

New Fortress Energy: Potential Outcomes from Show Cause Vary, Temporary Halt in Operations Until Proper Permitting Obtained Likely, Experts Say; Unique Facts Make Predictions Difficult

New Fortress Energy's (NFE) liquefied natural gas import facility in San Juan, Puerto Rico may be subject to a suspension of its operations, fines, or cancellation if the company is unable to justify its construction of the facility without the Federal Energy Regulatory Commission's (FERC) authorization, according to experts familiar with FERC's permitting and enforcement authority that *The Capitol Forum* interviewed.

The San Juan facility is forecast to supply the highest committed volumes of gas in the company's portfolio, supporting the company's operating margin more than any other project from Q3 2020 to Q4 2021, according to the company's most recent investor [slide deck](#).

"[A]ny cancellation related to or substantial disruption" in the company's ability to operate the facility "could have a material adverse effect on our financial condition, results of operations and cash flows," according to the company's most recent earnings [report](#).

FERC issued its show cause order on June 18, as previously reported by *The Capitol Forum*. The company's response is due Monday July 20, according to FERC's order and procedural rules. The company did not return requests for comment.

Experts say operating without FERC authorization does not appear to be justified. "FERC is responsible for authorizing the siting and construction of onshore and near-shore LNG import or export facilities," according to its [website](#).

In FERC's show cause [order](#), the agency wrote that New Fortress Energy's facilities appeared to be inside the agency's jurisdiction, asking the company to explain how the construction of the San Juan facility did not require the agency's authorization as required by the Natural Gas Act—the statute that gives the agency purview over liquefied natural gas import and export facilities.

Experts familiar with FERC and its legal authority saw few arguments that would support New Fortress Energy's project falling outside of FERC's jurisdiction, according to interviews conducted by *The Capitol Forum*.

"Operating a facility like New Fortress Energy's San Juan facility without FERC's authorization appears to be a blatant violation of the Natural Gas Act," said a Department of Energy (DOE) staffer familiar with the company's operations in Puerto Rico who spoke to *The Capitol Forum* on the condition of anonymity.

Given the company's size and structure, the company should know that they are under FERC's jurisdiction, said the source at DOE. "It seems intentional that they never applied [in order] to rush the project," the source said.

FERC's ultimate enforcement decision, or lack thereof, will be contingent on how New Fortress Energy responds, but "FERC does not, and will not, look kindly on companies that try to build projects that require FERC approval without letting FERC know ... So, I'm not necessarily optimistic that there will be good results for the company," University of Minnesota School of Law's Alexandra Klass told *The Capitol Forum* in an interview.

"I don't know how New Fortress Energy could try to get around [FERC's authorization]," Professor James Coleman of Southern Methodist University's Dedman School of Law said in an interview with *The Capitol Forum*.

Coleman compared the facility's complexity, capacity, and nature as factors that are different between New Fortress Energy's Puerto Rico facility and other, larger liquefied natural gas facilities under FERC's jurisdiction, but even though "they can try to appease FERC ... they can't say they're not legally required to get approval."

Suspended operations and fines likely, experts say, but caution that unique nature of facts makes outcome difficult to predict. After the agency considers New Fortress Energy's response to its order, it can take a number of actions, like temporarily ceasing operations until the permit is obtained which three legal experts considered the most likely outcome over solely a fine or immediate approval without commencing the permitting process, according to *The Capitol Forum's* interviews.

The length of a temporary halt to operation could turn on New Fortress Energy's response to FERC's Show Cause Order.

If New Fortress Energy acknowledges its facility is under FERC's jurisdiction, the evaluation of the permitting process would likely be faster, making the period in which the company can resume operations sooner, University of Michigan Ross School of Business' Tom Lyon wrote to *The Capitol Forum* in an email.

On the other hand, Lyon—an expert that predicted FERC would likely initiate an evaluation of the permit and temporarily pause operations over the agency issuing solely a fine—wrote that "a clumsy/resistant response on New Fortress Energy's part will motivate FERC to take a more legalistic approach, which will ultimately be slower to reach a resolution."

FERC's guidelines to approve a liquified natural gas import or export facility hope to complete an application for authorization by at least 180 days, according to agency [guidelines](#).

Beyond operations being potentially suspended, FERC generally [issues](#) penalties in response to Orders to Show Cause.

“FERC would definitely have incentives to enforce [a significant penalty] because they don't want to encourage other companies to try to circumvent their regulatory authority,” said Professor Klass.

One factor that may make predicting the outcome more difficult, the experts cautioned, is that the question before the agency is unique in that it is not common for a company to construct and operate a project without FERC's approval.

Other company projects face public scrutiny over permits; company avoided public comment by not filing with FERC for Puerto Rico. Other New Fortress Energy projects in the U.S., Jamaica, and Ireland have faced public opposition, as the company often assumes a swift construction timeline or moves forward on the local level without necessary federal approval, as it appears to have done in Puerto Rico, according to *The Capitol Forum*'s analysis of the company's security filings and the respective projects' regulatory filings.

For example, the company's first project, its liquified natural gas Florida East Coast Railway shipping facility, [assumed expedient](#) permit approval to investors and the public—[advertising](#) the railroad was able to transport natural gas five months before it received federal [authorization](#).

The liquified natural gas that was to be exported from Florida was, in part, slated to be imported by New Fortress Energy's planned Montego Bay, Jamaica project. The import facility there was delayed and came in over budget, according to a March 2019 operations [update](#).

As the company worked through the Jamaican permitting process, it faced [allegations](#) of rushing the process in Jamaica despite not yet receiving U.S. federal authorization to export to the island, according to the federal approval to export to Jamaica.

In New Jersey, the company's planned export dock in Gloucester County has garnered [litigation](#) and wide-spread local [opposition](#) that argues the project kept the [public out](#) of the process—in some instances inciting the New Jersey Department of Environmental Protection to [rescind](#) previously granted permits and local bodies to [reconsider](#) siting and dredging permits.

The company's Shannon liquefied natural gas terminal in Ireland is also facing pushback and potential cancellation as the government reconsiders its consumption of fossil fuels and implications of importing fracked gas from the U.S., according to [local media reports](#).

When a company files for FERC authorization to construct an import or export facility, the application is published in the Federal Register, inviting an opportunity for the public to comment or an interested party to intervene (example [here](#)).

“By not having FERC approval for something, you sort of circumvent public notice... you circumvent the ability for environmental groups that are opposed to the project to file proceedings approving the project or saying why it doesn't meet FERC's requirements,” Professor Klass said.

As New Fortress Energy defends its Puerto Rico facility to FERC in the U.S., it is coming under [increasing scrutiny](#) for its local contracting methods and extra costs incurred by the Puerto Rico Electric Power Authority due to the project's delays as other business opportunities on the island the company was hoping to take advantage of are [shelved](#).

Director of Finance at the Institute for Energy Economics and Financial Analysis Tom Sanzillo has watched the project in San Juan closely, asking the Governor of Puerto Rico and U.S. Attorney for the District of Puerto Rico to look more closely at the territory's contract with New Fortress Energy.

“FERC's authorization should have been a settled matter before the contract [with the Puerto Rico Power Electric Authority] was signed,” Sanzillo said in an interview with *The Capitol Forum*. “Same bad deal, same due diligence and oversight, same lack on time delivery, same shaky payment system, same false savings claims. This is the first new generation deal on the island, but the same shabby deal making ... This company is the wrong company for Puerto Rico.”