S.C. § 552(e)(i). Such a need exists here, so Sierra Club requests expedited processing.

According to the NERA study, export may decrease labor income for Americans in some years by as much as \$40 billion. NERA Study at 8. Export will also increase gas production, including shale gas production, which DOE’s own Shale Gas Subcommittee has determined to be inadequately regulated. These economic and environmental effects will fall upon millions of people. These effects would persist for decades, changing the daily lives of people across the country. Yet, DOE has afforded the public only a few months – over the holiday season -- to comment upon the NERA study, which it has indicated will greatly influence its decision on whether to proceed with LNG export licensing. There are now only a few days before the initial comment period closes, and only a few weeks more before the docket closes entirely. We request that DOE provide a full response to this FOIA before the docket closes. If it requires more time to provide a response, we request that DOE keep the docket open until a response has been provided and the public has been able to analyze and comment upon DOE’s response.

In these circumstances, there is plainly a compelling need for disclosure. If DOE does not share this information in time for it to inform public comment, it will have prevented the public from participating in a pressing policy debate. The courts have repeatedly held that such a denial is an irreparable injury, so preventing such an injury is plainly a compelling need. *See, e.g., Electronic Privacy Info. Ctr. v. Dep’t of Justice*, 416 F.

Supp. 2d 30, 41-42 (D.D.C. 2006); *Washington Post v. Dep't of Homeland Security*, 459 F. Supp. 2d 61, 74-75 (D.D.C. 2006); *Electronic Frontier Found. v. Office of the Director*, 2007 WL 4208311, *6 (N.D. Cal. 2007); *EFF v. Office of the Director*, 542 F. Supp. 2d 1181,1186 (N.D. Cal. 2008). DOE must not allow such harm to occur here, and so should expedite processing of this request.

VI. Conclusion

Thank you for your assistance with this request. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,
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