

UNITED STATES OF AMERICA  
DEPARTMENT OF ENERGY  
FEDERAL ENERGY REGULATORY COMMISSION

IN THE MATTER OF	)	
	)	
Rio Grande LNG, LLC	)	Docket Nos. CP16-454-000
	)	CP16-454-001
	)	

**Motion to Intervene and Protest of City of Port Isabel, Esto’k Gna Tribal Nation of Texas,  
Healthy Gulf, Public Citizen, Sierra Club, and Vecinos para el Bienestar de la Comunidad  
Costera**

On November 22, 2019, the Federal Energy Regulatory Commission (“FERC”) approved a request by Rio Grande LNG, LLC (“Rio Grande”) to construct a massive liquefied natural gas (“LNG”) export terminal capable of exporting 27 million tonnes per annum (“MTPA”) of LNG.<sup>1</sup> That order required that the export terminal be in service within seven years, or November 22, 2026.<sup>2</sup> However, despite FERC’s initial approval, Rio Grande has failed to attract the customers necessary to reach a final investment decision and go forward with the project. Now, Rio Grande seeks to extend its deadline for construction and operation by two years to November 22, 2028.

This project is in a very different situation than the typical project requesting an extension, because the whole project is already up in the air and subject to FERC reconsideration. —The underlying certificate for this project is already on remand to FERC, and FERC is additionally considering multiple proposed revisions to this project and the associated pipelines. Thus, whereas FERC has argued that an extension request, itself, may not be ground for revisiting prior conclusions about need, the public interest, *etc.*, here, those issues pending before FERC regardless of this request for an extension. But the current extension request, which arises because the project has, for years, failed to secure customers and thus reach a final investment decision, is still further evidence that the project is contrary to the public interest and should be denied.

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<sup>1</sup> *Rio Grande LNG, LLC*, 169 FERC ¶ 61,131 (2019) (“Certificate Order”), *order on reh’g*, 170 FERC ¶ 61,046 (2020).

<sup>2</sup> *Id.* at ¶ 135.

As we further explain below, the extension request and the project as a whole should be denied. And while FERC’s notice states FERC’s normal goal of “acting on the [extension] request within 45 days,”<sup>3</sup> at a minimum, FERC cannot grant the extension request here while review of the underlying project remains pending.

## I. Intervention

We support FERC’s decision to notice this extension request in the existing docket for this facility, rather than to open a new docket. In the past, FERC has suggested that parties who had already intervened in an initial certificate proceeding would need to intervene in a new docket regarding an extension. Our understanding is that such repeated intervention is not required here, where the extension request will be considered in the initial docket. However, because FERC’s notice, Accession 20220412-3060, is not explicit in this regard, in an abundance of caution, parties to the initial proceeding (City of Port Isabel, Vecinos para el Bienestar de la Comunidad Costera, and Sierra Club) are submitting renewed interventions here. In the future, FERC should be explicit about whether such repeated intervention is necessary.

### A. Intervention of City of Port Isabel

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), the City of Port Isabel, Texas states that the exact name of the movant is the City of Port Isabel, and the movant’s principal place of business is 305 E. Maxan St., Port Isabel, TX 78578.

Pursuant to 18 C.F.R. § 385.203(b)(3), the City of Port Isabel identifies the following persons for service of correspondence and communications regarding this application:

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<sup>3</sup> Accession 20220412-3060 at 2.

City of Port Isabel (“City”) previously intervened in this docket<sup>4</sup> and should be granted intervention again here.

The City, a Texas municipal corporation chartered in 1928, is located in Cameron County, Texas along the shores of the Laguna Madre. In 2014, the American FactFinder recorded the City’s population as 5,022. Principal industries in the City include fishing, tourism and shipping and light industries associated with the Port Isabel-San Benito Navigation District. Visitors to the City would pass by this project before arriving to the City, and elements from the project will be visible from the City.

As a community dependent on tourist spending, the aesthetic appeal of the surrounding area is economically vital. City residents employed in the fishing and tourism industries use waters and other natural environments commercially that may be impacted by the project, while other city residents use potentially impacted waters and environments for recreational purposes. The City, including its schools, housing and health care facilities, are located in close proximity to the project site, and subject to potential adverse health and safety impacts, including emissions, dust, noise and light generated from daily operations, as well as technological hazards associated with potential incidents at the project site. The proximity of the project to the City’s transportation infrastructure, including the Brazos Santiago Pass, Gulf Intracoastal Waterway and Port Isabel Ship Channel and Turning Basin, as well as State Highways 100 and 48 expose the City to potential transportation disruption caused by operations or incidents at the project site. Furthermore, the City is highly dependent on revenues collected from property and sales taxes, and any decline in property values or in tourist visits will result in economic harm to the City.

In addition to impacts related to the project’s location in relation to the City, the City also potential adverse impacts by this project on cultural and environmental resources located at or adjacent to the project site, including the potential for takings of West Indian Manatees within the Brazos Santiago Pass and the Brownsville Ship Channel, and impacts upon the Bahia Grande unit of the Laguna Atascosa Wildlife Refuge, which houses endangered species such as the Ocelot, Jaguarundi, and numerous bird and plant species; and which has also been the site of discoveries of artifacts of ancestral Native peoples and original peoples, including Esto’k Gna, human peoples.

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<sup>4</sup> Accession Nos., 20160609-5279, 20170517-3057.

The City reasonably believes that the project will impact these precious cultural and environmental resources, which are of significance to Port Isabel residents. The City reserves the right to add or amend elements related to its standing to intervene in this proceeding.

Accordingly, the City has a direct and substantial interest in this matter and may be directly impacted by the outcome of this proceeding. The City cannot be adequately represented by any other party and may be adversely affected or bound without opportunity to present its position unless it's permitted to intervene in this proceeding. Moreover, the City's participation in this proceeding is in the public interest. Good cause exists to grant the City's motion to intervene.

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), the City's position is that this request for an extension of time should be denied by FERC.

**B. Intervention of Esto'k Gna Tribal Nation of Texas**

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), the Esto'k Gna Tribal Nation of Texas ("the Tribe") states that the exact name of the movant is Esto'k Gna Tribal Nation of Texas.

Pursuant to 18 C.F.R. § 385.203(b)(3), the Esto'k Gna Tribal Nation of Texas identifies the following persons for service of correspondence and communications regarding this application:

Juan Mancias  
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Esto'k Gna Tribal Nation of Texas  
1250 Roemer Lane, Unit C  
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onebigjuan@gmail.com

Christa Mancias  
Tribal Administrator  
Esto'k Gna Tribal Nation of Texas  
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Floresville, TX 78114  
Chrissysontirim26@gmail.com

The Tribe should be granted intervention pursuant to 18 C.F.R. § 385.214(b)(2)(ii). The location of the Rio Grande LNG project prevents the Tribe and its members from accessing sacred lands and offering their prayers. Alternatively, and separately, the Tribe's intervention is in the public interest and should be granted pursuant to 18 C.F.R. § 385.314(b)(2)(iii).

Pursuant to 18 C.F.R. 385.203(b)(1)-(2), the Tribe's position is that this request for an extension should be denied that the underlying certificate should be vacated because it is clear that the project will not be completed by the deadline imposed therein.

**C. Intervention of Healthy Gulf**

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), Healthy Gulf states that exact name of the movant is Healthy Gulf, and the movant's principal place of business is 935 Gravier Street, Suite

700, New Orleans, LA 70112.

Pursuant to 18 C.F.R. § 385.203(b)(3), Healthy Gulf identifies the following persons for service of correspondence and communications regarding this application:

Naomi Yoder  
Staff Scientist  
Healthy Gulf  
P.O. Box 66226  
Houston, TX 77266  
504-525-1528 x213 (tel)

Cynthia Sarthou  
Executive Director  
Healthy Gulf  
935 Gravier Street, Suite 700  
New Orleans, LA 70112  
(504) 525-1528 x202 (tel)

Healthy Gulf should be granted intervention pursuant to 18 C.F.R. § 385.214(b)(2)(ii). Healthy Gulf is a 501(c)(3) organization with over 2,400 members in Texas. If this project goes forward, many of these members could be impacted by effects on water, air pollution, noise, etc. Separately and alternatively, Healthy Gulf's intervention would be in the public interest as provided by 18 C.F.R. § 385.314(b)(2)(iii). Healthy Gulf has expertise concerning the environmental impacts of LNG export facilities that are constructed and operate around the Gulf Coast. Additionally, Healthy Gulf also has expertise concerning the impacts of LNG export facilities that are constructed and operate around the Gulf Coast on environmental justice communities. Finally, Healthy Gulf employs staff members who work to protect the integrity of wetlands, waters, wildlife, and other ecological resources throughout the Gulf Region. This work will be directly affected by the construction and operation of these proposed facilities.

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), Healthy Gulf's position is that the request for an extension should be denied, and that the underlying certificates should be vacated without prejudice because it is clear that the project will not be completed by the deadline imposed therein.<sup>5</sup>

#### **D. Intervention of Public Citizen**

Established in 1971, Public Citizen is a national, not-for-profit, non-partisan, research and advocacy organization representing the interests of household consumers. Public Citizen is active

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<sup>5</sup> While Healthy Gulf has not previously intervened in this docket, Healthy Gulf's intervention and the content of its protest are allowable under the new policy announced by FERC in *Adelphia Gateway*. 178 FERC ¶ 61,030 P10 (Jan. 20, 2022).

before FERC promoting just and reasonable rates, and supporting efforts for both gas and electric utilities to be accountable to the public interest. Public Citizen has a Texas field office, with full time staff and a director serving the interests of its Texas-based membership. Public Citizen has filed a doc-less motion to intervene in this docket<sup>6</sup> and includes the following additional information.

Pursuant to 18 C.F.R. § 385.314(b)(1), Public Citizen states that its position is that this request for extension should be denied; that if FERC approves the extension, additional NEPA review is necessary, and if FERC approves the extension, FERC must consider requiring additional mitigation measures. These positions are further described in the following protest, and Public Citizen expects to further develop its position as this proceeding progresses.

Pursuant to 18 C.F.R. § 385.314(b)(2), Public Citizen should be permitted to intervene because its public participation would be in the public interest, as recognized by subparagraph (b)(2)(iii).

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), Public Citizen states that the exact name of the movant is the Public Citizen, Inc., and the movant's principal place of business is 215 Pennsylvania Ave SE, Washington, DC 20003.

Pursuant to 18 C.F.R. § 385.203(b)(3), Public Citizen identifies the following persons for service of correspondence and communications regarding this extension request:

Tyson Slocum, Energy Program Director  
Public Citizen, Inc.  
215 Pennsylvania Ave SE  
Washington, DC 20003  
202-454-5191  
tslocum@citizen.org

Adrian Shelley, Director, Public Citizen Tex.  
Public Citizen, Inc.  
309 E 11th Street, Suite 2  
Austin, Texas 78701  
512-477-1155  
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#### **E. Intervention of Sierra Club**

Sierra Club has already been granted intervention in this proceeding.<sup>7</sup>

Sierra Club is the nation's largest grassroots environmental organization, is dedicated to the protection of the natural environment and public health, and has a longstanding interest and

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<sup>6</sup>Accession No. 20220418-5121.

<sup>7</sup> *Id.* at ¶ 15. *See also* Secretary's May 17, 2017 Notice Granting Interventions.

expertise in LNG export facilities around the Gulf of Mexico generally and Brownsville, Texas specifically. Sierra Club's intervention is in the public interest, as provided by as provided by 18 C.F.R. § 385.314(b)(2)(iii). Sierra Club has experience with FERC's obligation and authority regarding greenhouse gas emissions, and as FERC works to develop its policy in this area, FERC and the public will benefit from Sierra Club's participation in individual dockets and Sierra Club's perspective. Sierra Club also provides an important perspective on FERC procedures, and Sierra Club's participation will benefit the public as FERC develops post-*Algonquin* procedures for handling extension requests, interventions, etc.

Separately and alternatively, Sierra Club should be granted intervention because its members' interests will be directly affected by the proceeding. 18 C.F.R. § 385.214(b)(2)(ii). As of March 31, 2022, Sierra Club has more than 26,000 members in Texas. If the LNG export facility is built and operated, many of these members will be impacted by effects on water, air pollution, noise, etc.

Sierra Club has demonstrated the vitality of these interests in many ways, including Sierra Club's participation in prior proceedings concerning this export facility and its related pipeline before FERC, the United States Court of Appeals for the District of Columbia Circuit, and the United States Court of Appeals for the Fifth Circuit. More broadly, Sierra Club runs national advocacy and organizing campaigns dedicated to reducing American dependence on fossil fuels, including natural gas, and to protecting public health. These campaigns, including its Beyond Coal and Dirty Fuels campaigns, are dedicated to promoting a swift transition away from fossil fuels and towards reducing global greenhouse gas emissions.

Sierra Club therefore satisfies the conditions for intervention both as representatives of interested consumers and because their participation is in the public interest. See 15 U.S.C. § 717n(e); 18 C.F.R. § 385.214(b)(2).

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), Sierra Club states that the exact name of the movant is the Sierra Club, and the movant's principal place of business is 2101 Webster Street, Suite 1300, Oakland, CA 94612.

Pursuant to 18 C.F.R. § 385.203(b)(3), Sierra Club identifies the following persons for service of correspondence and communications regarding this application:

Nathan Matthews  
Senior Attorney  
Sierra Club  
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Oakland, CA 94612  
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415-977-5779

Pursuant to 18 C.F.R. § 385.314(b)(1), Sierra Club’s position is that the request for an extension should be denied, and that the underlying certificate should be vacated because it is clear that the project will not be completed by the deadline imposed therein.

**F. Intervention of Vecinos para el Bienestar de la Comunidad Costera**

VBCC has already been granted intervention in this docket.<sup>8</sup> To the extent that VBCC must intervene again to protest this request for an extension, VBCC does so here and provides the following information.

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), VBCC states that the exact name of the movant is Vecinos para el Bienestar de la Comunidad Costera.<sup>9</sup>

Pursuant to 18 C.F.R. § 385.203(b)(3), VBCC identifies the following persons for service of correspondence and communications regarding this application:

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Abdiel Reyna  
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Texas Rio Grande Legal Aid  
301 S. Texas Ave.  
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965-447-4835

VBCC should be granted intervention pursuant to 18 C.F.R. § 385.214(b)(2)(ii). VBCC is an unincorporated association of residents of Laguna Heights, Texas and nearby areas that seeks to protect and improve the health, standard of living, and economic development of the coastal community in the Rio Grande Valley of South Texas. The members of VBCC are largely low-income, Hispanic families whose livelihoods depend on the continued vibrancy of existing locals

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<sup>8</sup> Accession No. 20170517-3057.

<sup>9</sup> VBCC is an unincorporated association and, thus, does not have a principal place of business.



industries, such as fishing and hospitality. VBCC's members will be directly and materially affected by the proposed project, and FERC's ultimate decision on this extension request, based on their close proximity to the proposed export facility and the harmful impacts the facility will have on their livelihoods, health, and properties. VBCC has concerns about the location, size, and safety of the project among other concerns. VBCC is also concerned about the environmental and health impacts related to construction and operation of the project, specifically the local air pollution created by the project and the safety risk from fires, explosions, or other accidents. Within VBCC, there are members who have health conditions, such as asthma, that will make them especially sensitive to the impacts associated with the project. The project will add an aesthetically unattractive feature to an existing natural viewscape, that will be visible from most members' residences and will emit additional light and noise. It is believed that members' property values will be negatively affected by the project.

The project lies within three to four miles of the residences of VBCC members. Several members of VBCC attend school approximately three miles from the project area. VBCC members work or travel to work within three miles of the project site, including in the fishing and hospitality industries. It is believed that these industries that members work in will be negatively impacted by the proposed project due to the marine impacts from the facility, increased tanker traffic, exclusion zones and a reduction in tourism. These impacts are particularly harmful to low-income families such as VBCC's members who already face barriers to economic opportunity and health services.

Moreover, the impacts of the project to VBCC members' health, standard of living, and economic development should be considered in conjunction with the other contiguous and contemporaneous LNG project proposed for the Port of Brownsville: Texas LNG Brownsville, Docket No. CP16-116-000. The cumulative impacts of these projects would be significant for VBCC members who live in close proximity to the facilities.

In addition to being directly impacted, the interests VBCC represents here, including health, economic, and environmental interests, are shared by the public at large, such that VBCC's intervention is in the public interest as provided by 18 C.F.R. § 385.314(b)(2)(iii).

## II. Protest

As noted above, this request differs from the typical extension request because the underlying certificate is on remand to FERC for reconsideration.<sup>10</sup> That remand provides authority for FERC to reevaluate the certificate as a whole.<sup>11</sup> And such broad reconsideration is appropriate, both in order to properly balance the issues identified in *Vecinos*, and in light of the numerous other changes that have been proposed to the Rio Grande terminal and the Rio Bravo pipelines.

This context alters FERC's evaluation of the extension request. Normally, in evaluating a request for an extension, FERC considers whether the applicant has shown good cause<sup>12</sup> and whether the findings underlying the initial certificate have gone stale.<sup>13</sup> Here, as we explain below, Rio Grande has failed to show good cause. But on the second factor, the question isn't merely whether presumptively-valid prior findings have gone stale, because many of those prior findings have already been found to be unsupported by the D.C. Circuit or have been superseded by proposed changes in the project.

Here, Rio Grande has failed to satisfy either requirement for an extension. Accordingly, for either or both of these reasons, the request for an extension must be denied.

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<sup>10</sup> *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021).

<sup>11</sup> *TransCanada PipeLines Ltd. v. FERC*, 24 F.3d 305, 308 (D.C. Cir. 1994)

<sup>12</sup> See, e.g., *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61149, 62133 (2012) (“In addition to the potential for information and data to become dated, there could potentially be anti-competitive implications associated with granting project sponsors extensions of time to construct authorized projects based primarily upon the projects' inability to garner market support. The fact that one company already holds a certificate for a project, even if it hasn't started construction, could inhibit a potential competitor from pursuing its own project to serve the same market, since the certificate holder, having already received Commission authorization to proceed with its project, could conceivably begin construction at any time.”).

<sup>13</sup> *Const. Pipeline Co., LLC Iroquois Gas Transmission Sys., L.P.*, 165 FERC ¶ 61081 P9 (Nov. 5, 2018); accord *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61144, P15 (2020) (“the purpose of establishing a deadline for the completion of construction is to diminish the potential that the public interest might be compromised by significant changes occurring between issuance of the certificate and commencement of the project.”) (internal quotation and modification omitted).

### A. Rio Grande Has Not Shown Good Cause for an Extension

Each certificate order includes a completion date that “provides what the Commission believes—based on its assessment of circumstances relevant to the specific project—to be a reasonable period of time for the project sponsor to conclude any necessary marketing efforts, complete construction, and make the project available for service.”<sup>14</sup> A showing of good cause is required *even if* the extension request is filed “within a timeframe during which the environmental and other public interest findings underlying the Commission’s authorization can be expected to remain valid.”<sup>15</sup> To satisfy the good cause standard, the applicant must show that it “made good faith efforts to meet its deadline but encountered unforeseeable circumstances,”<sup>16</sup> typically delays in issuance of other needed permits.<sup>17</sup> In evaluating good cause, FERC should follow the principles articulated in *Chestnut Ridge Storage*, 139 FERC ¶ 61149, 62134 P13 (2012), wherein FERC explained that “recent experiences” caused FERC to reevaluate prior practices regarding extensions.

*Chestnut Ridge* explained that an applicant failed to show “good faith efforts” to complete a project where the applicant “set its certificate on a shelf and let it lie dormant,” rather than being “actively engaged in preparations in anticipation of commencing construction.”<sup>18</sup> In *Chestnut Ridge*, the applicant had not commenced construction based on the apparent determination that the “project was not financially viable under current conditions.”<sup>19</sup> FERC concluded that a voluntary decision not to proceed with construction based on “market-related” setbacks was fundamentally different than other types of setbacks, such as firm barriers to construction.<sup>20</sup> Accordingly, FERC concluded that the applicant had failed to show good cause, denied the

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<sup>14</sup> *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 P8 (2016).

<sup>15</sup> *Id.*

<sup>16</sup> *Const. Pipeline Co., LLC Iroquois Gas Transmission Sys., L.P.*, 165 FERC ¶ 61081 P9 (2018)

<sup>17</sup> *See, e.g., id.* P9 n.32 (collecting FERC decisions).

<sup>18</sup> *Id.* P18.

<sup>19</sup> *Id.* P11.

<sup>20</sup> *Id.* P13.

request for an extension, and vacated the underlying certificate without prejudice.<sup>21</sup>

In contrast with *Chestnut Ridge*, in modern cases where FERC has found good cause, the applicant was typically actively working to complete the project, but some outside force other than a lack of market support prevented the applicant from doing so. This is not such a case. Although there has been extensive litigation regarding the project, no agency or court has entered any sort of stay or injunction. Indeed, even when FERC’s issuance of the certificate was found to be arbitrary, Rio Grande persuaded the D.C. Circuit not to issue the “ordinary remedy” of vacatur, instead prevailing in a request to leave the certificate in place, specifically so as to avoid delaying the project.<sup>22</sup> Similarly, in this docket, Rio Grande has opposed requests for additional analysis and process, such as to consider changed circumstances at the Space X facility close to the Rio Grande facility site,<sup>23</sup> or regarding Rio Grande’s proposed carbon capture and sequestration (“CCS”), arguing that “RGLNG is working very hard to commence construction of the RGLNG Terminal” and that delay would hinder these efforts.<sup>24</sup>

Despite previously arguing against actions that would have paused Rio Grande’s clock and insisting that any action that may delay Rio Grande’s progress was untenable,<sup>25</sup> Rio Grande seeks this extension. This request is facially self-contradictory—Rio Grande fought for a running clock and got it. As a result, Rio Grande was free to proceed and commence construction. To be clear, Protestors’ position is that the project should have been stayed in each of these circumstances and that construction should not have commenced prior to resolution of the various legal and technical issues presented by the project. But it is obviously self-contradictory for Rio Grande to argue that a stay or delay would cause it harm by halting progress on the project, then not move forward with the project by choice. This undercuts Rio Grande’s assertion that it has

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<sup>21</sup> *Id.* P26.

<sup>22</sup> *Vecinos*, 6 F.4th at 1325.

<sup>23</sup> *See* Accession No. 20210506-5091.

<sup>24</sup> Accession No. 20220110-5107 at 5, 34-35.

<sup>25</sup> While denigrating and questioning the motives of those it disagreed with. *See* Accession No. 20220110-5107 at 34-35 (“new public hearings would serve no purpose at this time other than to allow disingenuous and inequitable opposition to RGLNG another opportunity to delay the project”).

“worked diligently to continue to develop” the project.<sup>26</sup> Every time Rio Grande argued against a stay or delay, it suggested that, absent a stay, it would be willing to begin construction while proceedings were pending. If Rio Grande was unwilling or unable to construct while proceedings were pending without a stay, a stay would not have harmed Rio Grande. But Rio Grande has obviously not begun construction. Instead, Rio Grande vigorously and successfully opposed imposition of the types of barriers that FERC has previously recognized as constituting good cause for an extension.

Here, Rio Grande’s sole attempt at establishing good cause of an extension is the brief impact that the COVID-19 pandemic had on the global LNG market.<sup>27</sup> But Rio Grande had sought, but failed to acquire, customers for years prior to the COVID-19 pandemic. And while Rio Grande argues that it has secured some additional customers this year,<sup>28</sup> as the pandemic ebbs, Rio Grande does not assert that these customers are sufficient to support the project, and Rio Grande *still* has not made a final investment decision and does not anticipate doing so until later this year.<sup>29</sup> This is precisely the kind of voluntary, market-driven delay that FERC found insufficient to support good cause in *Chestnut Ridge*.<sup>30</sup>

We recognize that in *Adelphia*, FERC explained the COVID-19 pandemic contributed to

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<sup>26</sup> Request for Extension at 1.

<sup>27</sup> Request for Extension at 2. Rio Grande solely points to market disruption, and does not argue that COVID-19 pandemic made it difficult to proceed with construction due to worker safety, supply chain, and other practical issues. Nor could Rio Grande so argue: had not attempted to commence construction, and still has not reached a final investment decision or sought to start construction.

<sup>28</sup> *Id.*

<sup>29</sup> Harry Weber, *Rio Grande LNG project final investment decision delayed to second half of 2022*, S&P Global, Jan. 3, 2022, <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/lng/010322-rio-grande-lng-project-final-investment-decision-delayed-to-second-half-of-2022> (attached).

<sup>30</sup> To the extent that the applicant suggests that its carbon capture and sequestration (“CCS”) proposal indicates an effort to move the project forward and justifies good cause for an extension, Protestors disagree. Without commenting on the merits of that particular application or CCS in general, it is irrelevant to the specific question of whether good cause exists for an extension because it is not related to whether the applicant made sufficient efforts to bring the project online or whether the applicant remains sufficiently committed to the project.

“good cause” for a delay in construction. *Adelphia* PP19-20. But there, the impact of COVID-19 was to physically disrupt construction activities and to delay issuance of necessary permits, rather than to frustrate development of market support. *Id.* And while FERC accepted COVID-19’s impact on markets as part of the good cause demonstration for *Delfin LNG*, 178 FERC ¶ 61,031 PP21-22, FERC’s reasoning there was unpersuasive and should not be followed here; as FERC emphasized, FERC will review “extension requests on a case-by-case-basis.” *Id.* P22.

There are sound policy reasons for FERC to continue to require good cause, independent of questions of stale findings, in evaluating extension requests. As recognized in *Chestnut Ridge*, allowing certificate holders to leave certificates “on a shelf” risks permitting anticompetitive behavior that “introduce[s] or perpetuate[s] market inefficiencies.”<sup>31</sup> Pertinent to intervenors’ interests, allowing LNG export authorization holders to sit on dormant projects prevents FERC, the Department of Energy, and others from properly assessing the cumulative impact of already-approved projects when evaluating future proposals. And these impacts can be severe. As FERC has recognized, LNG exports are presently the “primar[y]” source of demand that is driving large increases in U.S. gas prices.<sup>32</sup> The impacts of these increases fall particularly hard on low-income, Black, Hispanic, and Native American households, which statistically face dramatically higher energy burdens—spending greater portions of their income on energy bills—than the average household.<sup>33</sup>

Perhaps sensing that the reason it has not commenced construction is not good cause for an extension, Rio Grande attempts to exploit Russia’s invasion of Ukraine. Rio Grande’s

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<sup>31</sup> 139 FERC ¶ 61,149 PP9, 18.

<sup>32</sup> FERC, Winter Energy Market and Reliability Assessment (Oct. 21, 2021) at 2, available at <https://ferc.gov/sites/default/files/2021-10/Winter%20Assessment%202021-2022%20-%20Report.pdf> (attached); accord *id.* at 11. See also Clark Williams-Derry, IEEFA U.S.: Booming U.S. natural gas exports fuel high prices, IEEFA.ORG (Nov. 4, 2021), <https://www.energy.gov/sites/default/files/2021-12/Williams-Derry%2C%20Booming%20Export%20Prices.pdf> (attached).

<sup>33</sup> American Council for an Energy-Efficient Economy, *How High are Household Energy Burdens?* (Sept. 2020), available at <https://www.aceee.org/sites/default/files/pdfs/u2006.pdf> (attached). Accord Eva Lyubich, *The Race Gap in Residential Energy Expenditures* (June 2020), available at <https://haas.berkeley.edu/energy-institute/research/abstracts/wp-306/#:~:text=Black%20households%20have%20higher%20residential,status%2C%20and%20city%20of%20residence> (attached).

contention that it will be able to contribute to the United States' short-term efforts to increase LNG shipments to Europe as it transitions from dependence on Russian LNG is absurd on its face. The United States has not committed to shipping LNG from any particular sources or at any particular volumes.<sup>34</sup> But, what is clear, is that shipping LNG to Europe is not a long-term policy. In the agreement cited by Rio Grande, LNG exports are being paired with European measures to reduce energy demand and a long-term commitment to achieving greenhouse gas emissions targets.<sup>35</sup> Satisfying this agreement will not require construction of any LNG export infrastructure that is not already under construction.<sup>36</sup>

The facilities at issue here would come on-line too late to be helpful to Europe. Obviously, Rio Grande is attempting to extend its construction deadline to November 2028. Rio Grande is not likely to hit this target either and will likely need another extension. As explained above, it has not reached a final investment decision yet. Construction will take approximately six years.<sup>37</sup> This is already cutting it tight for completion of construction in November 2028. But consider that this project is currently the subject of active litigation in the United States Court of Appeals for the Fifth Circuit<sup>38</sup> and, as explained in more detail below, still requires numerous approvals from FERC.

Rather than supporting Rio Grande's extension request, the presence of the United States-Europe LNG export agreement underscores why Rio Grande's extension should not be granted. As explained above, one of the policies advanced by this good cause inquiry is to avoid distortion

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<sup>34</sup> See White House Press Release, *FACT SHEET: United States and European Commission Announce Task Force to Reduce Europe's Dependence on Russian Fossil Fuels*, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/25/fact-sheet-united-states-and-european-commission-announce-task-force-to-reduce-europes-dependence-on-russian-fossil-fuels/>.

<sup>35</sup> *Id.*

<sup>36</sup> See generally Clark Williams-Derry, *The U.S. Can Increase LNG Exports to Europe: No New Contracts or Infrastructure Are Required*, IEEFA (Apr. 2022), available at <https://ieefa.org/ieefa-analysis-finds-u-s-can-increase-lng-shipments-to-europe-without-building-new-facilities/> (attached).

<sup>37</sup> Accession No. 20190426-3020 at 2-32 – 2-33 (table showing construction schedule).

<sup>38</sup> See Accession No. 20211119-5044.

of markets<sup>39</sup> and, by extension, to ensure that the relevant stakeholders can properly assess those markets. It is hard to imagine a more important context within which the LNG market must be properly assessed with granularity and certainty. Here, the United States and Europe are attempting a challenging feat—a short-term expansion of fossil fuel exports to Europe while still meeting applicable greenhouse gas emissions targets. Not meeting these emissions targets would, as the Commission is aware, be dire.<sup>40</sup> Thus, it is imperative that markets not be distorted now and that information concerning whether a given facility will indeed come online be as accurate as possible. Providing Rio Grande this extension despite the fact that significant demand has not materialized for its facility would undermine efforts to assist Europe while ensuring that emissions targets are not exceeded.

Ultimately, this case is clearly more like *Chestnut Ridge* than other cases in which FERC found good cause for an extension. Rio Grande seeks an extension because, essentially, it did not begin construction as a result of a brief market downturn. In reality, Rio Grande did not begin construction either because it chose not to or because there was insufficient demand for Rio Grande’s project. Neither of these constitute good cause under FERC’s precedents. But, even if a brief market downturn were the reason for Rio Grande’s struggles, Rio Grande still has not established good cause. A mere market downturn is not a sufficient justification for an extension under FERC’s precedents.<sup>41</sup>

**B. Changed Circumstances Provide an Additional and Alternative Ground for Denying the Extension Request, or at a Minimum, Demonstrate the Need for Additional Review**

Second, if an applicant has shown good cause, FERC must address whether subsequent factual developments undermine or require revisiting FERC’s prior findings. “If the service authorized by a certificate is not initiated within the time period specified in the certificate, it

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<sup>39</sup> *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61149, 62133 (2012).

<sup>40</sup> See IPCC, *Climate Change 2022 Impacts, Adaptation and Vulnerability: Summary for Policy Makers SPM-20* (Feb. 2022), available at <https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/> (“If global warming temporarily exceeds 1.5°C in the coming decades or later (overshoot), then many human and natural systems will face additional severe risks, compared to remaining below 1.5°C.”) (attached).

<sup>41</sup> *Chestnut Ridge*, 139 FERC ¶ 61,149, P13.



cannot be presumed that the public convenience and necessity still require the project.”<sup>42</sup>

Even if FERC determines that the applicants have shown good cause for an extension, FERC must address whether it’s prior findings have been “compromised by significant changes occurring between issuance of the certificate and commencement of the project.”<sup>43</sup> Accordingly, “parties must have the right to argue that developments since the issuance of the certificate have called into question the Commission’s finding of public convenience and necessity.”<sup>44</sup> Generally, in reviewing an extension request, FERC will “not relitigate the Commission’s decision to issue a certificate, including whether the Commission properly found the project to be in the public convenience and necessity.”<sup>45</sup> Instead, FERC generally only considers new or changed circumstances that occurred after FERC’s initial approval.<sup>46</sup>

At the threshold, FERC’s general policy limiting its review of this extension request to new or changed circumstances should not apply here. FERC’s initial decision to issue this certificate is already before the commission after the D.C. Circuit held that FERC’s initial approval was insufficient and remanded to FERC.<sup>47</sup> Now FERC plainly has broad authority to reconsider and re-evaluate the certificates underlying this extension request. In *TransCanada Pipelines Ltd v. FERC*, 24 F.3d 305, 308 (D.C. Cir. 1994), the D.C. Circuit remanded, without vacatur, FERC orders regarding the expansion of a pipeline.<sup>48</sup> On a subsequent appeal, the court explained that “once FERC reacquired jurisdiction, it had the discretion to reconsider the whole of its original discretion.” *Se. Michigan Gas Co. v. FERC*, 133 F.3d 34, 38 (D.C. Cir. 1998). The same is true here and FERC should adjust its approach to this extension request accordingly.

FERC now has before it multiple proceedings related to this project. In addition to this requested extension, FERC has outstanding obligations to consider:

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<sup>42</sup> *Wyoming-California Pipeline Co.*, 70 FERC ¶ 61041, 61130 (1995).

<sup>43</sup> *Constitution Pipeline Co.*, 165 FERC ¶ 61,081, at ¶ 9 (Nov. 5, 2018).

<sup>44</sup> *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144, Dissent of Comm’r Glick P9 (2020).

<sup>45</sup> *Adelphia Gateway*, 178 FERC at P10.

<sup>46</sup> *Id.*

<sup>47</sup> *Vecinos*, 6 F.4th at 1325.

<sup>48</sup> *See Great Lakes Gas Transmission Ltd. P’ship*, 72 FERC ¶ 61,081, 61,431 (1995) (FERC explaining, on remand, that remand had been without vacatur).

- In dockets CP16-454 and CP16-455, the climate and environmental justice impacts of the entire Rio Grande LNG export terminal and Rio Bravo pipeline system, pursuant to the remand in *Vecinos*.
- In those same dockets, the overall questions of whether the terminal and pipeline systems are consistent with the public interest or required by the public convenience and necessity, in light of FERC’s forthcoming additional analysis of climate and environmental justice issues.
- In docket CP20-481, Rio Bravo’s proposal to substantially redesign the Rio Bravo pipeline system, and comments from Shrimpers and Fishermen of the RGV *et al.* arguing that these changes, as well as cancellation of the Annova LNG project,<sup>49</sup> demonstrate that a single pipeline could satisfy the project purpose.
- In docket CP21-17, Rio Grande’s proposal to add CCS equipment to its LNG export terminal.
- Further potential design changes, *e.g.*, in response to the changes in the reinstated Clean Water Act section 404 permit.<sup>50</sup>

All these issues pertain to the same overall project, and it would be unjustified and frankly infeasible for FERC to attempt to consider each in isolation. Nor is it what Rio Grande purports to desire. For example, Rio Grande and Rio Bravo appear to agree that FERC should consider the emission mitigations and reductions proposed in dockets CP22-17 and CP20-481 as part of the remand in dockets CP16-454 and CP16-455. Given how many aspects of these interrelated projects are subject to ongoing FERC review, if FERC does not deny the extension request and vacate its underlying approvals, FERC should suspend and comprehensively reconsider those approvals.

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<sup>49</sup> See Accession No. 20210335-5212.

<sup>50</sup> See Accession No. 20211006-5120. The modified permit authorizes impacts to fewer acres of wetlands than discussed in the final EIS. As of this writing, we have been unable to determine whether this change solely reflects the changes proposed in CP20-481, or additional changes as well.

If FERC opts for the latter approach, it must pay particularly close attention to several significant considerations, many of which have changed significantly since FERC's initial approval of this project.

### **1. FERC Must Revisit the Impact of this Project on Climate Change**

What was frightening when FERC initially approved this project is now dire as more information about climate change and associated impacts has been made available to the public.<sup>51</sup> According to the most recent report from the Intergovernmental Panel on Climate Change, if global warming is to be limited to 1.5° C significant action must commence now. The previous decade featured the highest average annual greenhouse gas emissions relative to any previous decade.<sup>52</sup> Achieving climate change targets necessarily involves “rapid and deep and in most cases immediate GHG emission reductions in all sectors.”<sup>53</sup> In the energy sector, this entails “a substantial reduction in overall fossil fuel use, the deployment of low-emission energy sources, switching to alternative carriers, and energy efficiency and conservation.”<sup>54</sup>

In issuing the initial Section 3 and Section 7 certificates, FERC explicitly refrained from making any determination of the significance of project greenhouse gas emissions, based on the claim that FERC lacked the tools to do so.<sup>55</sup> The D.C. Circuit decided that this greenhouse gas emissions analysis was insufficient.<sup>56</sup> And, since issuing the certificate, the United States has adopted nationwide emission reduction targets and President Biden has reinstated the social cost

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<sup>51</sup> While FERC need not limit itself to significant new and changed circumstances, climate change and its impacts would certainly constitute significant new circumstances. In addition to the climate change impacts discussed in this sub-section, it is worth pointing out that the recently released Climate and Economic Justice Tool identifies the area surrounding this project as disadvantaged. *See* <https://screeningtool.geoplatform.gov/en/#10.07/25.939/-97.4076>.

<sup>52</sup> IPCC, Climate Change 2022 Mitigation of Climate Change: Summary for Policy Makers SPM-4 (Feb. 2022), *available at* <https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/> (attached).

<sup>53</sup> *Id.* at SPM-32.

<sup>54</sup> *Id.* at SPM-36.

<sup>55</sup> 169 FERC ¶ 61,131 P109

<sup>56</sup> *Vecinos*, 6 F.4th at 1329.

of carbon protocol. FERC must reconsider the certificate in light of each of these developments.

We note that, with respect to climate change, the facts here are different than in other cases in which FERC has asked, in considering whether to extend a certificate, whether prior factual findings remained valid. In prior cases, FERC’s initial certificate order and environmental review in fact evaluated the environmental impact at issue, including reading a conclusion about significance, need for or appropriateness of mitigation, etc. *See, e.g., Arlington Storage Co.*, 155 FERC ¶ 61,165 P18. Here, in contrast, the issue is not whether FERC must reverse a prior conclusion, but instead whether FERC must now fill what FERC previously acknowledged was a gap in the analysis.

Now, the United States has joined the Glasgow Pact, which calls for net-zero emissions by 2050, and a 45% reduction in emissions by 2030—the type of target that FERC claimed was missing before.<sup>57</sup> The Intergovernmental Panel on Climate Change has explained that achieving these reductions requires eliminating or reducing fossil fuel use and moving to renewable energy as extensively and as quickly as possible.<sup>58</sup> Accordingly, Executive Order 14,008 instructs federal agencies to discourage “high carbon investments” or “intensive fossil fuel-based energy.”<sup>59</sup> Peer-reviewed published literature similarly affirms that every year of delay in phasing out fossil fuel infrastructure makes carbon “lock-in” more difficult to escape and the possibility of keeping global temperature rise below 1.5°C less likely.<sup>60</sup>

As we’ve previously explained, an alternative to using overall emission reduction targets (or in addition), FERC can assess significance of greenhouse gas emissions using the social cost of carbon. Although this tool had been withdrawn, as a matter of federal policy, at the time FERC

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<sup>57</sup> U.N. Framework Convention on Climate Change Secretariat, Glasgow Climate Pact at ¶17, available at [https://unfccc.int/sites/default/files/resource/cop26\\_auv\\_2f\\_cover\\_decision.pdf](https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf) and attached.

<sup>58</sup> Intergovernmental Panel on Climate Change, *Special Report: Global Warming of 1.5 C, Summary for Policymakers* at 15 (May 2019) (“IPCC 2019”), available at [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15\\_SPM\\_version\\_report\\_LR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf) and attached.

<sup>59</sup> Executive Order 14,008, 86 Fed. Reg. 7619, at § 102(f), (h) (Jan. 27, 2021).

<sup>60</sup> Smith, Christopher J. et al. 2019. Current fossil fuel infrastructure does not yet commit us to 1.5°C warming. Nature Communications. doi.org/10.1038/s41467-018-07999-w, attached.

reviewed and approved this project, it was formally readopted in early 2021,<sup>61</sup> and in the past year, the Environmental Protection Agency has repeatedly called on FERC to use this readopted tool in the evaluation of individual natural gas infrastructure projects.<sup>62</sup> While Protestors contend that the social cost of carbon has consistently been generally accepted in the scientific community, the fact that the protocol did not reflect official federal policy at the time FERC reviewed and approved this project, but that it does now, coupled with the fact that EPA has affirmed appropriateness of the tool for FERC’s project specific reviews, are changed circumstances that demonstrate that FERC can fill what FERC previously recognized was a gap in the analysis.

## **2. FERC Must Revisit the Impact of this Project on Environmental Justice Communities**

As FERC is already aware, its previous environmental justice analysis was inadequate. If FERC does not deny this extension outright, it must perform an adequate environmental justice analysis. Among other considerations, FERC must ensure that all relevant data is current to make sure that any relevant changes that have occurred in the project area since FERC’s initial analysis are captured in the new analysis.

## **3. FERC Has Not Considered Impacts on Recently Listed Species**

FERC must evaluate changed circumstances for two species recently listed under the Endangered Species Act (“ESA”): the endangered Rice’s whale (formerly designated as the Gulf of Mexico population of the Bryde’s whale)<sup>63</sup> and the threatened oceanic whitetip shark.<sup>64</sup>

The Rice’s whale was listed as an endangered species on August 23, 2021, well after the issuance of the underlying certificates here. The whale was previously considered a subpopulation of the Bryde’s whale, and National Marine Fisheries Service’s (“NMFS”) response to FERC’s

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<sup>61</sup> Executive Order 13,990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037, 7040 (Jan. 25, 2021).

<sup>62</sup> *E.g.*, EPA, Comment on Iroquois Gas Transmission System FEIS, CP20-48 (Dec. 20, 2021), Accession 20211220-5086.

<sup>63</sup> 86 Fed. Reg. 47,022 (Aug. 23, 2021).

<sup>64</sup> 83 Fed. Reg. 4,153 (Jan. 30, 2018).

request for consultation under ESA discussed impacts of the project on the Bryde's whale.<sup>65</sup> But NMFS and FERC must re-evaluate the project in light of new information about whale and the new listing. For example, NMFS concluded that the likelihood of a project-related vessel strike of a Bryde's whale was low, but now the Rice's whale has been recognized as a distinct species with only an estimated 51 living individuals,<sup>66</sup> making it one of the most endangered whales on earth. Thus, even if the likelihood of a ship strike has not increased relative to NMFS's previous analysis, new research suggests that consequences of a strike are more severe than previously recognized. For the Rice's whale to recover, it can only afford to lose one whale approximately every 15 years as a result of human activity. After, NMFS responded to FERC's request for consultation regarding this project, NMFS issued a biological opinion concluding that exploration and development of oil and gas in the Gulf of Mexico would likely jeopardize the continued existence of what was once called the Gulf of Mexico population of Bryde's whales, in which NMFS explained that because of the "precarious status [of the species], any effects that are expected to reduce the fitness of individuals or result in mortality are of great concern."<sup>67</sup>

And, in addition to the increased severity of consequences, recent research suggests that the likelihood of impacts to a Rice's whale are also greater than previously recognized. For one, NMFS concluded that a strike was unlikely because the geographic range of the whale population was principally confined to the Florida coast and away from the routes that would primarily be used by LNG tankers associated with this project.<sup>68</sup> But the peer-reviewed research that led to identification of the Rice's whale as a distinct species indicates that Rice's whales may also be

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<sup>65</sup> Accession No. 20190822-4001 at 14.

<sup>66</sup> NMFS, *Bryde's Whale*, Northern Gulf of Mexico Stock, NOAA Fisheries (April 2021), [https://media.fisheries.noaa.gov/2021-07/f2020\\_AtlGmexSARs\\_GMexBrydes.pdf](https://media.fisheries.noaa.gov/2021-07/f2020_AtlGmexSARs_GMexBrydes.pdf) (attached).

<sup>67</sup> NMFS, Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico, FPR-2017-9234, 553 (Mar. 13, 2020) (emphasis added), *available at* <https://repository.library.noaa.gov/view/noaa/23738> (attached).

<sup>68</sup> Accession No. 20190822-4001 at 14-15.

present along the Texas coast.<sup>69</sup> Specifically, whales have been observed there,<sup>70</sup> and historic whaling data suggests that the whales used to be found in the western Gulf of Mexico.<sup>71</sup> This may indicate that current habitat of the Rice's whale may extend beyond the area previously described by NMFS, or that a separate population of the Rice's whale exists near the Texas coast,<sup>72</sup> in areas that may be impacted by this project.

In addition, NMFS did not address the impact of noise on the Rice's whale. One assertion by NMFS in its initial analysis was that vessel strikes were less likely because LNG vessels make more noise than other types of ships, which, according to NMFS, makes it easier for aquatic species to avoid LNG vessels.<sup>73</sup> But NMFS did not address the impact of noise itself on the Rice's whale. This silence contradicts previous statements made by NMFS—that noise can harm whales by “hindering their ability to use sound, causing a disruption of their ability to communicate, choose mates, find food, avoid predators, and navigate.”<sup>74</sup>

FERC must also consider the impacts on the recently-listed whitetip shark. While the whitetip shark was listed before FERC and NMFS performed their initial analyses, neither addressed this species or explained its exclusion.

#### **4. FERC Must Revisit the Economic and Upstream Impacts of the Project**

Because the applicants delayed the project, and now seek an extension, because of changes in gas markets and because market demand for the project has been insignificant, FERC must evaluate the same as it reconsiders its certificate decisions. As noted above, FERC has already concluded that increases in LNG exports are driving large increases in domestic gas

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<sup>69</sup> Rosel, P.E., Wilcox, L.A., Yamada, T.K., & Mullin, K.D. (2021). *A new species of baleen whale (Balaenoptera) from the Gulf of Mexico, with a review of its geographic distribution*. Marine Mammal Science. 37(2), 577-610. doi:10.1111/mms.12776 (attached).

<sup>70</sup> *Id.* at 588.

<sup>71</sup> *Id.* at 597.

<sup>72</sup> *Id.*

<sup>73</sup> Accession No. 20190822-4001 at 13.

<sup>74</sup> <https://www.fisheries.noaa.gov/species/brydes-whale> (attached).

prices.<sup>75</sup> To date, no federal agency has addressed whether this level of export-driven price increases is consistent with the public interest. This is likely because, as FERC is aware, exporting LNG in the contiguous United States is a relatively recent phenomenon.<sup>76</sup>

Historically, the Department of Energy, rather than FERC, has held responsibility for evaluating the impact of export projects on domestic prices and supply, as the D.C. Circuit explained in *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016) (“*Freeport*”). However, after FERC’s initial certificate decisions approving this project, DOE disclaimed authority over impacts occurring upstream of the point of export, and thus the predicate for *Freeport*, as part of a NEPA Categorical Exclusion.<sup>77</sup> Protestors contend that DOE’s interpretation of its own authority is mistaken, and that this categorical exclusion is unlawful. And we note that DOE has announced that it will reconsider this rule.<sup>78</sup> But FERC cannot simply assume that these issues will work themselves out, or that someone else will consider the issue. If DOE will not exercise authority over upstream impacts, FERC must.

Alternatively, even if DOE *does* consider the impact of the Rio Grande LNG project on gas prices and production, FERC must *also* integrate such evaluation into FERC’s NEPA analysis, pursuant to FERC’s statutory obligation to act as the “lead agency,” 15 U.S.C. § 717n(b)(1), and the requirement to ensure that NEPA review is not “segmented,” *Del. Riverkeeper v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). *Freeport*, in holding that FERC was not required to consider upstream impacts in that case, explicitly refrained from addressing FERC’s obligations as lead agency or the rule against segmentation.<sup>79</sup> But FERC must address those issues here.

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<sup>75</sup> *Supra* note 32.

<sup>76</sup> See e.g., Jacob Gronholt-Pedersen, *U.S. exports first shale gas as LNG tanker sails from Sabine Pass terminal*, Reuters (Feb. 24, 2016), <https://www.reuters.com/article/us-shale-export/u-s-exports-first-shale-gas-as-lng-tanker-sails-from-sabine-pass-terminal-idUSKCN0VY08B>.

<sup>77</sup> DOE: Proposed Rule, NEPA Implementing Procedures, 85 Fed. Reg. 25,341 (May 1, 2020); *accord* Final Rule, 85 Fed. Reg. 78,198 (Dec. 4, 2020).

<sup>78</sup> <https://www.reginfo.gov/public/do/eAgendaSimpleSearch>.

<sup>79</sup> *Freeport*, 827 F.3d at 45.



## 5. FERC Must Use the Soon-to-be Reinstated NEPA Rules

If FERC does not deny the extension outright, it still must perform a supplemental a supplemental environmental analysis and issue a supplemental environmental impact statement that comprehensively assesses the environmental impacts of this project in light of significant changes that occurred since the initial approval, the disapproval of the environmental analysis underpinning the initial approval, and the various matters pending before FERC that relate to this project. In doing so, FERC must not use the NEPA regulations amended in September 2020: FERC can either use the regulations that were in effect when this project was first proposed, or apply the (substantially similar) NEPA regulations that the Council of Environmental Quality (“CEQ”) finalized on April 20, 2022.<sup>80</sup> The 2020 CEQ rules are arbitrary because, *inter alia*, they contravene the text of the NEPA statute in many regards, as argued in numerous lawsuits challenging the 2020 rules credited by CEQ<sup>81</sup> and by CEQ itself in the regulatory preamble to the proposed rule.<sup>82</sup> In accordance with the statutory text, CEQ proposes to again explicitly require consideration of indirect and cumulative effects,<sup>83</sup> and affirms that agencies can and must consider factors beyond the applicant’s goals when determining the purpose and need of the project.<sup>84</sup> Accordingly, to ensure compliance with the forthcoming NEPA regulations and to avoid violating the underlying statute, FERC’s NEPA analysis must conform to the once-and-present NEPA regulations, rather than those adopted in 2020.

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The issue before FERC, in deciding whether to extend a certificate or instead to let it expire, is broader than just whether to prepare a supplemental NEPA document. The project will

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<sup>80</sup> Council on Environmental Quality, 87 Fed. Reg. 23453.

<sup>81</sup> *See* 86 Fed. Reg. at 55,758 (noting these lawsuits).

<sup>82</sup> *E.g., id.* at 55,759.

<sup>83</sup> *Id.* at 55,763-65 (proposed 40 C.F.R. § 1508.1); *see also City of Davis v. Coleman*, 521 F.2d 661, 676-77 (9th Cir. 1975) (holding, prior to promulgation of CEQ regulations, that NEPA’s statutory text requires consideration of indirect effects), *Kleppe v. Sierra Club*, 427 U.S. 390, 409-10 (1976) (same, for cumulative effects).

<sup>84</sup> 86 Fed. Reg. at 55,760 (proposed 40 C.F.R. § 1502.13).

not proceed without an extension, and in deciding whether to extend these certificates, FERC must address whether the project continues to be in the public interest pursuant to the Natural Gas Act. Because those public interest determinations require balancing benefits of the project against harms, FERC cannot evaluate new information in isolation. Faced with new information regarding project harms, there is no way to consider this information other than to look to the project as a whole and ask whether the project provides benefits that justify these harms. And when faced with new information about mitigation—*i.e.*, ways in which the project could be modified to limit harms—FERC must evaluate whether to require such mitigation as a condition of extending the authorization.

### III. Conclusion

Sierra Club hereby moves to intervene in this docket. The request for an extension must be denied, both because the applicants have not shown good cause for an extension and because factual developments following FERC's initial authorization call FERC's prior findings into question and demonstrate that the project is contrary to the public interest.

Respectfully submitted on April 27, 2022:

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## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Austin, TX on April 27, 2022.

**/s/ Thomas Gosselin**

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