

(ORAL ARGUMENT NOT YET SCHEDULED)

Docket No. _____

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

In Re Sierra Club, Center for Biological Diversity, Delaware Riverkeeper
Network, Friends of the Earth, and Environment America,

Petitioners.

Petition for Writ of Mandamus

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GLOSSARY

The following acronyms and abbreviations are used in this brief:

CO	Carbon monoxide
DOE	United States Department of Energy
EPA	United States Environmental Protection Agency
FERC	United States Federal Energy Regulatory Commission
LNG	Liquified natural gas
NO _x	Nitrogen oxide
PM	Particulate matter
SSM	Start up, shut down, and malfunction
VOC	Volatile organic compound

INTRODUCTION AND FACTS

In 2013, Sierra Club, Center for Biological Diversity, Environment America, Friends of the Earth, Delaware Riverkeeper Network, and several other environmental organizations (collectively, “Petitioners”) submitted a Petition¹ to the United States Department of Energy (“DOE”) requesting the agency issue rules outlining how it will decide whether proposed exports of liquified natural gas (“LNG”) are “consistent with the public interest,” pursuant to section 3(a) of the Natural Gas Act. 15 U.S.C. § 717b(a). It has been nearly ten years since Petitioners submitted their Petition with DOE, and the agency has yet to respond, despite the massive increase in LNG export application approvals. Given the significant environmental, climate, and economic harm the continued increase in LNG exports will cause, much of which would be disproportionately borne by already overburdened Gulf Coast and Delaware River communities, Petitioners now implore this Court to issue a writ of mandamus compelling DOE to respond to their 2013 Petition.

New and expanded gas export facilities will harm Gulf Coast and Delaware River communities that already suffer from a massive amount of industrial pollution from the fossil fuel industry as well as the effects of extreme weather driven by climate change. Even during normal operations, export terminals emit

¹ A copy of this Petition is attached as an exhibit.

high volumes of air pollution that can result in concentrations exceeding health-based air quality standards. During so-called startup, shutdown, and malfunction (“SSM”) events, though, pollution levels from LNG facilities can be staggering. Last year, for example, the Freeport LNG facility in Texas had a catastrophic explosion, resulting in 5,912 hours of emissions well in excess of the facility’s permitted limits, including hundreds of thousands of pounds of harmful nitrogen oxide (“NO_x”), carbon monoxide (“CO”), volatile organic compound (“VOC”), and particulate matter (“PM”) pollution,² as well as the unauthorized emission of hazardous and toxic pollutants, like hydrogen chloride and hydrogen cyanide.³ A separate emissions “incident” occurred when Freeport LNG attempted to restart operations in February 2023, resulting in another 348 hours of excess NO_x, CO, and VOC emissions.⁴ The majority of the proposed or approved LNG export terminals are planned, under construction, or already built in low-income

² Tex. Comm’n on Env’t Quality, Air Emission Event Report Database, Incident 381191 (Feb. 2023), <https://www2.tceq.texas.gov/oce/eer/index.cfm?fuseaction=main.getDetails&target=381191>.

³ Tex. Comm’n on Env’t Quality, Air Emission Event Report Database, Incident 381194 (June 2022), <https://www2.tceq.texas.gov/oce/eer/index.cfm?fuseaction=main.getDetails&target=381194>.

⁴ Tex. Comm’n on Env’t Quality, Air Emission Event Report Database, Incident 394549 (Feb. 2023), <https://www2.tceq.texas.gov/oce/eer/index.cfm?fuseaction=main.getDetails&target=394549>.

communities and communities of color that are among the 25% worst areas in the country for air toxics cancer risk, according to the U.S. Environmental Protection Agency’s (“EPA”) EJScreen data tool. New or expanded LNG projects will exacerbate the already significant cumulative pollution burden these neighborhoods face.

The climate impacts of LNG export facilities are also staggering. If all 25 currently-proposed (or approved) LNG export facilities go into operation, their collective lifecycle emissions—from extraction to the end use of the gas—could emit approximately 1,660 million metric tons of carbon dioxide equivalent each year, roughly the annual greenhouse gas equivalent of all of the country’s operational coal plants twice over.⁵

Under the Natural Gas Act, DOE oversees the export of gas as a commodity into the global market.⁶ DOE *must* grant applications to export LNG to the 20 countries with which the United States has a free trade agreement, but DOE cannot

⁵ Compare Leslie Abrams et al., *Life Cycle Greenhouse Gas Emissions from U.S. Liquefied Natural Gas Exports: Implications for End Uses*, 49 *Env’t Sci. Tech.* 5, 3237-45 (analyzing the total lifecycle greenhouse gas emissions associated with LNG export terminals) with EPA, *Greenhouse Gas Equivalencies Calculator*, <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator> (last visited March 2, 2023).

⁶ Regulation of LNG exports is divided between the Federal Energy Regulatory Commission (“FERC”), which oversees the construction and operation of LNG export terminals, and DOE, which, as noted, oversees the export of gas as a commodity into the global market. 15 U.S.C. § 717.

authorize exports to *non*-free trade agreement countries where such exports would be “[in]consistent with the public interest.” 15 U.S.C. § 717b(a). The statute does not explicitly define what is or is not “consistent with the public interest” in the export context, and DOE has never issued guidelines or regulations explaining how it will make “public interest” determinations. *Id.* Instead, the agency has repeatedly issued ad-hoc and inadequate “public interest” analyses that have failed to meaningfully consider highly pertinent factors like the environmental impacts of the actual export terminals themselves, the climate change-related impacts associated with the extraction, refinement, transportation, and ultimate combustion of the gas being exported, and the effect of increased gas exports on the price of domestic gas for low-income ratepayers.

The scale of U.S. gas exports abruptly changed in 2010, when, as a result of a glut of domestic supply resulting from the hydraulic fracturing or fracking boom,⁷ the gas industry began seeking access to global markets to maximize its

⁷ Hydraulic fracturing (or fracking) is a technique used to enable the extraction of natural gas or oil from shale and other forms of “tight” rock (impermeable rock formations that lock in oil and gas and make extraction difficult). Large quantities of water, chemicals, and sand are blasted into these formations at pressures high enough to crack the rock, allowing the once-trapped gas and oil to flow to the surface. EPA, *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States* (Dec. 2016), https://ordspub.epa.gov/ords/eims/eimscomm.getfile?p_download_id=530285. Starting in the early 2000’s, the use of fracking drastically increased across the country, significantly increasing the domestic gas supply. *Id.* at 1.

profits. DOE has approved more than 40 non-free trade agreement LNG export applications since Petitioners sent DOE their 2013 Petition, facilitating a massive proliferation of dangerous gas export infrastructure along the Gulf Coast and elsewhere throughout the country.⁸ Indeed, approximately 25 new LNG facilities—primarily located along the Gulf Coast in Texas and Louisiana—are either under construction, approved, or proposed, and LNG exports are projected to increase by an astounding 149% from 2020 to 2030, an increase equivalent to the gas use of the entire U.S. commercial sector projected for 2030.⁹

Nevertheless, the agency has failed to issue any rules defining how it will make “public interest” determinations in the gas export context, or to respond to the 2013 Petition. With fifteen more export applications now pending under DOE review, the need for consistent rules defining how the agency will make “public interest” determinations is as pressing as ever.

⁸ Although FERC authorizes the export terminals, as a practical matter, many of the facilities FERC has approved have waited to begin construction until *after* they obtained export authorizations from DOE. *See, e.g.,* Callum O’Reilly, *Cameron LNG sponsors finalise FID*, LNG INDUSTRY, (Aug. 7, 2014), <https://www.lngindustry.com/liquefaction/07082014/cameron-lng-sponsors-finalise-fid-1161/> (noting that the developers of the Cameron LNG facility waited until after they obtained authorization from DOE for exports to none-free-trade countries before making a final investment decision).

⁹ *See* U.S. Energy Info. Admin., *Annual Energy Outlook 2022: Liquefied Natural Gas Exports*, <https://www.eia.gov/outlooks/aeo/data/browser/#/?id=76-AEO2022®ion=00&cases=ref2022&start=2020&end=2050&f=A&linechart=~ref2022-d011222a.10-76-AEO2022&map=&ctype=linechart&sourcekey=0> (last visited March 2, 2023).

In undertaking “public interest” determinations in the gas export context, DOE has purported to consider “a range of factors,” including “the domestic need for the natural gas proposed to be exported; whether the proposed exports pose a threat to the security of domestic natural gas supplies; . . . whether the arrangement is consistent with [the Department’s] policy of promoting competition in the marketplace,” and any other factors bearing on the public interest. *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas From Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations, at 27-29, Docket No. 10-111-LNG (May 20, 2011). The agency, however, has never provided any discussion regarding how it balances these factors. In practice, the agency consistently considers impacts like the balance of trade, purported job creation, global strategic concerns (including diversifying other nations’ energy supplies), and other issues not enumerated in its purported list of factors. *See, e.g., Magnolia LNG LLC*, DOE/FE Order No. 3909-C, Order Amending Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations, at 24-26, Docket No. 13-132-LNG (Apr. 27, 2022) (emphasizing job creation, global strategic concerns, and balance of trade as key considerations in the public interest determination). And in some cases, the agency has changed its

mind about whether to even consider some factors, despite claiming that they are critical to its analysis in other contexts.¹⁰

In addition to these factors, DOE typically invokes its 1984 guidelines for making public interest determinations in the context of gas *imports*¹¹ when making “public interest” determinations in the gas export context. *See, e.g., Magnolia LNG LLC*, DOE/FE Order No. 3909-C at 24. Those guidelines are inapplicable to *export* proposals and to present day circumstances. The world has changed a great deal since the 1984 guidelines were issued. The import price control issues the 1984 guidelines were designed to solve no longer exist, as a result of the glut in domestic supply associated with the fracking boom. Today, DOE must wrestle with the proper role of LNG exports in the context of a modern, technology-based U.S. economy, at a time of increasingly severe climate change, and where gas is increasingly produced using hazardous fracking technologies. These shifts, as well

¹⁰ *Compare* Statement of Deputy Assistant Secretary Christopher Smith Before the Committee on Energy and Natural Resources, U.S. Senate, *The Department of Energy’s Role in Liquefied Natural Gas Export Applications* at 4 (Nov. 8, 2011) (including “consistency with DOE’s long-standing policy of promoting competition in the marketplace,” “U.S. balance of trade,” and impacts on industry as key factors to consider) *with* Statement of Deputy Assistant Secretary Christopher Smith Before the Oversight and Government Reform Committee, U.S. House of Representatives, *The Department of Energy’s Program Regulating Liquefied Natural Gas Export Applications* at 3 (Mar. 19, 2013) (omitting those factors as key issues to consider).

¹¹ Those 50-year-old guidelines are focused on reducing consumer rates, and were issued in order to limit the government’s role in the gas import context. 48 Fed. Reg. 34,501 (July 29, 1983); 49 Fed. Reg. 6,684, 6,685 (Feb. 22, 1984).

as the inherent differences between gas imports and gas exports, underline why clear DOE regulations are so urgently needed.

DOE's ad-hoc determinations have ignored key factors that plainly impact the public interest, namely the environmental impacts of the actual export terminals themselves, the climate change-related impacts associated with LNG exports, and the effect of increased gas exports on the price of domestic gas for low-income ratepayers. In addition to the public health and climate impacts associated with LNG export infrastructure, for example, increased gas exports also harm low-income energy customers by raising the price of domestic gas.¹² These economic harms disproportionately fall on communities of color and low-income households, which face dramatically higher energy burdens—spending a greater portion of their income on energy bills—than the average household, and on energy-intensive industries and public gas utilities that purchase a disproportionate share of the nation's gas supply.¹³ DOE has refused to consider these

¹² See, e.g., Clark Williams-Derry, *IEEFA U.S.: Booming U.S. natural gas exports fuel high prices*, INSTITUTE FOR ENERGY ECONOMICS AND FINANCIAL ANALYSIS, Nov. 4, 2021, <https://ieefa.org/resources/ieefa-us-booming-us-natural-gas-exports-fuel-high-prices>.

¹³ See Nat'l Conf. of State Legislatures, *Energy Justice and the Energy Transition*, <https://www.ncsl.org/energy/energy-justice-and-the-energy-transition> (last updated May 3, 2022).

disproportionate economic impacts in its “public interest” determinations.¹⁴

Instead, the agency has obstinately and arbitrarily asserted that export opponents have failed to demonstrate that the economic equity impacts of LNG exports are substantial enough to warrant the agency’s attention. *See, e.g., Magnolia LNG LLC*, DOE/FE Order No. 3909-C at 49 (citing *Sierra Club v. U.S. Dep’t of Energy*, 703 F. App’x 1, 3 (D.C. Cir. 2017)).

In the nearly ten years since Petitioners first submitted their Petition to DOE, the agency has failed to issue regulations explaining how it will determine whether gas export applications are or are not “consistent with the public interest.”¹⁵ U.S.C. § 717b(a). Given the amount of time that has passed, the continued proliferation of dangerous gas export infrastructure, and the ever-increasing urgency of the climate crisis, on October 27, 2022, Petitioners sent DOE a letter reiterating the need for a rulemaking addressing the LNG export “public interest” determination.¹⁵ In addition, approximately 50 environmental, consumer advocacy,

¹⁴ DOE has argued that it is FERC’s responsibility to fully balance the environmental harms associated with LNG exports. *See, e.g., Magnolia LNG LLC*, DOE/FE Order No. 3909-C at 24-26. Notably, FERC has done the same thing, and avoided a full balancing of these environmental harms by pointing to DOE. *See, e.g., Commonwealth LNG, LLC*, 181 FERC ¶ 61,143 (Nov. 17, 2022).

¹⁵ *See* Letter from Sierra Club et al. to Secretary Jennifer Granholm, DOE (Oct. 27, 2022), https://www.sierraclub.org/sites/www.sierraclub.org/files/2022-10/DOE%20Letter%20re_2013%20Petition.pdf (This letter did not present an additional petition for rulemaking; rather, the letter made clear that the signers were seeking action on the initial 2013 petition.).

and community groups not affiliated with the original petition also submitted similar letters to DOE.¹⁶

The agency's nearly ten-year delay here is patently unreasonable. 5 U.S.C. § 706(1) (reviewing courts shall “compel agency action . . . unreasonably delayed”); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (“six-year-plus delay is nothing less than egregious”). As discussed in detail below, this Court should compel DOE to issue an order responding to Petitioners’ 2013 Petition on the merits by a date certain in the near future.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review Petitioners’ claim that DOE has unreasonably delayed responding to their 2013 Petition under the Natural Gas Act, since it would have exclusive jurisdiction to review DOE’s response to the 2013 Petition pursuant to that Act, 15 U.S.C. § 717r(b).¹⁷ Under the All Writs Act, courts are empowered to “issue all writs necessary or appropriate in aid of their . . . jurisdictions.” 28 U.S.C. § 1651(a). Though the All Writs Act itself does not grant jurisdiction, it authorizes courts to issue a writ of mandamus in order to aid the jurisdiction the court will have as a result of issuing the writ. *In re Tennant*, 359

¹⁶ See *EJLF Letter to DOE Regarding Guidelines on LNG Exports* (Oct. 27, 2022), <https://www.weact.org/ejlf-letter-to-doe-regarding-guidelines-on-lng-exports/>.

¹⁷ Notably, though the Natural Gas Act’s judicial review provision provides for exclusive jurisdiction of DOE actions in the circuit courts of appeals, it does not similarly grant jurisdiction to review DOE’s failures to act. 15 U.S.C. § 717r(b).

F.3d 523, 527-28 (D.C. Cir. 2004). Where, as here, an agency has unreasonably delayed an action that this Court would have jurisdiction to review, this Court can issue a writ under the All Writs Act compelling that agency to complete the action so that it can exercise its jurisdiction to review it. *See, e.g., Telecomms. Rsch. & Action Ctr. v. Fed. Commc'ns Comm'n*, 750 F.2d 70, 75-79 (D.C. Cir. 1984) (“*TRAC*”) (holding that the D.C. Circuit had jurisdiction to review agency’s unreasonable delay in responding to the petitioner’s complaint “in order to protect its future jurisdiction” to review the agency’s ultimate decision in response to the petitioner’s complaint).

Here, this Court would have jurisdiction over DOE’s response to the 2013 Petition under the Natural Gas Act’s judicial review provision. 15 U.S.C. § 717r(b). Therefore, this Court has jurisdiction to issue a writ compelling DOE to respond to the 2013 Petition so that it can exercise its jurisdiction to review it. *In re Nat’l Nurses United*, 47 F.4th 746, 753 (D.C. Cir. 2022) (“When a statute grants courts of appeals jurisdiction to review agency action, the All Writs Act empowers those courts to issue a writ of mandamus compelling the agency to complete the action.”).

RELIEF REQUESTED

Petitioners respectfully request that the Court issue a writ of mandamus compelling DOE to issue an order that grants or denies their 2013 Petition

requesting the issuance of rules defining how DOE will make “public interest” determinations when evaluating whether to approve gas export applications.

STATEMENT OF THE ISSUES

Whether DOE violated its obligation to respond to Petitioners’ 2013 Petition within a “reasonable time,” as required by the Administrative Procedure Act, by failing to act on that petition for nearly ten years. 5 U.S.C. § 555(b).

ARGUMENT

I. Petitioners Have Article III Standing to Pursue This Writ.

To satisfy the “case or controversy” requirements of Article III of the U.S. Constitution, organizations (like Petitioners) must establish “representational standing” to sue on behalf of their members. *United Food & Com. Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557 (1996). To do so, they must demonstrate that (1) their members would otherwise have standing to sue in their own right; (2) the interests they seek to protect are germane to their organizational purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. *Id.* at 553. To demonstrate that their members would otherwise have standing to sue in their own right, petitioners must show (1) that their members will suffer an “injury in fact” without judicial relief; (2) that the injury is “fairly traceable” to the complained-of conduct; and (3) that a favorable judicial ruling will “likely” redress that injury. *Friends of the*

Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000).

Importantly, the injury need not be large; an “identifiable trifle” is sufficient to confer standing. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973). That said, such injury must be “concrete and particularized,” as opposed to an injury that is shared equally by the public at large, and “actual or imminent,” rather than “conjectural or hypothetical.” *Laidlaw*, 528 U.S. at 180-81.

Here, Petitioners have standing to bring this action since their members would independently have standing to sue, and since Petitioners’ organizational missions include slowing or stopping the expansion of fossil fuel production and infrastructure and averting the worst impacts of the climate crisis. *See, e.g.*, Collentine Decl. ¶¶ 2-6; Hartl Decl. ¶¶ 7-12; Van Rossum Decl. ¶ 8; Templeton Decl. ¶ 3. For one, Petitioners’ members suffer injury because they live in and near the communities where LNG export terminals have been proposed or are under construction, and near LNG extraction and refinement facilities where the gas to be exported is obtained and prepared. *See* Allaire Decl. ¶¶ 2-10; Oldham Decl. ¶¶ 2-9; Van Rossum Decl. ¶¶ 1-16; Templeton Decl. ¶ 9. Construction and operation of these facilities has and will significantly impact members’ property and quality of life, the surrounding ecosystems, and cause and exacerbate light and air pollution problems. *See* Allaire Decl. ¶¶ 11-20; Oldham Decl. ¶ 9; Van Rossum Decl. ¶¶ 1-

16. The LNG export facilities being considered by FERC and DOE would emit massive quantities of harmful pollutants, including, for example, particulate matter, volatile organic compounds, nitrogen oxides, and carbon monoxide.¹⁸ This pollution causes myriad adverse impacts on human health, including, but not limited to, premature mortality, respiratory disease, damage to the nervous system, and ill effects on pregnancy and birth outcomes.¹⁹ Petitioners' members are therefore acutely impacted by LNG export infrastructure far and away beyond the general public.

Further, Petitioners' members live on or near, or recreate in and along, rivers, lakes, beaches, and wetlands throughout the Gulf Coast, the Delaware River watershed, and elsewhere across the country, that are impacted by current LNG export facilities or would be impacted by proposed LNG export facilities. *See, e.g.*, Allaire Decl. ¶¶ 11-20; Van Rossum Decl. ¶¶ 8, 12-13; Templeton Decl. ¶ 9. Such members frequently use these areas for outdoor recreation and scientific study, including nature study, birdwatching, observing wildlife (including protected species), photography, fishing, canoeing, kayaking, solitude, and a variety of other activities. *See, e.g.*, Allaire Decl. ¶¶ 13-20; Van Rossum Decl. ¶¶ 8, 12-16. The

¹⁸ *See* FERC, *Final Environmental Impact Statement for the Commonwealth LNG Project* (Sept. 2022), https://www.energy.gov/sites/default/files/2022-09/final-eis-0533-vol2-commonwealth-lng-2022-09_0.pdf.

¹⁹ *Id.*

many proposed and approved LNG export facilities intended to supply the gas exports being reviewed by DOE interfere or would interfere with Petitioners' members' use and enjoyment of these waters. Allaire Decl. ¶¶ 13-20; Van Rossum Decl. ¶¶ 8, 12-16.

For example, Sierra Club member John Allaire owns and lives on a 311-acre property directly adjacent to the proposed Commonwealth LNG export facility and within approximately one mile from the approved and operational Venture Global Calcasieu Pass LNG export facility in Louisiana. *See generally* Allaire Decl. ¶¶ 2-18. John and his family enjoy hunting, fishing, birdwatching, beach-walking, and stargazing, and have many special traditions on and around his property that are significantly harmed by the operational facility and would be further deteriorated by any new facility. Filling the nearby wetlands to construct the Commonwealth facility will substantially decrease available habitat for the birds and fish John and his family hunt and fish hundreds of days each year. *Id.* ¶¶ 13, 15. Filling the wetlands is also likely to lead to significant flooding on John's property, potentially damaging his property, and diminishing important habitat that John actively works to protect for the federally threatened Eastern Black Rail, along with the U.S. Fish and Wildlife Service and the National Audubon Society. *Id.* ¶¶ 14-16.

John takes his dogs and grandkids on walks on his beachfront property along the Gulf of Mexico 4 to 5 times each week. *Id.* ¶ 18. Dredging a channel for the Calcasieu Pass LNG export terminal dislodged massive quantities of black sludge from the bottom of the Calcasieu River that subsequently collected on his beachfront as a result of prevailing tides. *Id.* As a result, he has been unable for long periods of time to allow his dogs or grandchildren to swim in the Gulf, for fear that they'll encounter black viscous sludge and get stuck. *Id.* Constructing the Commonwealth facility would likely exacerbate this problem on his property. *Id.*

Petitioners and their members also have procedural interests in ensuring that DOE fully considers the information in the 2013 Petition, and in participating in any rulemaking activity undertaken in response to the Petition. *See, e.g.,* Allaire Decl. ¶¶ 21-22; Oldham Decl. ¶¶ 3, 15-16; Van Rossum Decl. ¶ 9; Collentine Decl. ¶¶ 9-11; Templeton Decl. ¶ 8. DOE's lengthy delay violates the procedural rights of Petitioners and their members to participate in a rulemaking process through comments, information sharing, and advocacy. If DOE begins a regulatory process, Petitioners and their members will participate. *See, e.g.,* Collentine Decl. ¶ 11; Oldham Decl. ¶ 16; Allaire Decl. ¶ 22; Templeton Decl. ¶ 12.

The injuries suffered by Petitioners and their members are directly traceable to DOE's failure to timely respond to their Petition. The subject of the 2013 Petition is the environmental impacts that inevitably will harm Petitioners'

members through DOE's approval of LNG exports without careful consideration of relevant "public interest" factors. By authorizing export proposals, DOE creates the demand driving the proliferation of gas export infrastructure; even if it does not authorize the export facilities themselves, DOE's export decisions are key considerations for the developers of proposed LNG export facilities, since they determine the scope of the market available for the gas to be exported. In many instances, the developers of proposed gas export facilities wait until after they have obtained authorization to export to none-free-trade countries before beginning construction in earnest, even where FERC had already authorized construction of the facility.²⁰

An order from this court directing DOE to respond to the Petition would redress Petitioners' injuries and those of their members. If DOE were to act in response to the Petition, the agency may begin to consider these public health and climate-related impacts when making decisions on proposed gas exports, and, as a result, may either decline to authorize proposed exports or otherwise issue directives better protecting Petitioners' members and other community residents in

²⁰ See, e.g., Callum O'Reilly, *Cameron LNG sponsors finalise FID*, LNG INDUSTRY, (Aug. 7, 2014), <https://www.lngindustry.com/liquefaction/07082014/cameron-lng-sponsors-finalise-fid-1161/> (noting that the developers of the Cameron LNG facility waited until after they obtained authorization from DOE for exports to none-free-trade countries before making a final investment decision).

and near proposed and approved gas export infrastructure. Petitioners need not prove that this will be the outcome of DOE’s response, however, because the normal standards for causation and redressability are relaxed when a party has asserted a violation of a procedural right. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992)). These relaxed standards relieve parties from having to prove that an agency will ultimately reach a decision most favorable to their interests, and instead require only that there be “some possibility” that the requested relief will prompt the agency to take action favorable to the party. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

Petitioners also satisfy the second requirement for representational standing because this litigation regarding gas exports is germane to the purposes of Petitioners’ organizations—the protection of the environment and averting climate catastrophe. *United Food & Com. Workers Union Local 751*, 517 U.S. at 553; *see also* Collentine Decl. ¶¶ 3, 5-6; Hartl Decl. ¶¶ 7, 9-11, 12; Van Rossum Decl. ¶¶ 3, 7; Templeton Decl. ¶ 3. The third element of representational standing is satisfied because Petitioners’ members are not seeking individualized relief and thus the members’ direct participation in the litigation is not required.

II. This Court Should Grant Mandamus Because DOE Has Unreasonably and Unlawfully Delayed Its Clear, Nondiscretionary Duty to Respond to Petitioners' 2013 Petition.

The All Writs Act provides that federal courts “may issue all writs [of mandamus] necessary or appropriate in aid of their respective jurisdictions.” 28 U.S.C. § 1651(a). “[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances.” *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (holding that only “exceptional circumstances amounting to a judicial ‘usurpation of power’” justify the issuance of the writ).

Accordingly, a petitioner seeking mandamus must first establish that the agency has violated “a crystal-clear legal duty.” *In re Nat’l Nurses United*, 47 F.4th at 752. One such circumstance exists where an agency unreasonably delays nondiscretionary action. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 418. Indeed, the APA obligates agencies to “conclude [] matter[s] presented to [them]” within a “reasonable time,” 5 U.S.C. § 555(b), and directs courts to “compel agency action” where that action has been “unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1); *see also In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (*per curiam*). Here, the DOE has violated a clear, nondiscretionary duty to respond to the 2013 Petition within a “reasonable time,” pursuant to the APA. 5 U.S.C. § 555(b).

Violating a clear duty, however, is only part of the mandamus analysis. A mandamus petitioner must further show that judicial intervention would be appropriate. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004). In cases of alleged agency delay, the central question is whether the agency’s delay is “so egregious as to warrant mandamus.” *In re Core Commc’ns, Inc.*, 531 F.3d 849, 885 (D.C. Cir. 2008). This Court’s holding in *Telecommunications Research & Action Center v. Federal Communications Commission* guides this inquiry, as discussed in detail below. 750 F.2d at 80.

III. Petitioners Have a Clear Right to Relief Because DOE’s Nearly 10-Year Delay Is Unreasonable Pursuant to the APA and the *TRAC* factors.

Under the APA, agencies must conclude matters presented to them within a “reasonable time.” 5 U.S.C. § 555(b). Courts must “compel agency action” that has been “unlawfully withheld or unreasonably delayed.” *Id.* § 706(1); *see In re Int’l Chem. Workers Union*, 958 F.2d at 1149. In determining whether an agency’s delay is so “unreasonable” as to warrant mandamus relief, this Court balances the factors outlined in *TRAC*:

- (1) the time agencies take to make decisions must be governed by a rule of reason;
- (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
- (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
- (4) the court should consider the effect of expediting delayed

action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC, 750 F.2d at 80 (internal quotation marks and citations omitted).

These factors weigh strongly against DOE in this instance. For one, the agency's more than nine-year delay in responding to Petitioner's 2013 Petition "flouts the 'rule of reason.'" *In re Ctr. for Biological Diversity*, 53 F.4th 665, 671 (D.C. Cir. 2022). Since neither the Natural Gas Act nor the APA provide a timetable governing when the agency must respond to petitions for rulemaking, the agency's time to respond is "governed by a rule of reason." *Id.* at 670. Although "there is no *per se* rule as to how long is too long to wait for agency action . . . a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 419 (internal quotation marks and citations omitted); *see also Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) ("[T]his court has stated generally that a reasonable time for an agency decision could encompass 'months, occasionally a year or two, but not several years or a decade.'" (quoting *MCI Telecomms. Corp. v. Fed. Commc'ns Comm'n*, 627 F.2d 322, 340 (D.C. Cir. 1980))). It has been more than nine years since the instant Petition was submitted. This near-decade delay is plainly unreasonable on this basis alone, without further context. *See In re Core*

Commc 'ns, Inc., 531 F.3d at 855 (asserting that while courts, in applying *TRAC*, balance each of the factors, the length of the agency's delay is the "first and most important factor"). In fact, Petitioners are not aware of a single case where a court has upheld a nine-year delay like that at issue here. *In re A Cmty. Voice*, 878 F.3d 779, 787 (9th Cir. 2017) (noting that the agency at issue there had failed to "identify a single case where a court has upheld an eight year delay as reasonable").

This Court has repeatedly found analogous delays unreasonable in previous cases. In *In re American Rivers & Idaho Rivers United*, for example, this Court held that FERC's six-year delay in failing to respond to a petition to consult under the Endangered Species Act regarding the impacts of hydropower facilities along the Snake River on endangered salmon and steelhead was "nothing less than egregious." 372 F.3d at 419. There, like here, the governing statute did not require the agency to respond within a particularized deadline. *Id.* Many other cases have held that shorter delays were unreasonable. *See, e.g., In re Core Commc 'ns, Inc.*, 531 F.3d at 857 (six-year delay); *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (nine-year delay); *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (five-year delay); *In re Int'l Chem. Workers Union*, 958 F.2d at 1150 (six-year delay); *In re Ctr. for Biological Diversity*, 53 F.4th at 671 ("Eight years of outright non-compliance flouts the 'rule of reason'");

Nader v. Fed. Commc 'ns Comm 'n, 520 F.2d 182, 206 (D.C. Cir. 1975) (“[N]ine years should be enough time for any agency to decide almost any issue.”); *In re A Cmty. Voice*, 878 F.3d at 787 (eight-year delay).

Further, the agency’s delay in responding to the 2013 Petition has serious implications for human health and welfare. *See TRAC*, 750 F.2d at 80 (“delays ... are less tolerable when human health and welfare are at stake”). The consideration of human health and welfare includes environmental concerns. *In re Bluewater Network*, 234 F.3d at 1316. Here, the agency’s failure to respond to the 2013 Petition has left it without an appropriate method of evaluating whether exports are or are not consistent with the “public interest” that considers environmental and human health and welfare concerns. Absent such review, the agency has repeatedly authorized LNG exports that have exacerbated the proliferation of dangerous gas export infrastructure in already over-polluted communities without considering the immediate effects of such decisions on the families living near major LNG export terminals or properly evaluating climate change impacts. *See e.g., Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961 at 27-29 (authorizing massive increase in LNG exports from Sabine Pass export terminal without considering the impacts of the facility on the surrounding community; wrongly determining that increased LNG exports would benefit the climate by supplanting potential coal-based generation); *Magnolia LNG LLC*, DOE/FE Order No. 3909-C at 24-26

(authorizing significant increase in LNG exports from Magnolia export facility without considering the impacts of the facility on local communities).

Under the fourth factor, Petitioners cannot speculate as to what, if any, competing priorities have prevented DOE from substantively responding to their Petition because DOE has not yet provided any justification for its delay. *TRAC*, 750 F.2d at 80 (considering “the effect of expediting delayed action on agency activities of a higher or competing priority”). However, “nine years should be enough time for any agency to decide almost any issue.” *Nader*, 520 F.2d at 206.

Whatever justifications DOE may articulate to explain its nearly ten-year delay “must . . . be balanced against the potential for harm,” *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). Agencies’ “asserted justifications . . . become less persuasive the longer the delay continues.” *In re Int’l Chem. Workers Union*, 958 F.2d at 1150; *Cobell v. Norton*, 240 F.3d 1081, 1097 (D.C. Cir. 2001) (“[N]either a lack of sufficient funds nor administrative complexity, in and of themselves, justify extensive delay.”). “There is a point when the court must ‘let the agency know, in no uncertain terms, that enough is enough.’” *In re Int’l Chem. Workers Union*, 958 F.2d at 1150 (quoting *Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d 627 (D.C. Cir. 1987)). After more than nine years with no response to the Petition, and given the ongoing proliferation of dangerous gas export infrastructure, that time has come.

In considering the fifth *TRAC* factor, this Court draws on some of the same considerations as the third factor. *In re Barr Laboratories, Inc.*, 930 F.2d 72, 75 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991). DOE’s nearly ten-year delay continues to prejudice the interests of the communities impacted by LNG export infrastructure, including Petitioners’ members. *See TRAC*, 750 F.2d at 80 (considering “the nature and extent of the interests prejudiced by delay”). DOE has repeatedly authorized LNG export proposals, causing the proliferation of dangerous gas export infrastructure that will further exacerbate the climate crisis and expose already overburdened communities to dangerous concentrations of pollution. DOE’s authorization of LNG exports without meaningful “public interest” review not only harms these communities, but it also threatens to undermine the country’s ability to adequately respond to the climate crisis.

CONCLUSION

Petitioners submitted their Petition to DOE nearly ten years ago, and the agency has yet to respond. For the foregoing reasons, Petitioners request this court issue a writ of mandamus directing DOE to grant or deny the 2013 Petition on the merits, and provide any other relief that is just and equitable pursuant to the All Writs Act.

Dated: March 13, 2023

Respectfully submitted,

/s/ Harrison Beck

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CERTIFICATE OF PARTIES

In accordance with D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), Petitioners certify that the following persons are parties, movant-intervenors, or amici curiae in this Court:

1. Parties

Petitioners: Sierra Club, Center for Biological Diversity, Delaware Riverkeeper Network, Friends of the Earth, Environment America

Respondent: Department of Energy

2. Movant-Intervenors

At present, no parties have moved to intervene in this action.

3. *Amici Curiae*

At present, no parties have moved for leave to participate as amicus curiae.

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PETITIONERS' RULE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners make the following disclosures:

Sierra Club: Sierra Club has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Sierra Club.

Sierra Club is a nonprofit organization dedicated to the protection and enjoyment of the environment.

Center for Biological Diversity: Center for Biological Diversity has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Center for Biological Diversity.

Center for Biological Diversity is a national nonprofit environmental advocacy organization working to secure a future for animals and plants hovering on the brink of extinction, for the ecosystems they need to survive, and for a healthy, livable future for all.

Delaware Riverkeeper Network: Delaware Riverkeeper Network has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Delaware Riverkeeper Network.

Delaware Riverkeeper Network is a nonprofit 501(c)(3) membership organization that advocates for the protection of the Delaware River, its tributaries, and the communities of its watershed.

Environment America: Environment America has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Environment America.

Environment America is a nonprofit organization whose mission is to transform the power of our imaginations and our ideas into change that makes our world a greener and healthier place for all.

Friends of the Earth: Friends of the Earth has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Friends of the Earth.

Friends of the Earth is a nonprofit organization whose mission is to fight for a more healthy and just world by building long-term political power and campaigning to prevent economic and political systems from creating injustice and destroying nature.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of FRAP 32(c)(2) and the word limit of FRAP 21(d) because, excluding the parts of the document exempted by FRAP 32(f) this document contains 5,955 words.

This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this document has been prepared with a proportionally spaced typeface using Microsoft Word 2019 in 14-point font size and Times New Roman type style.

Dated: March 13, 2023

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on March 13, 2023, copies of the foregoing Petition for Writ of Mandamus, the Exhibit thereto, Certificate of Parties, and Rule 26.1 Statement, and the attached Petitioners' Addendum of Declarations were served via Federal Express on the following parties:

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