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Via U.S. Mail and Email

Tristan Brown
Acting Administrator
Pipeline and Hazardous Materials Safety
Administration
U.S. Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590
tristan.brown@dot.gov

William S. Schoonover
Associate Administrator for Hazardous Material
Safety
Pipeline and Hazardous Materials Safety
Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590
william.schoonover@dot.gov

RE: New Fortress Energy's Renewal Application for Special Permit to Transport LNG by Rail (DOT-SP 20534)

Dear Mr. Brown and Mr. Schoonover,

On behalf of the Sierra Club, PennFuture, and Clean Air Council, we urge PHMSA to deny the renewal application filed by New Fortress Energy Inc. subsidiary Energy Transport Solutions, LLC for DOT-Special Permit 20534. The permit, which expired on November 30, 2021, authorized the transport of liquefied natural gas ("LNG") by rail through populated areas, from Wyalusing, Pennsylvania to Gibbstown, New Jersey.¹ No LNG has been shipped under the Special Permit and, as PHMSA has noted, transport along this route is not expected to occur in the near future. *See* 86 Fed. Reg. 61731, 61736 (Nov. 8, 2021). PHMSA also has acknowledged that its understanding of the public health and environmental risks posed by LNG-by-rail was incomplete in 2019 (when it issued the Special Permit), and that remaining information gaps are substantial and require further evaluation. *See id.* at 61733-36.

¹ Energy Transport Solutions, LLC and the companies proposing to build the related LNG liquefaction and export facilities in Wyalusing and Gibbstown are all affiliates of New Fortress Energy Inc., and will be referred to as "New Fortress Energy" or "NFE" herein.

Accordingly, PHMSA should deny the renewal application. If New Fortress Energy desires to move forward with its LNG export project at a future date, the company may apply for a new Special Permit at that time. PHMSA could then utilize updated research when evaluating any such new application—including updated analysis regarding environmental impacts, health and safety risks, and risk reduction measures—rather than renewing an expired permit that relies on admittedly incomplete and outdated information regarding the serious hazards posed by transporting LNG by rail. If PHMSA feels that it needs more information before deciding whether to deny the renewal application, the agency must conduct supplemental environmental review and initiate a formal public comment period to ensure that the views and information provided by interested stakeholders—including community members who would be put in harm’s way by transporting LNG by rail between Wyalusing and Gibbstown—are fully considered.

I. PHMSA Should Deny New Fortress Energy’s Application to Renew its Expired Permit

A. PHMSA Admittedly Lacked a Comprehensive Understanding of the Public Health and Environmental Risks Posed by LNG-by-Rail When it Issued the Special Permit in 2019

Transporting LNG by rail poses serious risks to the environment and to public health and safety. *See, e.g.*, National Academy of Sciences, Engineering, and Medicine, *Preparing for LNG by Rail Tank Car: A Review of a U.S. DOT Safety Research, Testing, and Analysis Initiative* (Jun. 2021)² (“Phase I Report”) at 19-20 (explaining that “[s]kin contact with an LNG pool or vapor cloud will cause cryogenic burns,” and that “the radiant heat flux of an LNG fireball” is “much higher” than the heat flux from a liquefied petroleum gas fire); Comments Objecting to the Proposed Rulemaking to Authorize the Transportation of Methane, Refrigerated Liquid by Rail (Jan. 13, 2020)³ (“Earthjustice Comments”) at 7-15, 23-27; *id.* at Millar Aff. ¶50 (“Overall, cryogenic LNG loss-of-containment transportation releases involve serious risks of cold embrittlement of nearby structures and surfaces, fire radiation from high and unquenchable gas cloud fires, and offsite travel downwind of flammable and explosive LNG vapor clouds.”) (citing 84 Fed. Reg. 56964, 56972-73 (Oct. 24, 2019)); *id.* at ¶51 (“Even without serious loss of containment, experts now estimate that LNG containment vessels are subject to overheating and consequent Boiling Liquid Expanding Vapor Explosions (BLEVEs)...”); 84 Fed. Reg. at 56973 (“If ignited, the flash fire that forms [if an LNG vapor cloud is ignited] has a temperature of about 1,330 °C (2,426 °F)” and “travels back to the release point producing either a pool fire or a jet fire.”).

² Available at <https://www.nap.edu/read/26221/chapter/1>.

³ Available at <https://www.regulations.gov/comment/PHMSA-2018-0025-0440>.

Indeed, PHMSA now recognizes that the uncertainties and risks posed by transporting LNG by rail justify suspending the agency’s final LNG-by-rail rule published in July 2020, which authorized LNG transportation in rail tank cars, while the agency “conducts a thorough evaluation of the [Hazardous Materials Regulations’ (‘HMR’)] regulatory framework for rail transportation of LNG...” 86 Fed. Reg. at 61732. PHMSA acknowledges that suspending transportation under the rule is necessary to, *inter alia*, 1) avoid “any risks to public health and safety or environmental consequences” that are still being evaluated, and 2) “assur[e] timely implementation of any mitigation measures and operational controls” that are still being evaluated. *Id. See also id.* at 61735 (“PHMSA believes the increased uncertainty regarding the potential benefits and safety and environmental consequences of rail transportation of LNG pursuant to the LNG by Rail final rule warrants temporary suspension while PHMSA evaluates ... whether and under what circumstances the HMR should allow rail transportation of LNG.”).

In 2020, PHMSA established a joint LNG Task Force with the Federal Railroad Administration (“FRA”) “as part of its ongoing research efforts on the transportation of LNG.” *Id.* at 61733. The work of that task force is ongoing. *See id.* (explaining that “several tasks—including full-scale impact testing, puncture and derailment simulation modeling, and LNG portable tank pool fire testing—are not expected to be completed until sometime in 2022”). Similarly, the Transportation Research Board committee⁴ studying LNG-by-rail is currently engaged in Phase II of its study, which “involves a more comprehensive assessment of topics relevant to the safe movement of LNG by rail tank car *pursuant to both [special permit] and the [Hazardous Materials Regulations].*” *Id.* at 61734 (emphasis added). In its Phase I Report issued in June 2021, the committee “noted that the interdependency of many of these outstanding tasks complicated its and the LNG Task Force’s work in developing a complete understanding of the risks associated with transportation of LNG in rail tank cars” and “expressed particular concern regarding the incomplete status of tasks pertaining to full-scale impact testing, portable tank pool fire testing, worse-case scenario analysis, and quantitative risk assessment.” *Id. See* Phase I Report at 23-34.

In other words, PHMSA admittedly lacks a comprehensive understanding of the risks posed by LNG-by-rail, including but not limited to “the potential risks to public and worker safety arising from releases during loading, unloading, and transloading of LNG tank cars”; “overcoming limited emergency planning and response training and resources”; “worst-case scenarios”; and “explosion hazards from a spill of LNG resulting in vapor dispersion in an environment with confined or congested spaces.” *Id. See also id.* at 61735 (noting that the Transportation Research Board committee “identified a number of information gaps in its and

⁴ The Further Consolidated Appropriations Act of 2020 “called on PHMSA to commission a study by the Transportation Research Board (TRB) of the National Academies of Sciences, Engineering, and Medicine to examine the safety of transporting natural gas by rail.” Phase I Report at vi.

the LNG Task Force’s work that PHMSA was not aware of” in 2020, including “gaps concern[ing] testing and the evaluation of public safety and environmental risks”); Earthjustice Comments at 23-24.

Given these substantial “gaps” in the agency’s understanding of the “risks to the public, workers, and the environment from rail tank car transportation of LNG,” 86 Fed. Reg. at 61735, PHMSA must deny New Fortress Energy’s application to renew its expired Special Permit, which the company applied for before the LNG-by-rail notice of proposed rulemaking was initiated in October 2019. Indeed, the transport authorized by the 2019 Special Permit presents even greater risks than the transport authorized by the 2020 final rule that PHMSA is proposing to suspend. For example, the 2020 rule authorized LNG transport in DOT-13C120W9 specification rail tank cars, which have “enhanced outer tank requirements.” *Id.* at 61733. *See also id.* (“The LNG by Rail final rule increased the thickness of DOT-113 outer tank shells from 7/16 to 9/16 inch ... and mandated use of stronger TC-128 Grade B normalized steel.”).⁵ In contrast, the 2019 Special Permit that New Fortress Energy seeks to renew “allow[s] the transportation of LNG in *existing* DOT-113 tank cars....” *Id.* at 61732 (emphasis added). *See also* Earthjustice Comments at 20-23; Phase I Report at 26 (standard DOT-113’s thinner outer tank shell is less likely “to resist loss of containment in a derailment”). In other words, the Special Permit does not achieve a safety level at least equal to the safety level required under the final LNG-by-rail rule, which itself is insufficiently protective of public safety such that PHMSA is now proposing to suspend the rule. *See* 49 U.S.C. § 5117(a)(1).

B. Renewal of the Special Permit Is Not Justified

New Fortress Energy has failed to “provide specific justification as to why the special permit should be renewed.” 49 C.F.R. § 107.109(a)(8). New Fortress Energy’s proposed liquefaction facility in Wyalusing, PA has not begun construction. The company noted in its Q2-2021 quarterly report filed with the SEC “that it has not yet issued a final notice to proceed to its engineering, procurement, and construction contractors for its liquefaction facility in Wyalusing, PA—an origination-point for the route authorized” by the Special Permit. 86 Fed. Reg. at 61736. Further, “NFE admits ‘there can be no assurances that [it] will complete the Pennsylvania Facility or be able to supply [its] Facilities with LNG produced at [its] own Liquefaction Facilities.’” *Id.* (alterations in original). The Gibbstown LNG Terminal (Dock 2) also has not yet been constructed. And both of these proposed facilities, which the expired Special Permit

⁵ The LNG-by-rail final rule also included additional operational controls “expected to reduce the likelihood of an incident and reduce potential damages if an incident were to occur.” *Id.* at 61733.

authorized LNG transport between, are subject to pending, contested petitions regarding FERC's jurisdiction over the facilities.⁶ *See id.*

In other words, New Fortress Energy has not shipped any LNG by rail since the 2019 issuance of the Special Permit, and—given that the origination and receiving facilities have not been constructed—will not do so in the near future. While New Fortress Energy's renewal application contains various excuses for the status of its proposed LNG export project, a cursory mention of “supply chain and workforce disruptions” and “economic and political uncertainties”⁷ does not constitute the “specific justification” for why the permit should be renewed that is required under 49 C.F.R. § 107.109(a)(8). Not having been able to use a permit is not sufficient justification for renewing it. Nor do these factors justify renewal of an expired permit that will not be used in the foreseeable future, and that relies on incomplete and outdated information regarding the serious hazards posed by LNG-by-rail.

In light of these serious risks that the agency acknowledges are still not fully understood (and thus indisputably were not understood when the Special Permit was issued in 2019), as well as the status of New Fortress Energy's LNG export project, PHMSA should deny the renewal application. If and when New Fortress Energy decides to attempt to move forward with its proposed LNG project, the company may re-apply for a Special Permit. In considering that new application, PHMSA would be able to utilize the knowledge of LNG-by-rail safety risks and environmental consequences gained since the issuance of the original Special Permit in 2019, as well as any new information regarding safety control and other mitigation measures. *See* 86 Fed. Reg. at 61740 (acknowledging that PHMSA has not yet had the opportunity “to evaluate the results of ongoing and delayed research efforts to ensure the safe transportation of LNG by rail tank car”).

⁶ New Fortress Energy is unlikely to commence construction unless and until it receives orders from FERC stating that FERC does not have jurisdiction over the facilities. The company is presumably eager to avoid repeating its recent experience with an LNG facility in Puerto Rico, where it constructed an LNG handling facility without first seeking FERC authorization and, after the facility was constructed, FERC determined that the facility is subject to its jurisdiction. *New Fortress Energy LLC*, 174 FERC P 61,207 (March 19, 2021).

⁷ Letter from C. Guinta (NFE) to W. Schoonover (PHMSA), Nov. 29, 2021, at 2-3. In addition, while New Fortress Energy claims in its application that natural gas is necessary for a “global energy transition to a low-carbon economy,” *id.* at 3, PHMSA now recognizes that increased gas production caused by proposals like New Fortress Energy's LNG export project “would entail significant environmental consequences” by increasing greenhouse gas emissions. 86 Fed. Reg. at 61735, n.35. *See id.* (discussing “the urgency of limiting such additional [natural gas] production for avoiding the worst consequences from anthropogenic climate change from indirect emissions associated with production and transportation activity”).

II. If PHMSA Does Not Deny the Renewal Application Outright, the Agency Must Conduct Supplemental Environmental Review and Provide a Meaningful Opportunity for Public Comment

A. PHMSA Must Conduct Supplemental Environmental Review

If PHMSA does not deny New Fortress Energy’s renewal application outright, the agency must undertake supplemental National Environmental Policy Act (“NEPA”) analysis and disclosure in light of significant new information and circumstances since issuance of the Environmental Assessment (“EA”) for the Special Permit in December 2019. *See* 40 C.F.R. § 1502.9(d). NEPA “imposes a continuing duty to supplement previous environmental documents.” *Price Rd. Neighborhood Ass’n, Inc. v. U.S. Dep’t of Transp.*, 113 F.3d 1505, 1509 (9th Cir. 1997) (citation omitted). This duty to supplement persists as long as there is “remaining government action [that] would be environmentally significant” (e.g., acting on New Fortress Energy’s permit renewal application) and the agency maintains “a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment.” *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989).

As an initial matter, PHMSA erred in preparing an EA rather than a full Environmental Impact Statement (“EIS”) for this highly controversial project with potentially catastrophic consequences. *See* Earthjustice Comments at 29-31; *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004) (“[A]n EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment.”). Moreover, additional information has been developed over the past two years that has enhanced federal regulators’ understanding of the risks of LNG-by-rail, as well as potential mitigation measures. For example, neither the PHMSA-FRA LNG Task Force nor the Transportation Research Board’s Committee for a Study on the Safe Transportation of Liquefied Natural Gas by Railroad Tank Car existed in 2019, when the Special Permit was issued. In light of these research efforts that post-date the EA, PHMSA cannot renew the permit without first conducting supplemental NEPA review. *See* 40 C.F.R. § 1502.9(d); *Marsh*, 490 U.S. at 371 (“It would be incongruous with [NEPA’s] approach to environmental protection, and with the Act’s manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval....”).

PHMSA’s recent proposal to suspend the 2020 LNG-by-rail rule—which, as explained above, requires use of tank cars with greater puncture resistance—demonstrates that the agency is well aware that its prior authorizations to transport LNG by rail were made without an adequate understanding or disclosure of the serious public safety and environmental risks. *See also id.* at 61735 (acknowledging “information gaps ... concern[ing] testing and the evaluation

of public safety and environmental risks” that “PHMSA was not aware of” when the Special Permit was issued); *id.* at 61736 (noting that suspension would ensure that authorization of LNG-by-rail “reflects the ‘best science’ available, including additional information obtained from the ongoing and delayed research efforts of the LNG Task Force, the forthcoming TRB Phase II Report expected in mid-2022, and continuing developments in scientific understanding of the near-term risks of climate change from enhanced natural gas transportation investments.”).⁸ PHMSA expects that suspending the 2020 rule would allow the agency “to review *new information* to evaluate the potential impact on safety, environmental justice, and [greenhouse gas] emissions.” *Id.* at 61742 (emphasis added). This significant new information is indisputably “relevant to environmental concerns and bear[s] on” the impacts of transporting LNG by rail from Wyalusing to Gibbstown. 40 C.F.R. § 1502.9(d)(1)(ii).

As demonstrated by PHMSA’s proposal to suspend the 2020 LNG-by-rail rule, subsequent information and circumstances “raise[] new concerns of sufficient gravity” such that supplemental environmental review of NFE’s proposed action is required. *State of Wis. v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984). This supplemental review would also further the purposes of NEPA. *See* 40 C.F.R. § 1502.9(d)(2); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983) (citation omitted) (describing NEPA’s “twin aims” of ensuring 1) that an agency considers every significant aspect of the environmental impact of a proposed action, and 2) “that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process”).

B. PHMSA Must Allow for Meaningful Public Participation

As explained in Section I, *supra*, PHMSA should deny the renewal application and require New Fortress Energy to submit a new application if and when it decides to move forward with this project. However, if PHMSA feels that it needs more information before deciding whether to deny the renewal application, then the agency must provide meaningful opportunities for public comment, including as part of the supplemental NEPA review process.

There is considerable public concern regarding the safety and environmental hazards posed by LNG-by-rail, and PHMSA must consider public input from all interested stakeholders—including the communities that would be exposed to the hazards associated with transporting LNG by rail from Wyalusing, PA to Gibbstown, NJ. Notably, after FRA recently received a petition to extend an approval to ship LNG by rail in portable tanks, the agency initiated a 60-day comment period “to ensure that FRA had opportunity to consider any

⁸ PHMSA’s enhanced understanding of the project’s climate impacts—including due to “more recent science” such as the Intergovernmental Panel on Climate Change’s Sixth Assessment Report and a May 2021 report by the International Energy Agency (*see id.*)—further warrants supplemental environmental review. *See* 40 C.F.R. § 1502.9(d).

additional views or information that stakeholders provided” *Id.* at 61736. *See also id.* (explaining that suspending the 2020 LNG-by-rail rule “would allow consideration of additional public comment, particularly on issues such as public and worker safety, environmental risks, and environmental justice, as well as on any additional testing or other information generated by PHMSA, FRA, and the TRB”).

For the foregoing reasons, we respectfully request that PHMSA deny New Fortress Energy’s application to renew expired Special Permit 20534. At a minimum, PHMSA must conduct supplemental environmental review and provide a meaningful opportunity for public comment. Please contact us with any questions.

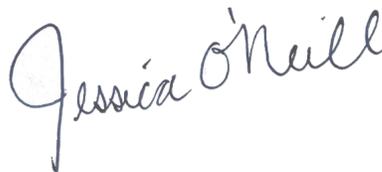
Sincerely,



Elly Benson
Senior Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Tel: 415-977-5723
elly.benson@sierraclub.org



Joseph Otis Minott, Esq.
Executive Director & Chief Counsel
Clean Air Council
135 South 19th Street, Suite 300
Philadelphia, PA 19103
Tel: (215) 567-4004
joe_minott@cleanair.org



Jessica R. O’Neill
Senior Attorney
Citizens for Pennsylvania’s Future

1429 Walnut St., Suite 400
Philadelphia, PA 19102
Tel: 215-545-9694
oneill@pennfuture.org

cc: Secretary Pete Buttigieg (DOTExecSec@dot.gov)