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**UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY**

IN THE MATTER OF)
) **DOCKET NO.**
Dominion Cove Point LNG, LP) **11-128-LNG**
)

Request for Rehearing

Pursuant to Section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), and 10 C.F.R. § 590.501, the Sierra Club hereby requests rehearing of the Department of Energy Office of Fossil Energy’s “Final Opinion and Order Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Cove Point LNG Terminal in Calvert County, Maryland, to Non-Free Trade Agreement Nations” (“Order”), DOE Order No. 3331-A, issued May 7, 2015.

Sierra Club asks that these actions be withdrawn and pending further inquiry into the environmental impacts of the proposed exports, or in the alternative, that the order be withdrawn and the underlying application be denied.

Sierra Club additionally moves for a stay of the Order pending resolution of this motion, pursuant to Section 19(c) of the Natural Gas Act, 15 U.S.C. § 717r(c), and 10 C.F.R. § 590.502

All communications regarding this motion should be addressed to and served upon Nathan Matthews, Staff Attorney, and Natalie Spiegel, Legal Assistant, at Sierra Club, 85 2nd St., Second Floor, San Francisco, California 94105.

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I. Statement of the Issues and Argument

A. DOE Has An Independent Obligation To Assess Environmental Impacts Under NEPA and the Natural Gas Act, and the Natural Gas Act Neither Permits Nor Compels a Presumption that A Project With Adverse Environmental Impacts Is Consistent With The Public Interest

Section 3 of the Natural Gas Act provides:

[N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of [DOE] authorizing it do so. [DOE] shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest.

15 U.S.C. § 717b(a).

DOE errs in concluding that “*This provision* creates a rebuttable presumption that a proposed export of natural gas is in the public interest,” and that “DOE *must* grant such an application unless opponents of the application overcome that presumption by making an affirmative showing of inconsistency with the public interest.” Order 3331-A at 9 (emphases added). These interpretations are inappropriate in the environmental context.

For environmental impacts, DOE has an affirmative obligation to investigate impacts on its own; DOE cannot simply rely on information provided by project proponents or opponents. Approving an application to export liquefied natural gas is a major action with the potential to “significantly affect[] the quality of the human environment,” and as such, the National Environmental Policy Act (“NEPA”) requires DOE to affirmatively investigate the impacts of exports. 42 U.S.C. § 4332(C). The environmental impacts revealed by DOE’s NEPA inquiry must be weighed in the Natural Gas Act public interest analysis, because the “public interest” protected by the Natural Gas Act includes the public’s environmental interests. *See Nat’l Ass’n for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 670 n.4, n.6 (1976).

DOE has not provided a reasoned basis for presuming that a project that has adverse environmental impacts (such as this one) will nonetheless be in the public interest. The only court case DOE cites did not hold that any such presumption was compelled by the statutory text. *Panhandle Producers and Royalty Owners Ass’n v. Economic Regulatory Administration*, 822 F.2d 1105, 1111 (D.C. Cir. 1987). Instead of interpreting the statute, *Panhandle Producers* interpreted DOE policy guidance. This guidance, in turn, articulated the narrow proposition that

an *import* project with flexible terms will not have *market* impacts inconsistent with the public interest. *Id.* (interpreting *New Policy Guidelines and Delegation Orders From Secretary of Energy to Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas*, 49 Fed. Reg. 6684-01 (Feb. 22, 1984)). As summarized by *Panhandle Producers*, these guidelines created two specific rebuttable presumptions regarding natural gas imports: “that if the contract terms are flexible enough the gas will be delivered only if it is competitive; and that if the imported gas is competitive it will fill a [domestic] need.” *Panhandle Producers*, 822 F.2d at 1111. *Panhandle Producers* determined that these presumptions were a permissible interpretation of the statute, but did not reach the question of whether any presumptions regarding imports or exports were compelled by the Natural Gas Act. *Id.* Even the two presumptions articulated by the policy guidance were “highly flexible,” rebuttable, and did not preclude assertion of other factors. *Id.* at 1113.

The import policy guidance’s presumptions have no bearing on the question of whether the environmental impacts of exports demonstrate inconsistency with the public interest.¹ Even if the import policy statement purported to adopt such a presumption, DOE would be prohibited from blindly relying on it: *Panhandle Producers* explicitly stated the import policy guidance, which was not subject to notice and comment rulemaking, does not bind DOE. *Id.* at 1110 (citing *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986)).

DOE therefore cannot base its decision to authorize the project on a presumption of consistency with the public interest. As we explain below, Sierra Club has provided evidence and argument that does, in fact, affirmatively show that the application is “inconsistent with the public interest.” Order 3331-A at 8. But even if DOE were to determine that Sierra Club had not made this showing, DOE could not rest on a perceived failure by “opponents of the application overcome [the] presumption” of consistency with the public interest. Order 3331-A at 9. Instead, pursuant to both NEPA and Natural Gas Act section 3, DOE must undertake its own inquiry, using the tools at its disposal (such as the National Energy Modeling System), to take a hard look at the environmental impacts of the project and determine whether these impacts are consistent with the public interest.

B. DOE Violated NEPA by Approving the Project Without an EIS Considering the Direct, Indirect and Cumulative Effects of LNG Exports

DOE has obligations under NEPA that are distinct from DOE’s Natural Gas Act obligations. NEPA requires federal agencies to consider and disclose the “environmental impacts” of proposed agency action, and prescribes a particular set of procedures to be used to effectuate this process. 42 U.S.C. § 4332(C)(i).

¹ Separate from environmental impacts, we note that exports differ from imports in key ways: while a domestic buyer’s willingness to pay international rates for foreign gas demonstrates a domestic need for the gas, DOE has not offered any basis for presuming that a foreign buyer’s willingness to pay international rates for domestic gas demonstrates that there is not a domestic need for the gas.

Here, DOE purports to meet its NEPA obligations by adopting the Environmental Assessment (“EA”) prepared by the Federal Energy Regulatory Commission (“FERC”). Order 3331-A at 82. CEQ regulations permit such adoption only where DOE independently ensures that the adopted statement satisfies DOE’s NEPA obligations regarding the proposed DOE action. 40 C.F.R. § 1506.3(c). As we explain below, FERC’s EA fails to take a hard look at DOE’s proposed authorization of exports. Because DOE failed to cure the deficiencies in the EA or to supplement the EA to address the effects of this particular DOE action, DOE’s approval of the application violates NEPA.

1. The Environmental Addendum and NETL Reports Are Not A Substitute for NEPA Review

As a threshold NEPA issue, the Environmental Addendum, and the NETL reports DOE released alongside it, are not a substitute for NEPA review. Putting aside deficiencies in the scope and content of these documents, as a procedural matter, these documents cannot fulfill DOE’s NEPA obligations. These documents contradict one another and therefore fail to inform the public of DOE’s actual conclusions; the documents do not specify the impacts of this particular project; and the documents therefore failed to adequately inform the public and provide a basis for public comment.

As summarized by one circuit court:

By requiring the consideration of environmental factors in the course of agency decisionmaking on major federal actions, NEPA serves two purposes: First, it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision. In other words, by requiring agencies to take a “hard look” at how the choices before them affect the environment, and then to place their data and conclusions before the public, NEPA upon democratic processes to ensure—as the first appellate court to construe the statute in detail put it—that “the most intelligent, optimally beneficial decision will ultimately be made.”

Oregon Natural Desert Ass’n v. Bureau of Land Mgmt., 625 F.3d 1092, 1099-100 (9th Cir. 2010) (internal citations and some internal quotation marks removed).

Clear presentation of agency conclusions is essential to NEPA’s purpose. Here, however, the Environmental Addendum, NETL reports, EA, and Order 3331-A fail to present DOE’s

conclusions in a coherent manner, rather, they simply list facts which are not necessarily pertinent to the specific project. The environmental addendum cannot satisfy the purposes of NEPA because it does not give a “detailed statement...on...the environmental impact of the *proposed action*.” 42 U.S.C. § 4332(C)(i) (emphasis added). And the documents DOE relies upon contradict one another. As Sierra Club explained in comments on the Addendum and NETL reports, these reports reach different conclusions regarding the potency of methane as a greenhouse gas and the amount of air pollution emitted by natural gas production.

Separate from the problems relating to inconsistencies in this data and DOE’s failure to present this information in accordance with the process required by NEPA, these additional materials cannot substitute for NEPA analysis because they provide no discussion of the impacts caused by DCP’s particular project.

2. DOE Violated NEPA By Failing to Conduct an EIS for a Large-Scale Industrial Facility Located Immediately Adjacent to Residential Areas

Under only an Environmental Assessment (“EA”), FERC and now DOE, by virtue of Order 3331-A, are allowing DCP to convert a virtually idle LNG import facility in Calvert County, Maryland, into a facility able to export close to one billion cubic feet of LNG per day to customers in India and Japan. Calvert County is a largely rural county on a peninsula bordered by the Chesapeake Bay and the Patuxent River. The export terminal will be located in an otherwise residential community, with some homes barely 300 feet away.²

To construct the export terminal, DCP has cleared nearly 100 acres of forest to create a laydown area for heavy construction materials and a parking lot for 1,700 employee cars.³ The construction materials, which could be up to 150 feet long and weigh up to 330 tons, will be barged to DCP’s new pier on the Patuxent River and taken to the laydown area on trucks.⁴ Within the unusually small, 59.5-acre footprint of the terminal site, DCP will construct a 130-megawatt, utility-scale power plant to provide energy to supercool the gas.⁵ Four new 102,500-gallon tanks will store flammable propane that will be trucked to the facility on the main road to Cove Point, which also serves as the local residents’ principal emergency evacuation route.⁶ Once operational, the facility will emit air pollutants that harm human health and contribute to climate change.⁷ Crowding the propane tanks and tanks of hazardous materials that are stripped out of the gas before it is liquefied onto the small site presents unusual safety hazards to nearby

² “Environmental Assessment for the Cove Point Project” at 81 (May 15, 2014) (“EA”).

³ *Id.* at 13.

⁴ *Id.* at 29.

⁵ *Id.* at 8.

⁶ *Id.* at 111 (describing tanks); *id.* at 158 (noting concern about evacuation).

⁷ *Id.* at 112 & Table 2.7.1-6.

residents, whose principal protection from flammable vapor clouds will be a 60-foot sound barrier.⁸

If DOE had acknowledged its obligations, it would necessarily have also recognized that FERC's EA was not sufficient and that a full Environmental Impact Statement ("EIS") was and is required for this license. Sierra Club has already explained why an EIS is necessary in its Protest, which it incorporates in full by reference here. Because DOE nonetheless failed even to respond to these arguments, we emphasize them again here.

NEPA requires an EIS where a proposed major federal action would "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(C). The "significance" of effects is determined by both the context and intensity of the proposed action. 40 C.F.R. § 1508.27. If there is a "substantial question" as to the severity of impacts, an EIS must be prepared. See *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 561-62 (9th Cir. 2006) (holding that the "substantial question" test sets a "low standard" for plaintiffs to meet). Where it is unclear whether a proposal will have significant effects, the agency may prepare an EA to determine whether an EIS is required. Here, FERC issued an EA and finding of no significant impact, declining to prepare an EIS. DOE joined in this determination without addressing Sierra Club's argument that a full EIS was required.

The determination that the project would not significantly affect the environment, and that no EIS was required, was unlawful because the environmental effects on the adjacent neighborhood and of the reasonably foreseeable induced production will be significant.

3. DOE Violated NEPA By Authorizing Exports Without Taking A Hard Look at Effects of Induced Gas Production

DOE acknowledges that "a decision by DOE to authorize exports to non-FTA nations could accelerate" the development "of natural gas resources in the United States." Order 3331-A at 85. In the incorporated Environmental Addendum, DOE more candidly states that "DOE believes," as it must, that exporting LNG from the U.S. will "increase[] domestic production of natural gas (principally from unconventional sources)."⁹ Similarly, in the related proceeding regarding exports from the Cameron, Louisiana project, DOE stated that "more natural gas is likely to be produced domestically if LNG exports are authorized than if they are prohibited." DOE Order 3391, at 88 (Sept. 10, 2014).

This belief that production will rise in response to exports is central to DOE's economic and other public interest findings: if production did not increase in response to LNG exports, then the gas exported would, ultimately, have to come from reductions in existing domestic

⁸ *Id.* at 3 (noting facility footprint); *id.* at 126–30 (describing vapor cloud risks); *id.* at 148–57 (analyzing potential impacts and sound barrier protection (pp. 150–51)).

⁹ Environmental Addendum at 1.

demand or an increase in natural gas imports, both of which would lead to much more severe price increases and which would undermine DOE's conclusion that there was not a domestic need for the gas exported. The Environmental Addendum summarizes EIA's January 2012 predictions on the domestic energy market's response to exports: "across all cases, an average of 63 percent of increased export volumes would be accounted for by increased domestic production. Of that 63 percent, EIA projected that 93 percent would come from unconventional sources (72 percent shale gas, 13 percent tight gas, and 8 percent coalbed methane [CBM]) (EIA 2012)."¹⁰ The link between exports and additional gas production is simple: exports expand the demand for natural gas, which will provide an incentive and outlet for additional gas production.

This type of market effect falls squarely within the purview of NEPA's indirect and cumulative effects analyses. Indirect effects are "caused by the action" but

are later in time or farther removed in distance [than direct effects], but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effect on air and water and other natural systems, including ecosystems.

40 C.F.R. § 1508.8(b). NEPA must also take a hard look at cumulative impacts. Cumulative impacts are not causally related to the action. Instead, they are:

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. Numerous courts have held that market-based effects such as increased gas production (marketed supply) in response to the demand created by exports are indirect and cumulative effects within the meaning of these regulations. *See, e.g., High Country Conservation Advocates v. United States Forest Serv.*, 52 F. Supp. 3d 1174, 1196 (D. Colo. 2014) (NEPA review of project that would provide roads enabling additional coal mining must consider effects of increased coal combustion); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (environmental effects of increased coal consumption due to construction of a new rail line to reach coal mines was reasonably foreseeable and required evaluation under NEPA).

¹⁰ Environmental Addendum at 5

Nonetheless, despite this plain connection between the demand created by exports and an increase in domestic production (i.e., marketed supply), DOE wrongly determined that “NEPA does not require the review to include induced upstream natural gas production.” Order 3331-A at 83. DOE offered two arguments for this exclusion, both resting on claims of uncertainty: DOE claims that it is uncertain whether, if authorized, exports would in fact occur, *id.*, and that, even if exports do occur, there would be “fundamental uncertainty as to where any additional production would occur and in what quantity.” *Id.* at 84. Both of these arguments are contrary to the applicable law and the facts in the record here.

a) Exporting LNG Is Not A Speculative or Unforeseeable Consequence of An Export Authorization

DOE’s initial argument for excluding induced production from NEPA review is that it is unforeseeable whether authorizing exports will cause exports to occur. DOE states that “[r]eceiving non-FTA authorization from DOE does not guarantee that a particular facility would be financed and built; nor does it guarantee that, if built, market conditions would continue to favor export,” and that “there is uncertainty as to the aggregate quantity of natural gas that ultimately may be exported to non-FTA countries.” Order 3331-A at 83-84.¹¹ DOE’s approach violates NEPA, because while lack of foreseeability can narrow the scope of the indirect and cumulative effects inquiries, unforeseeability cannot provide a basis for excluding the direct effects of the action.

DOE is authorizing export of 0.77 billion cubic feet per day (bcf/d) of natural gas. Order 3331-A at 98. Exporting 0.77 bcf/d of gas is not an effect of the proposed action: it is the action itself. As such, it would be nonsensical to require further certainty as to whether exports will occur before evaluating the effects that exports (if they do occur) will have. Of course, in every context in which a federal agency authorized private action, there will be some uncertainty as to whether that private action will occur. NEPA regulations regarding foreseeability pertain only to the indirect and cumulative effects assessments.¹² Exports, however, are the action itself, or at minimum a direct effect of the action, and not an indirect or cumulative effect. DOE has not identified any authority allowing an agency to avoid discussion of the effects of a proposed action on the ground that it was uncertain whether the action itself would be undertaken.

Even if DOE wrongly determines that it is appropriate to impose some foreseeability inquiry regarding whether exports will occur, the proposed exports are plainly foreseeable for purposes of NEPA. DOE states that “Receiving a non- FTA authorization from DOE does not *guarantee* that a particular facility would be financed and built; nor does it *guarantee* that, if built, market conditions would continue to favor export once the facility is operational.” Order

¹¹ *Accord* Environmental Addendum at 1 (“Fundamental uncertainties constrain the ability to predict what, if any, domestic natural gas production would be induced by granting any specific authorization or authorizations to export LNG to non-FTA countries.”).

¹² 40 C.F.R. §§ 1508.7, 1508.8(b).

3331-A at 83-84 (emphases added). DOE purports to “illustrate” the uncertainty regarding exports by stating that “of the more than 40 applications to build new LNG import facilities that were submitted to federal agencies between 2000 and 2010, only eight new facilities were built and those facilities have seen declining use in the past decade.” *Id.* at 84. DOE does not explain, however, how these observations have any relevance to DOE’s current NEPA obligations or to exports.

NEPA review is not limited to events that are ‘guaranteed’ to occur. Courts discussing the obligation to consider indirect effects have held that reasonable foreseeability extends far beyond the events that are most likely, or even likely, to occur. *See, e.g., Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975), *Sierra Club v. Watkins*, 808 F. Supp. 852, 868 (D.D.C. 1991). Courts routinely require NEPA analysis of effects acknowledged to be unlikely to occur. For example, courts have required consideration of the possibility of a terrorist attack on a proposed project, explaining that “in considering the policy goals of NEPA and the rule of reasonableness that governs its application, the possibility of terrorist attack is not so ‘remote and highly speculative’ as to be beyond NEPA’s requirements.” *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1031 (9th Cir. 2006). An agency may only exclude analysis of an event and its consequences from NEPA review when the event “is so ‘remote and speculative’ as to reduce the effective probability of its occurrence to zero.” *New York v. Nuclear Regulatory Comm’n*, 681 F.3d 471, 482 (D.C. Cir. 2012). Thus, the fact that DOE is not absolutely certain that the approved exports will occur is not a basis for excluding the effects of exports from NEPA review. Here, the actions DCP has taken—entering contracts for the full volume of proposed exports,¹³ expending considerable resources, planning the project and securing necessary permits, etc.—demonstrate that the exports for which DCP seeks authorization are anything but remote and speculative.

Similarly, authorities interpreting the obligation to discuss “cumulative effects” explain that uncertainty is only a ground for excluding an effect from NEPA review when the effect is so uncertain that it is not susceptible to “meaningful discussion” at the time of the analysis. *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897, 902 (7th Cir. 2010). DCP’s proposed LNG exports, of course, are a specific and concrete proposal that is far removed from the type of inchoate possibility of another possible timber lease from *Habitat Education Center*, which that court determined to be beyond the scope of meaningful discussion.

Thus, NEPA would require DOE to take a hard look at the consequences that would follow from exports even if DOE had determined that exports are unlikely to occur. Of course, in actual fact, DOE has reached the opposite conclusion. As Sierra Club explained in commenting on the Environmental Addendum:

¹³ *See* Update of Dominion Cove Point LNG, LP Concerning Signed LNG Export Contracts at 1-2 (May 2, 2013).

As DOE acknowledges, the Energy Information Administration's ("EIA") 2014 Annual Energy Outlook predicts that, in the "Reference case," the U.S. will become a net exporter of LNG, with net exports increasing by 9.6 bcf/d by 2030 and continuing at that rate through 2040. DOE does not criticize this forecast, nor does DOE argue that, if DOE authorizes this level of exports or more, this level of exports is not likely to occur.¹⁴

Although many NERA scenarios predicted lower levels of exports, the 2014 Annual Energy Outlook is significantly more recent and is prepared by an impartial federal agency rather than a private consultant with ties to extractive industry.¹⁵ In addition, certain assumptions in the LNG Export Study lead it to systemically underestimate the market conditions in which exports could occur, as we explained previously and reiterate below. Because DOE's actions regarding DCP bring the total volume of exports to have received final authorization to export to non-FTA countries to 8.61 Bcf/d, below EIA's estimate of likely total exports, it is likely that DOE's authorization here will increase the amount of gas actually exported.¹⁶

Insofar as DOE is concerned that it is uncertain what quantity of LNG would be exported in "aggregate" if DOE granted a number of export authorizations, that issue may narrow the scope of DOE's cumulative impacts inquiry.¹⁷ It is irrelevant, however, to DOE's separate obligation to consider the effects of the particular proposal under consideration. Here, DCP's authorization allows them to export 0.77 bcf/d to non-FTA countries.

b) DOE Has Not Shown that Uncertainty Regarding Location and Manner of Induced Production Precludes Meaningful Analysis of Induced Production's Environmental Impacts

DOE's remaining argument for excluding the effects of induced gas production from NEPA review is that "There is also fundamental uncertainty as to where any additional production would occur and in what quantity," and that "without knowing where, in what quantity, and under what circumstances additional gas production will arise, the environmental impacts resulting from production activity induced by LNG exports to non-FTA countries are not 'reasonably foreseeable' within the meaning of CEQ's NEPA regulations." Order 3331-A at 84. DOE has not explained why this uncertainty precludes meaningful review (and DOE has

¹⁴ Gas Production Comment at 5 (footnotes omitted) (citing Environmental Addendum at 42); EIA 2014 Annual Energy Outlook, MT-22 (predicting a net increase of 3.5 trillion cubic feet per year).

¹⁵ See Sierra Club Initial Comment on LNG Export Study at 53-56, Sierra Club Reply Comment on LNG Export Study at 20.

¹⁶ We note that no evidence in the record indicates that FTA countries present a potential market for the volume of exports forecast by EIA. For the total volume of exports to have received final authorization, see DOE Order 3638 at 206 (May 12, 2015) (the most recent authorization by DOE).

¹⁷ As we discuss below, however, DOE's own statements demonstrate that even as to aggregate exports, uncertainty is not so great as to preclude meaningful review.

acknowledged that it does not preclude review of climate impacts), nor has DOE explained why it cannot use available tools to limit or resolve this uncertainty.

The mere existence of some uncertainty does not prevent an effect from being “reasonably foreseeable.” “Reasonable forecasting and speculation is . . . implicit in NEPA, and [courts] must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’” *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). In undertaking this “reasonable forecasting,” agencies have an affirmative obligation to conduct or commission research when necessary for an understanding of the effects of proposed action. *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9th Cir. 1984) (collecting cases); *see also State of Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978) (“NEPA does, unquestionably, impose on agencies an affirmative obligation to seek out information concerning the environmental consequences of proposed federal actions. Indeed, this is one of NEPA’s most important functions.”), *vacated on other grounds in part sub nom. W. Oil & Gas Ass’n v. Alaska*, 439 U.S. 922 (1978). When information is necessary, the agency must obtain it unless “the overall costs of obtaining it are . . . exorbitant.” 40 C.F.R. § 1502.22(a).

Here, available tools allow DOE to predict “where, in what quantity, and under what circumstances” exports will induce additional gas production. Nothing in the EIS or in DOE’s orders explains why these tools are unavailable or inadequate. Indeed, EIA has already published predictions for how onshore gas production will increase in six specific regions in response to exports, in the supplemental materials to EIA’s January 2012 export report.¹⁸ DOE has not acknowledged these predictions or explained why they are insufficient to support meaningful discussion of the impacts of exports. Insofar as greater specificity is required, it is likely that EIA has already created predictions as to how production will increase in individual gas plays. The 2012 EIA Export Report is built on EIA’s National Energy Modeling System, which Sierra Club has repeatedly described. Because NEMS is built on a “play-level model that projects the crude oil and natural gas supply from the lower 48,”¹⁹ it appears that EIA must have already developed “play-level” forecasts of where production would increase in response to exports. If EIA has not already undertaken this type of modeling, or if the modeling EIA has done so far is insufficient to identify the impacts of DCP’s proposed exports, NEPA requires DOE to undertake or commission such modeling.

¹⁸ See <http://www.eia.gov/oiaf/aeo/tablebrowser/#release=FE2011&subject=0-FE2011&table=72-FE2011®ion=0-0&cases=rflhexrpd-d090911a,rflhexslw-d090911a,rflhexrpd-d090911a,rflhexslw-d090911a,ref2011fe-d020911a> (last visited June 2, 2015), Excel version available at http://www.eia.gov/oiaf/aeo/tablebrowser/aeo_query_server/?event=ehExcel.getFile&study=FE2011®ion=0-0&cases=ref2011fe-d020911a,rflhexslw-d090911a,rflhexrpd-d090911a,rflhexslw-d090911a,rflhexrpd-d090911a&table=72-FE2011&yearFilter=0

¹⁹ EIA, Documentation of the Oil and Gas Supply Module, 2-2 (2011), available at [http://www.eia.gov/FTP/ROOT/modeldoc/m063\(2011\).pdf](http://www.eia.gov/FTP/ROOT/modeldoc/m063(2011).pdf)

NEMS forecasts, like all forecasts, necessarily include some uncertainty. Nonetheless, DOE has already concluded that NEMS forecasts are certain enough to support meaningful discussion—including, in this proceeding, the NEMS-derived forecasts underlying EIA’s LNG Export Study. Because these forecasts have been determined to be sufficient to support analysis of price impacts, they are also sufficient to support analysis of environmental impacts. *See Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1097 (D.C. Cir. 1973).

The geographic information provided by NEMS and other models provides an adequate basis for discussing many of the impacts of induced gas production. Although NEMS models production at the play level, rather than at the siting of individual wells, for many impacts, the effects will be felt at the regional level, so it is unclear whether further geographic specificity would significantly improve discussion of those impacts. For example, gas production emits ozone forming pollution, particularly volatile organic chemicals and hazardous air pollutants. Ozone is largely a regional problem, and is primarily addressed at the state or regional level in other contexts.²⁰ Once DOE estimates the amount of gas production that will be added in a play or region, several tools allow DOE to predict the amount of ozone precursors that will be emitted by that regional production. NETL provides a method of estimating these impacts, illustrated by NETL’s bottom-up estimate of NOx emissions.²¹ NETL estimates that the cradle to transmission NOx emissions for natural gas used in combined cycle power plants are roughly 0.6 kilograms of NOx per megawatt hour generated, with roughly 0.5 kilograms specifically from production rather than transport.²² Using NETL’s assumption of a combined cycle power plant efficiency of 46% and EIA’s estimate of a natural gas heat content of 1028 British thermal units per cubic foot,²³ NETL indicates that production and transmission of natural gas emits 87 metric tons of NOx per bcf of gas. Thus, once DOE determined the amount of additional production that would occur in the nearby Marcellus and Utica shale plays, for example, DOE could estimate the amount of VOC and NOx emissions that would be emitted by this production in these regions. This emissions estimate would provide a basis for meaningful discussion regarding impacts on regional ozone levels.

Numerous other impacts are amenable to regional discussion, especially because, as DOE recognizes, the harm caused by these impacts occurs primarily as a result of the cumulative impacts of multiple wells throughout a region, rather than as a result of individual wells. This discussion can be informed by EIA’s modeling of the type, in addition to region, of additional production. For example, EIA has already predicted that 63% of demand created exports, on average, will be supplied by new production, and that 72% of this new production will come

²⁰ *See, e.g.*, EPA, Cross-State Air Pollution Rule (CSAPR), <http://www.epa.gov/crossstaterule/>.

²¹ NETL Gas LCA at 52-54.

²² *Id.* at Figure 4-19, “Life Cycle NOx Emissions for Natural Gas Power Using Domestic Natural Gas Mix.”

²³ “Frequently Asked Questions: Average Heat Content of Natural Gas,” <http://www.eia.gov/tools/faqs/faq.cfm?id=45&t=8> (last visited June 2, 2015).

from shale gas.²⁴ Once DOE has estimated the share of this production that will be added in a region, such as a particular shale play, DOE can estimate the number of wells required, using NETL's estimates of expected ultimate recovery for different well types (e.g., 3 to 3.5 bcf per well for the 72% of production that comes from shale wells). This information provides a basis for estimating the water demand export-induced production will place on the region (either using DOE's estimates of the national average of water use²⁵ or, when available, region-specific information regarding water consumption), and thus the region's ability to tolerate this additional water demand. Similarly, DOE can use the estimate of the number of additional shale wells that will be required in each region to estimate the total acreage that will be directly or indirectly disturbed by this additional production, using data regarding the number of wells per pad and size of each well pad.

Even if DOE concludes that, despite the availability of NEMS and other models, it is impossible to predict where gas production induced by exports will occur, DOE can nonetheless meaningfully discuss some of the environmental impacts of induced production. In particular, as DOE has recognized, effects of greenhouse gas emissions generally do not depend on the geographic location of the emissions, so discussion of the climate impact of gas production induced by exports does not depend on the location of that production.²⁶ Yet the EA does not address the greenhouse gas emissions of induced gas production. The analysis of climate impacts contained in the Addendum and other documents falls far short of the hard look NEPA requires, as we explain below. Even for non-climate impacts, even if regional discussion proves (contrary to the available evidence) to be impossible, DOE must inform itself and the public of the aggregate impacts of DCP's proposed exports, such as the nationwide total of land that will be disrupted by induced drilling.

c) DOE's Other Reason for Excluding Induced Production From Analysis

DOE contends that induced production is beyond the scope of NEPA analysis because DOE does not have direct regulatory authority over emissions and other effects of the induced production. Order 3331-A at 86. DOE would rely on "environmental regulators" such as EPA to "impose requirements on natural gas production" rather than considering the impacts of induced production when considering the NEPA analysis and the balance of the public interest. *Id.* This reflects a fundamental misunderstanding of NEPA. For example, the Ninth Circuit has explicitly held that NEPA requires agencies to analyze the effects of their actions even when the agency

²⁴ See LNG Export Study – Related Documents, available at <http://energy.gov/fe/services/natural-gasregulation/lng-export-study> (EIA 2012 Study), at 10, 11.

²⁵ Environmental Addendum at 10-12.

²⁶ DOE, Draft Addendum to Environmental Review Documents Concerning Exports of Natural Gas from The US, 2 (May 29, 2014), available at http://energy.gov/sites/prod/files/2014/05/f16/Addendum_0.pdf; see also DOE, Final Addendum to Environmental Review Documents Concerning Exports of Natural Gas from The US, 2 (August 2014), available at <http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf>.

does not have permitting authority over those effects, explaining that “while it is the development’s impact on jurisdictional waters that determines the scope of the [Army Corps of Engineers’] *permitting authority*, it is the impact of the permit on the environment at large that determines the Corps’ NEPA responsibility.” *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005) (emphasis added). Similarly, the Surface Transportation Board has been required to consider impacts railroad construction would have on coal combustion and coal mining without regard for the Board’s lack of authority to directly regulate these issues. *Mid States*, 345 F.3d at 545-51; *see also N. Plains Res. Council*, 668 F.3d at 1081-82. Still other cases have required NEPA analyses of proposed casino projects to include impacts of increases in vehicle traffic the projects would induce. *See Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 29-30 (D.C. Cir. 2008). Contending that other agencies will fix and mitigate the environmental harms caused by induced natural gas production and that NEPA analysis of the harms is not necessary is contrary to the purpose of NEPA.

4. DOE Failed To Support Its Conclusions Regarding The Climate Impact of Natural Gas Production

DOE has failed to take a hard look at the climate impacts of the production that would be induced by proposed exports. Although Order 3331-A includes some discussion of climate impacts, DOE explicitly contends that this discussion is separate from, and plays no part in, the NEPA analysis. Order 3331-A at 83. Of the two reasons DOE provides for excluding effects of induced production from NEPA analysis, one, uncertainty as to where production will occur, is plainly inapplicable to climate impacts. As DOE acknowledges, climate impacts are global, rather than occurring “on a local or regional level.”²⁷ DOE’s other justification for limiting the NEPA inquiry, uncertainty as to whether exports will occur, is flawed for the reasons stated above. Accordingly, there is no lawful basis for DOE’s failure to take a hard look, as part of the NEPA analysis, of the climate impacts of DCP’s proposed LNG exports, including the climate impacts of additional/induced gas production.

NEPA requires DOE to address the climate impacts of induced production. At a minimum, this requires an estimate of the amount of additional greenhouse gases that would be emitted by this production and a discussion of the impact of these emissions. This impact should be discussed in the context of the U.S.’s ability to meet emission reduction targets, the social cost of greenhouse gas emissions, and any other metric DOE finds appropriate. DOE has not provided any of this analysis.

Nor can DOE now argue that Order 3331-A’s limited discussion of climate impacts satisfies NEPA’s requirements. Order 3331-A, drawing on NETL’s “LCA GHG Report,” merely provides an estimate of the lifecycle GHG emissions of U.S. LNG on a per KWh basis, and compares these emissions with the lifecycle GHG impacts of other fossil fuels that could be used

²⁷ Environmental Addendum at 2.

in importing countries. This analysis is deficient in numerous regards. It is untethered from the actual project under consideration here: it provides no discussion of the *amount* of greenhouse gases that would be emitted as a result of production attributable to DCP's projects. Even on a per unit basis, DOE underestimates the amount of greenhouse gases emitted per unit of gas production, and DOE has failed to provide a rational basis for rejecting the higher estimates provided by Sierra Club. Finally, insofar as DOE contends that additional greenhouse gas emissions from induced gas production will be offset or mitigated by reductions in use of other fossil fuels, DOE has failed to provide an adequate basis to support this contention.

a) *Emission Rate of Natural Gas Production*

As to the amount of greenhouse gases emitted per unit of gas production, DOE has failed to support its conclusions regarding both the tonnage of methane emitted by the production and transportation process and the impact of each pound of methane emitted. Evidence in the record demonstrates that DOE's conclusions on these issues are too low. First, DOE has not provided a basis for using its estimated methane leak rate instead of the much higher leak rates estimated by other life cycle analyses NETL discusses or by the atmospheric studies summarized by Sierra Club. In Order 3331-A, DOE attributes a "cradle-through-transmission leakage rate" of 1.2% to NETL. Order 3331-A at 77. This figure is lower than the "expected" "cradle-to-liquefaction" leak rates NETL provided in the Export LCA, which were 1.3% for conventional onshore production and 1.4% for shale gas production.²⁸ More fundamentally, DOE has not provided a rational basis for using any of the NETL estimates instead of the other, higher estimates summarized by NETL itself or the still higher estimates indicated by the growing body of atmospheric studies.

NETL determined that "there [were] five major studies that account for the GHG emissions from upstream natural gas" and that three of these studies either provided or implied an estimate of "leakage rates from upstream natural gas."²⁹ These three studies were led by Howarth, Burnham, and Weber. All of these studies estimate much higher methane leakage than does NETL. While NETL provided a basis for disagreeing with the highest of these estimates, Howarth, nothing in the record explains why NETL's estimate is superior to Burnham and Weber. Order 3331-A argues that Burnham's estimate differs from NETL because of a difference in boundary conditions: NETL extends cradle through transmission, whereas Burnham adds the additional step of distribution. While DOE is correct that the studies differ in this regard, this difference does not explain the vast difference in estimates. Burnham estimated

²⁸ Export LCA at 6. Because EIA estimates that the majority of new production that will be caused by exports will be shale gas production, the shale gas leak rate is the most appropriate of NETL's values. Given that NETL appears to estimate relatively minor methane emissions from liquefaction, Export LCA at Figure 6-3, it appears that the cradle-through-transmission leak rate and the cradle-to-liquefaction leak rates should be identical.

²⁹ NETL, "Environmental Impacts of Unconventional Natural Gas Development and Production" (May 29, 2014) ("Unconventional Production Report"); *see also* Sierra Club Comment on LNG Export Study at 8 (July 24, 2014).

that 0.28% of methane produced was emitted during distribution.³⁰ Subtracting distribution out of Burnham’s lifecycle estimates therefore indicates a cradle-through-transmission leak rate of 2.47% for conventional onshore gas and 1.73% for unconventional gas.³¹ NETL identified a few remaining differences between the NETL and Burnham assumptions, but as Sierra Club previously explained and as DOE has not disputed, these differences do not support or explain NETL’s lower ultimate conclusion.³² As to Weber, DOE’s sole comment is the confusing assertion that “We have reviewed Weber et al.’s work and do not see any mention of leakage rate.” Order 3331-A at 78. Although the cited paper does not discuss emissions in terms of leakage rate, the emissions estimates therein imply a leakage rate, *as was expressed by the NETL Unconventional Production Report itself*.³³ The derivation of this leak rate from Weber’s estimates is explained by Bradbury 2013, as discussed in the NETL reports.³⁴ Because NETL already determined that the Weber team’s conclusions could be expressed as a leakage rate estimate, DOE cannot now argue that this work has no bearing on the appropriate estimate of leakage rates or, ultimately, methane emissions.

Sierra Club further summarized five “top down” studies that estimated still higher leak rates on the basis of atmospheric measurements—generally 3% or more.³⁵ Order 3331-A acknowledges that top-down studies generally do not match bottom-up calculations, and identifies one factor—inconsistent boundaries—that DOE contends “partly explain[s]” the differences between bottom up and top down estimates. Order 3331-A at 79. However, DOE offers no explanation as to why, for an assessment of the climate impacts of LNG exports, the boundaries used in the bottom up studies are more appropriate than the boundaries used in top down studies. Moreover, as DOE concedes, differences in boundaries cannot *fully* explain the differences between bottom up and top down studies. Studies have identified other likely explanations, all of which indicate that bottom up estimates are likely to be less accurate than top down estimates. Brandt 2014, which NETL repeatedly discusses, concludes that “official inventories,” which are bottom-up, “consistently underestimate actual CH₄ emissions, with [natural gas] and oil sectors as important contributors.”³⁶ Brandt provides several likely explanations for the flaws in bottom-up inventories. Evidence indicates that there are “a small number of ‘superemitters’”³⁷ with emissions that are much higher than anticipated by the “model[s] . . . based on engineering relationships and emission factors”³⁸ that inform the bottom-up estimates. In addition, Brandt notes that “there are reasons to suspect sampling bias in

³⁰ Burnham, et al. (2011), Supporting Information, at 2, *available at* http://pubs.acs.org/doi/suppl/10.1021/es201942m/suppl_file/es201942m_si_001.pdf

³¹ *I.e.*, 0.28% lower than the values provided in Unconventional Production Report Exhibit 2-8.

³² Sierra Club Comment on LNG Export Study at 8.

³³ Unconventional Production Report at Exhibit 2-8.

³⁴ And *available at* http://www.wri.org/sites/default/files/clearing_the_air_full_version.pdf

³⁵ Sierra Club Comment on LNG Export Study at 9-10.

³⁶ Brandt, et al., “Methane Leaks from North American Natural Gas Systems,” 2014 at 733 *available at* <http://www.novim.org/images/pdf/ScienceMethane.02.14.14.pdf>.

³⁷ *Id.*

³⁸ Order 3331-A at 79.

[emission factors]” and that “activity and device counts used in inventories are contradictory, incomplete, and of unknown representativeness.”³⁹ Other research supports Brandt’s conclusions regarding unrepresentativeness (whether due to sampling bias or other factors) of the inputs used for bottom-up estimates. For example, Sierra Club discussed how Allen 2013 sampled sites that would be expected to have some of the *lowest* emissions and found emissions equivalent to EPA and NETL’s estimates of the industry-wide *average* emissions.⁴⁰ While Brandt concludes that the particular emission rates estimated by regional atmospheric studies are unlikely to be representative of nationwide emissions, nothing in Brandt indicates that the broader top down estimates, such as Miller 2013, are *not* representative, and the 3% leak rate indicated by Miller is more than double the rate used by DOE. After the draft Environmental Addendum was released, yet another peer reviewed paper supported this estimate. This paper, by researchers at Carnegie Mellon and the National Ocean and Atmospheric Administration, concludes that the most likely methane leak rate is between 2 and 4 percent.⁴¹

As a final note on emission quantities, DOE’s observation “that leakage rate is not an input to NETL’s life cycle model” misunderstands Sierra Club’s argument. Order 3331-A at 78. Sierra Club recognizes that leakage rate is an output of, rather than an input to, NETL’s model. However, the fact that NETL’s model produces an output that is so inconsistent with the outputs of the other models cited by NETL and atmospheric studies cited by Sierra Club is strong evidence that there is a problem with either the inputs to NETL’s model or with the model itself.⁴²

Separate from the problems regarding DOE’s discussion of the amount of methane and other climate pollutants emitted by natural gas production and transmission, DOE understates the impact of each ton of methane pollution. As Sierra Club explained in comments on the Environmental Addendum and related NETL reports:

DOE errs . . . by using the IPCC estimates that do not incorporate climate-carbon cycle feedbacks. A climate carbon feedback involving changes in the properties of the land and ocean carbon cycle in response to climate change. For example, changes to ocean temperature and circulation could affect the CO2 balance between the oceans and the atmosphere. The IPCC explains that “it

³⁹Brandt 2014 at 734.

⁴⁰ Sierra Club Comment on LNG Export Study at 7-8. This research provides yet another indication that the NETL leakage rate estimate is too low. DOE has not responded to this comment.

⁴¹ Stefan Scheietzke *et al.*, “Natural gas fugitive emissions rates constrained by global atmospheric methane and ethane” *Environmental Science & Technology*, (June 19, 2014), DOI: 10.1021/es501204c, (see pages 22 to 23 of “Just Accepted” manuscript)

⁴² Another DOE observation not applicable to Sierra Club’s arguments is DOE’s discussion of the difference between leaks and losses. In DOE’s terminology, leaks are methane actually emitted to the atmosphere, whereas losses include methane that is combusted during the lifecycle prior to end use (in a flare, compressor, etc.). Order 3331-A at 77. Sierra Club’s comment, and the studies Sierra Club cites (Allen, Burnham, Weber, and the various atmospheric studies), do not run afoul of this distinction, and in pertinent part, specifically concern leaks.

is likely that including the climate–carbon feedback for non-CO₂ gases as well as for CO₂ provides a better estimate of the metric value than including it only for CO₂.” As DOE has properly recognized the IPCC report as reflecting the scientific consensus on methane’s potency, DOE should use the estimates that the IPCC states to be more accurate. Thus, DOE should use 20-year and 100-year fossil methane global warming potentials of 87 and 36, respectively.

Sierra Club Climate Comment at 12 (footnotes omitted). Neither Order 3331-A nor DOE’s response to comments regarding the Environmental Addendum and related materials addressed Sierra Club’s comment on this issue. Using the “better” estimate of methane’s global warming potential increases the 100-year GWP by 20% relative to the value used in the NETL Export LCA and Order 3331-A (*i.e.*, 30).

We reiterate that these problems regarding DOE’s discussion of the climate impacts of natural gas production in general are separate from the more fundamental NEPA violation: DOE’s failure to take a hard look at the climate impacts of DCP’s proposal. This hard look must include a quantification of the greenhouse gases that would be emitted by the production induced by DCP’s proposed exports. We further reiterate that NETL’s export lifecycle analysis, and DOE’s summary thereof in the final Order, is not a substitute for NEPA review of the climate impacts of upstream production.

b) Comparison between U.S. LNG Lifecycle Greenhouse Gas Emissions and Lifecycle Emissions of Other Fossil Fuels

DOE asserts that, *if* U.S. LNG exports displace coal or other sources of natural gas, the net effect on global greenhouse gas emissions may be neutral or positive. DOE has not argued that this possibility is in any way pertinent to the question of whether the climate impact of induced production must be assessed in the NEPA process, and DOE explicitly contends that it is not relying on this discussion to satisfy any NEPA obligation.

We agree with DOE that the comparative lifecycle analysis is tangential to DOE’s NEPA obligations. Greenhouse gases emitted as a result of export-induced gas production are an indirect effect of the DCP project that falls squarely within the scope of the NEPA analysis. This effect is reasonably foreseeable and capable of meaningful discussion: it is relatively certain that exports will induce significant natural gas production, and the available evidence supports informed predictions regarding the greenhouse gas emissions of this production. On the other hand, any potentially mitigating reductions in foreign fossil fuel combustion are highly uncertain, as DOE acknowledges. Indeed, available evidence indicates that potential LNG importers are making extensive use of renewables, efficiency, and other alternatives to fossil fuels.

5. DOE Violated NEPA by Excluding from Its Analysis The Environmental Impacts of Changes in Electricity Generation, Including Increases in Greenhouse Gas Emissions, Caused by Domestic Gas Price Increases

DOE further erred by refusing to consider indirect and cumulative effects on emissions from electricity generation. EIA's January 2012 LNG Export Study provided detailed forecasts of the way gas consumers would respond to LNG exports. A key finding of this study was that electricity producers are particularly price sensitive and would respond to export-driven gas price increases by switching to coal fired power generation. EIA modeled the effect this shift would have on nationwide greenhouse gas emissions. Because this effect has, in fact, already been foreseen by EIA and discussed in detail, it is plainly a reasonably foreseeable consequence of DCP's proposed exports, which required discussion in the EIS.

DOE nonetheless approved the project without taking a hard look at this impact that NEPA requires. DOE's justification for this omission is that federal rules (new and proposed) limit "the extent to which the U.S. coal fleet would compensate for reduced use of natural gas." Order 3331-A at 89. DOE has not, however, provided any estimate of the *extent* to which these new or proposed rules would in fact limit this switching. Given the complete absence of any explanation of the extent to which these rules will prevent this modeled impact, it is arbitrary for DOE to conclude that this impact may be ignored entirely. On the other hand, if these rules *do* limit gas-to-coal switching in response to exports, DOE's statement that the rules would limit the extent to which coal would compensate for reduced gas use puts the cart before the horse: if coal is unavailable, it is unclear whether there will be any reduced use of natural gas at all. That is, EIA predicted that the electricity generation sector would reduce its natural gas use in large part *because* this sector had the flexibility to switch to coal. Removing that flexibility does not mean that the electricity generation sector will simply reduce its demand by the same amount but seek other replacements. Instead, limiting the fuel switching ability of the electricity sector decreases the price sensitivity of this sector, and thus shifts the entire domestic demand curve for natural gas upward. This elevated demand curve will therefore intersect the supply curve at a different point than the ones predicted in EIA's forecasts, meaning that both gas prices and gas production will increase in response to exports at a higher level than EIA predicted. DOE cannot contend that EIA's predictions regarding price and supply impacts remain valid in one context—such as assessing the price impacts of exports—but not in another—such as assessing exports' impacts on electricity generation and associated emissions. *See Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1097 (D.C. Cir. 1973) (forecasts sufficient to support analysis economic impacts are also sufficient to support analysis of environmental impacts).

We further note that although DOE contends that "a substantial portion" of the emissions increase projected by EIA comes from the liquefaction process; DOE has not quantified this portion. Order 3331-A at 89. Analysis of the EIA data indicates that the majority of the projected

emissions increase is due to sources other than the liquefaction process. Moreover, liquefaction emissions also require DOE attention. DOE implies that liquefaction emissions can be ignored because they are captured in the LNG lifecycle analysis, but as we explain in the preceding section, that analysis is itself deficient. In particular, emissions from the liquefaction process are relatively certain, whereas potentially avoided emissions from displacement of other fossil fuel consumption abroad are much more speculative.

6. DOE Failed to Assess Cumulative Impacts of Numerous Approved and Pending LNG Export Approvals

For the reasons explained above, DCP's proposal and DOE's approval will induce additional gas production, and the environmental impacts of this production are reasonably foreseeable indirect effects of the proposal. NEPA requires DOE to consider these impacts, as well as the cumulative impacts of drilling induced by all other pending and foreseeable export proposals. Cumulative impacts are impacts that are not causally related to the action but that are:

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

DOE's order does not distinguish between indirect and cumulative impacts. Insofar as DOE contends that induced production due to approved and proposed export projects is outside the scope of the cumulative impacts analysis because it is not reasonably foreseeable, DOE is mistaken for the reasons explained in the preceding section.

DOE and FERC are considering export proposals from many operators, which cumulatively propose to export 41.95 bcf/d of LNG from the Lower-48 when operating at maximum capacity.⁴³ This is the equivalent of roughly 47% of current total domestic gas production.⁴⁴ Notably, much of the proposed exports have been requested to go to countries with which the United States has a free trade agreement; DOE lacks discretion to deny those requests, meaning that they are likely to be cleared for export. DOE retains discretion and should consider the cumulative impacts of the proposals for export to non-FTA countries. After approving DCP's

⁴³ "Summary of LNG Export Applications" available at <http://energy.gov/fe/downloads/summary-lng-export-applications-lower-48-states>

⁴⁴ Energy Information Administration, Monthly Natural Gas Gross Production Report (May 29, 2015) (daily production is ~90 bcf).

application and Cheniere Corpus Christi’s application, DOE has approved 8.61 bcf/d of LNG to non-FTA countries.⁴⁵

C. DOE Violated the Natural Gas Act by Failing to Adequately Weigh Economic and Environmental Impacts In the Public Interest Analysis

As the public interest analysis stands now, DOE considers the uncertain upstream economic benefits of induced natural gas production but refuses to consider the environmental harms which would occur as a result of induced natural gas production. DOE is casting widely for benefits while entirely ignoring environmental harms to the public benefit.

1. DOE Failed to Weigh Economic Impacts Properly

To begin with, the largest benefit DCP is claiming is its ability to “encourage and support increased domestic production of natural gas.” DCP Application at 35. DCP would like to have the best of both worlds by claiming responsibility for the benefits of upstream gas production but ignoring and claiming no responsibility for upstream environmental harms. Further, the economic model that DCP used to calculate the economic benefits and upon which DOE rests its case has serious flaws. It overestimates jobs figures and does not consider counterfactuals or foregone opportunities. Next, the LNG Export Study, upon which DOE relies, disregards the impacts felt by people outside the natural gas industry and relies too heavily on a possible slight increase in GDP to conclude that authorizing exports is within the public interest. Finally, the economic harms which could result from LNG exports are great—an increase in domestic natural gas prices costing the consumer billions of dollars per year.

a) Economic Benefits Asserted by DOE and DCP Are Uncertain

DCP claims billions of dollars in benefits and tens of thousands of jobs will result from its export proposal, *see* DCP Proposal at 16-19 & ICF Study, but the vast majority of these benefits are not directly associated with the construction or operation of the facility itself. That project will only result in several thousand construction-related jobs (defined quite broadly by DCP’s consultant, ICF, to include “induced” jobs in sectors as far flung as the “food and beverage retail” industry) and several hundred jobs during operations, only 70 of which appear to be direct employees of the facility. *See* ICF Study at Table 2.

Instead, the bulk of the economic benefits DCP claims result from what DCP calls its “most basic benefit”: its ability to “encourage and support increased domestic production of natural gas and [natural gas liquids].” DCP Application at 35. In DCP and ICF’s view, this increased production will, directly and indirectly, pump money into the economy – to the tune of billions of dollars – and create jobs regionally and nationally. *See* DCP Application at 36-40.

⁴⁵ DOE Order 3638 at 206 (May 12, 2015) (the most recent authorization by DOE).

Undoubtedly, increasing gas production will increase employment in that sector by some amount, but a more careful look at the data demonstrates that booms in resource extraction industry are far more of a mixed blessing than DCP acknowledges.

DCP's optimistic projections are based on ICF's economic modeling, *see* ICF Report at 6, rather than on direct empirical research on the observed economic consequences of increased gas production in the shale gas plays. Such information is, however, available, and, in combination with academic papers describing recognized limitations in the model ICF used, casts significant doubt on DCP's benefits calculations.

ICF used the "IMPLAN" model to calculate benefits. IMPLAN, as ICF explains, is an "input-output" model: Users input a description of economic activity in a given set of economic sectors, and the model responds by tracing this spending throughout the economy, using economic "flow information" for many industries. *See* ICF Report at 43-44. It is, in other words, ultimately a fairly mechanical system: Given an initial expenditure, it uses "accounting tables" to predict how this expenditure will be allocated among sectors and then uses "local-level multipliers" to conjecture how this allocation will alter employment decisions, among other things. *See id.* Importantly, IMPLAN is not a continuous model: It gives results for individual years, but does not track jobs or expenditures from year-to-year, meaning that multi-year forecasts are simply a series of snapshots, and that a "job" in one year may not be the same job in the next year. *Id.* at 44.

Notably, IMPLAN does not consider counterfactuals and foregone opportunities. It maps the consequences of a particular expenditure, rather than asking how the economy might have grown had investors and regulators made different choices. Nor does it consider how the particular choice at issue might displace other economic activity.

IMPLAN produces a somewhat misleading picture of employment effects which it *does* describe, for three reasons: First, the model, again, is "static," as ICF puts it, ICF Report at 44, meaning that it does not track employment over time. Second, the model produces an analysis of jobs "supported" – *not* created – by the original input, which turns out to be an overly generous metric. Third, input-output models may fail to account for "leakage" – that is, that some money simply is not passed on through the system or is passed on in other states or regions – and so can overestimate jobs figures.

The upshot is that IMPLAN model results should be seen as estimates of solely the effects of increased expenditures on a particular project (here, gas exports and production), and limited and overly-optimistic ones at that, rather than as a reliable comparison of how the economy would fare with and without gas exports – a real problem for DCP, as the "public interest" test requires that DOE conclude that the country would be better off with DCP's proposal. DOE cannot do so on the data DCP has presented, because that data does not speak to the economic possibilities the U.S. foregoes by embracing gas exports, or to the economic

damage such exports could cause, directly or indirectly. Thus, DOE lacks the information necessary to consider the public interest in a future with, or without, DCP exports, and therefore may not approve DCP's proposal.

The point of all this, of course, is that a simple economic model, like IMPLAN, cannot reliably capture the consequences of transforming an entire region of the country, converting it from a largely rural swath of small towns, farms, and forests into an industrial gas extraction zone. That transformation will benefit some discrete actors considerably, and some communities, if they are able to navigate the durable challenges of boom and bust economics. But it will also harm people, by displacing existing businesses and lifeways, straining infrastructure, shifting populations, and, potentially, leading to devastating economic crashes in some areas.

In the end, DCP's analysis stands for far less than first appears. No doubt some degree of additional economic activity would result from its proposal;⁴⁶ but its results cannot demonstrate that those benefits would not arise from projects or industries which the gas export plan will foreclose. Nor can it show that further tethering an entire region of the United States to an unstable and disruptive natural gas boom, rather than strengthening regional sectors which are not driven by boom-bust cycles, is the better course. In essence, DCP is trying to answer a difficult policy question by presenting one, highly-simplified side of the story, rather than engaging in the difficult, place-specific and empirically-guided analysis required to fully consider, and weigh, the costs and benefits of gas exports and extraction.

Because IMPLAN results offer such a limited piece of a much larger picture, DOE cannot approve DCP's application based upon these simplistic modeling figures. It must, instead, undertake its own independent inquiry into the costs and benefits of the proposal, carefully testing DCP's proposal based upon empirical data on experiences of states and citizens confronting the difficult changes inherent in the shale gas boom. DOE failed to address Sierra Club's concerns about DCP's use of the IMPLAN model in either the conditional or final order.

Additionally, DOE's reliance on the LNG Export Study completed by NERA disregards the impacts felt by people outside the natural gas industry and relies too heavily on a possible slight increase in GDP to conclude that authorizing exports is within the public interest. The LNG Export Study concludes that LNG exports' primary effect will be to transfer wealth from the majority of Americans to the small minority of wealthy corporations that will own natural

⁴⁶ The large construction project itself will, for instance, no doubt hire people (who may or may not have been hired elsewhere). But even if the construction project itself produces some economic benefits, DOE cannot afford these benefits much weight in its public interest determination because its concern is whether *exports* will be in the public interest, not whether facility construction would be so. Every LNG export proposal will involve construction activities; if these activities could suffice to demonstrate public benefits, every application would be approved, regardless of the merits of the exports which the construction would allow. That rubber-stamp result is not consistent with the letter, or the spirit, of the Natural Gas Act.

gas resources or LNG export infrastructure.⁴⁷ The purported “net benefit” of this transfer, in NERA’s view, is an increase in GDP that is equivalent to an increase of between 0.03% and 0.1% and NERA acknowledges that “total worker compensation declines.”⁴⁸ NERA writes: “there are costs to consumers of higher energy prices and lower consumption and producers incur higher costs to supply the additional natural gas for export,” and it relies on wealth being transferred to natural gas companies to offset these losses.⁴⁹ Thus, taken at face value, the LNG Export Study shows that exports will be contrary to the *public* interest (even if not contrary to the private gas exporters interests), by any reasonable interpretation of the term.

DOE must not, however, take the LNG Export Study on its own terms. Even on the narrow issue of net GDP impacts, the LNG Export Study’s conclusion is contradicted by the only other available comprehensive model of LNG exports’ impacts, conducted recently by Purdue University economists Kemal Sarica and Wallace E. Tyner.⁵⁰ This independent study provides credible evidence undermining the LNG Export Study’s sole finding of a public benefit. More broadly, the LNG Export Study’s focus on net GDP impacts is too narrow in scope, and the LNG Export Study contains numerous errors, as we explained in our initial comments on the study.⁵¹ The Natural Gas Act public interest inquiry must consider numerous issues ignored by NERA, including the way that increased gas production necessary to supply exports will cause harmful environmental impacts and disrupt communities where gas production occurs. These effects have economic aspects that could have been, but were not, included in the macroeconomic study. While the LNG Export Study includes economic benefits from increased drilling, it did not consider the environmental harms. DOE explained this by saying that the environmental impacts could only be addressed in FERC’s environmental review of the project. Order 3331-A at 95. However, looking at a national scale for economic benefits and only a local scale, addressed in the inadequate EA, for economic environmental harms means that the net benefits of LNG export are overestimated.

On a more technical level, NERA understates the potential volume of exports and domestic gas price increases. These price increases will merely transfer wealth from ordinary Americans and domestic businesses to the relatively few owners of natural gas companies and to foreign investors. Consideration of these additional impacts reinforces the Purdue Study’s conclusion that the likely net effect of LNG exports will be a *decrease* in United States GDP, rather than the slight increase NERA predicts.

⁴⁷ See 2012 LNG Export Study, 77 Fed. Reg. 73,627 (Dec. 11, 2012), available at http://energy.gov/sites/prod/files/2013/04/fr_notice_two_part_study.pdf (Federal Register Notice of Availability of the LNG Export Study); LNG Export Study – Related Documents, available at <http://energy.gov/fe/downloads/lng-export-study-related-documents> (EIA Analysis (Study - Part 1) & (NERA Economic Consulting Analysis (Study - Part 2))).

⁴⁸ NERA Economic Consulting Analysis at 77.

⁴⁹ *Id.* at 6.

⁵⁰ See Kemal Sarica & Wallace E. Tyner, Economic and Environmental Impacts of Increased US Exports of Natural Gas (Purdue Univ., Working Paper, 2013) (available from the authors) [hereinafter Purdue Study].

⁵¹ Sierra Club Comments on LNG/NERA Export Study (January 24, 2013).

In summary, LNG exports will have many effects that are not considered by the LNG Export Study but are contrary to the public interest. The record contains abundant information demonstrating that these impacts will be significant. DOE cannot move forward without considering them.

b) *Economic Harms Are Great*

Exporting domestic natural gas will increase gas demand and so will increase domestic gas prices. Although DCP dismisses the impacts of its project as “minor,” even its own application shows significant price increases.⁵²

The Navigant Consulting report underlying DCP’s application uses four cases: a “reference case” which already includes some exports, a “Cove Point export case” in which the facility begins export in 2016, an “aggregate export case” which assumes other facilities are also approved with 7.1 bcf/d in cumulative exports by 2019, and an “extreme demand” case in which demand for gas-powered vehicles and coal-to-gas switching in the power sector ramps up domestic demand.⁵³ The cases are cumulative (that is, each case includes the assumptions of the prior case). Even using Navigant’s own numbers, it is clear that exports produce notable price increases in coming years.

If Cove Point were to come online, but no other proposals other than Sabine Pass and Kitimat went forward, it would increase gas prices from the EIA’s reference by just under 10% in 2020, just under 7% in 2030, and just under 6% in 2035. If more export terminals were approved (up to 7.1 bcf/d in Navigant’s case), the increase in 2020 is 22% of the AEO 2012 reference case. If gas demand also increases in that year, the price increase is over 28%.

These are major increases in gas price, and will have substantial economic consequences. But even these increases, substantial though they are, are smaller than those which may well occur based only on the current raft of LNG export proposals.

DOE and FERC are considering export proposals from many operators, which cumulatively propose to export 41.95 bcf/d of LNG from the Lower-48 when operating at maximum capacity.⁵⁴ This is the equivalent of roughly 47% of current total domestic gas production.⁵⁵ Notably, much of the proposed exports have been requested to go to countries with which the United States has a free trade agreement; DOE lacks discretion to deny those requests, meaning that it is likely to be cleared for export. DOE retains discretion and should consider the cumulative impacts of the proposals for export to non-FTA countries. After approving DCP’s

⁵² DCP Application at 27

⁵³ Navigant Report at 13 (attached as Exhibit A to the DCP Application)

⁵⁴ “Summary of LNG Export Applications” available at <http://energy.gov/fe/downloads/summary-lng-export-applications-lower-48-states>

⁵⁵ Energy Information Administration, Monthly Natural Gas Gross Production Report (May 29, 2015) (daily production is ~90 bcf).

application and Cheniere Corpus Christi's application, DOE has approved 8.61 bcf/d of LNG to non-FTA countries.⁵⁶ The 41.95 and 8.61 bcf/d are higher than the 7.1 *maximum* export figure in DCP's application. Price impacts can be reasonably expected to be commensurately greater.

The EIA has recently released an updated analysis of the impacts high export volumes would have – though even the EIA report considers a maximum of 20 bcf/d in exports, which still falls short of the volume DOE has been asked to approve.⁵⁷ Even at the EIA's maximum level, though, price increases are striking.

EIA considered several combinations of conditions, based on both LNG export rates and economic circumstances. It considered a "low" export case of 12 bcf/d, phased in at a rate of 2 bcf/d each year starting in 2015, and a "high" case of 20 bcf/d, again phased at the same rate.⁵⁸ It considered the effects of these exports in the context of the EIA's AEO 2014 reference case, and predicted changes to average natural gas prices received by producers. Gas prices are expected to increase "4% (12 bcf/d) to 11% (20 bcf/d) more than their base projection over the 2015-40 period."⁵⁹ And if the reference case was too optimistic about the domestic oil and natural gas supply prospects, the Low Oil and Gas Resource Case predicts price increases of 10% (12 bcf/d) to 18% (20 bcf/d).⁶⁰ Prices paid by consumers under the AEO Reference Case are expected to increase 2% to 5% in the respective scenarios.⁶¹ These percentage increases are very large in absolute terms. In the low/slow scenario, gas and electricity bills increase by \$9 billion *per year*, and this increase grows to \$18 billion *per year* with the higher amount of exports.⁶²

In short, whatever economic benefits gas exports create also come with multi-billion dollar annual costs to U.S. consumers. These costs are large even with export levels of about 12 bcf/d, which is a level equivalent to just over a quarter of the total volume of exports already proposed. Natural gas is used for home heating, industrial feedstocks, and electricity generation, among other purposes. Gas price increases are, as a result, felt across the economy, and in many different sectors. As power prices rise, so do the prices of consumer goods and other services, and employment may, in turn, fall as it becomes more expensive to run businesses.⁶³ DCP's proposal would benefit a small subset of citizens (mostly those in the oil and gas sector) while penalizing millions more. These cost increases appear even if only a few export terminals are permitted, and grow steadily more severe as more terminals are added. DOE must consider the full range of possible increases, but even at low levels, these price increases are not consistent

⁵⁶ DOE Order 3638 at 206 (May 12, 2015) (the most recent authorization by DOE).

⁵⁷ EIA, "Effect of Increased Natural Gas Exports on Domestic Energy Markets" (October 2014).

⁵⁸ *Id.* at 12.

⁵⁹ *Id.*

⁶⁰ *Id.* at 14.

⁶¹ *Id.* at 12.

⁶² *Id.* at 21-22.

⁶³ One of the consequences of these increased costs may be a drop-off in U.S. exports, offsetting DCP's claimed improvements to the U.S. balance of trade. DOE must investigate this possible harm to the public interest.

with the public interest, because they outweigh the limited, and uncertain, benefits of short-term increases in gas production. DOE must, therefore, deny DCP's application for this reason.

2. DOE Failed to Weigh Environmental Impacts Properly

Separate from NEPA violations and its failure to adequately weigh the economic impacts, DOE violated the Natural Gas Act by giving insufficient consideration to environmental impacts in balancing effects on the public interest.

In discussing the non-climate impacts of additional gas production, DOE acknowledges that gas production has harmful impacts, but nonetheless declines to weigh these impacts in its assessment. Order 3331-A at 86. Engaging in another apples-to-oranges comparison, DOE contends that prohibiting exports “would cause the United States to forego entirely the economic and international benefits identified in the DCP Conditional Order and discussed below, but would have little more than a modest, incremental impact on the environmental issues identified by Sierra Club and others.” *Id.* at 87. Of course, the purported “economic and international benefits” are themselves “modest” and “incremental.” For example, there is no suggestion that the DCP project will, itself, “solve” the U.S. trade deficit. Similarly, the purported economic benefit is a “marginal” increase in income for limited sectors of the economy. Sierra Club agrees that domestic gas production will continue to cause environmental harm regardless of whether exports are approved. Sierra Club's contention has consistently been that the *marginal* increases in the harms caused by gas production caused by exports are, themselves, sufficient to outweigh any possible benefits of the project and thus demonstrate inconsistency with the public interest. DOE has refused to quantify, weigh, or otherwise meaningfully assess the magnitude of these marginal harms.

DOE separately contends that other policy tools are better suited to addressing the harmful environmental impacts of natural gas production. Order 3331-A at 86-87. This falls short of DOE's obligation to assess impacts to the public interest. All available evidence indicates that exports will increase gas production and attendant environmental harms. DOE must weigh whether these harms will outweigh the likely benefits of exports. DOE cannot rely on the fact that other entities could act to reduce these harms. Even if regulations or other efforts to reduce these harms *were* reasonably certain, there is no suggestion that such regulations could or would *fully* mitigate the environmental impacts of additional gas production. As such, DOE would be required to weigh any remaining, unmitigated environmental impacts against the purported benefits of the project. DOE has not undertaken any such analysis.

Although DOE provides a somewhat more extensive discussion of climate impacts, this analysis is also deficient. This discussion violated the Natural Gas Act because it relied on unsupported assumptions regarding these impacts and failed to place them in proper context.

DOE's discussion of climate impacts focuses on the life cycle analysis. As we explained above, DOE understates the greenhouse gas emissions of U.S. natural gas production. This error extends to the estimate of the overall life cycle impact of U.S. LNG.

Separate from this error, DOE entirely excludes climate impacts from its public interest weighing, based solely on the possibility that emissions associated with production, export, and consumption of U.S. LNG will be offset by displacement of combustion of other fossil fuels and avoidance of associated emissions. As we explained in our comments on the Environmental Addendum and NETL studies, this is an improper frame for assessing climate impacts. The inappropriateness of relying on extra-territorial reductions to offset increases in domestic emissions in this context is demonstrated by the United Nations Framework Convention on Climate Change, which requires reporting of emissions within a nation's borders. This reporting convention reflects the fact that nations can better measure and control emissions in their borders than they can emissions upstream and downstream for products they consume. In addition, this demonstrates a need for DOE to quantify the domestic emissions increase that would be caused by exports even if DOE found a reasonable basis for concluding that these emissions would be offset internationally: the U.S. must report its territorial emissions, and count these emissions when measuring progress toward emission targets. DOE must assess whether LNG exports would jeopardize the U.S.'s ability to reach these targets, and thereby frustrate international efforts to address climate change, even if DOE concludes that emissions from LNG export would not more directly increase global greenhouse gas emissions. DOE has not responded to this argument. Even within DOE's frame, DOE has not attempted to model the extent to which DCP's proposed LNG exports will, in fact, displace other fossil fuels. Because DCP is a specific proposal, for a definite amount of gas, with the majority of its output contracted to Japanese and Indian buyers, modeling the effect of DCP's exports presents a simpler problem than the abstract problem of modeling the effects of U.S. LNG exports in general. DOE has not shown that modeling the impacts of providing Japan and India with this additional supply of LNG would be unreasonably burdensome or speculative.

The available evidence indicates that, even if DOE chooses to look at potential displacement of foreign fuel use, it is inappropriate to compare the lifecycle of U.S. LNG solely to coal and other sources of gas. In arguing that the comparison with coal and natural gas is appropriate, DOE first cites China, where DOE states that 2012 generation capacity was composed of 66% coal and 3% natural gas. DOE provides no basis for comparing U.S. LNG against these two particular fuels rather than the aggregate greenhouse gas intensity of China's generation fleet. An even more appropriate comparison would be to compare U.S. LNG with the average greenhouse gas intensity of the additional capacity that China is expected to add. The same EIA source that DOE cites for the composition of China's current fleet predicts the composition of China's 2040 fleet as well.⁶⁴ Because of the massive growth anticipated in China,

⁶⁴ EIA, "China Analysis Brief," <http://www.eia.gov/countries/cab.cfm?fips=CH> (comparing 2012 and projected 2040 electricity capacity by fuel).

it is reasonable to assume that U.S. LNG would be more likely to compete against these sources of new capacity rather than existing sources. This added capacity, however, is more than 50% renewables. Thus, the greenhouse gas intensity of the aggregate anticipated growth in Chinese capacity is significantly lower than DOE's estimate of the greenhouse gas intensity of U.S. LNG, even under a 100-year GWP.

For Japan, EIA provides generation, rather than capacity data. The material cited by DOE does not forecast future Japanese generation, but it is likely that this information is available, and as noted above, DOE has an affirmative obligation to seek out information regarding the environmental impacts of the proposed project. IEA data relied upon by EIA,⁶⁵ however, provides information regarding Japan's current generation mix, and indicates that the greenhouse gas intensity of Japan's aggregate mix is very near NETL's estimate of the intensity of U.S. LNG. Correcting any of the errors in NETL's assessment, therefore, would likely lead to the conclusion that U.S. LNG has higher lifecycle emissions than the energy U.S. LNG would likely displace in Japan.

D. DOE Failed to Comply with the Endangered Species Act and the National Historic Preservation Act

According to the Environmental Assessment made by FERC and adopted by DOE, FERC complied with section 7 of the Endangered Species Act (ESA) and section 106 of the National Historic Preservation Act (NHPA).⁶⁶ However, as has been discussed previously, the EA covered only the site-specific impacts rather than the impacts from induced upstream natural gas production.

Pursuant to the Endangered Species Act's (ESA) directive that all agencies "shall seek to conserve endangered species," 16 U.S.C. § 1531(c)(1), DOE must ensure that the its approval of the DCP project "is not likely to jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). "Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a); see also 16 U.S.C. § 1536(a)(2).

This determination must be wide-ranging, because DCP's export proposal will increase gas production activities throughout the Northeast, and nationally. Thus, DOE must consider not just the effects of the project at the Cove Point site (as it has already done), but the effects of increased gas production across the full region the plant affects.

⁶⁵ International Energy Agency, *Japan – Overview* (August 2014), <http://www.iea.org/media/countries/slt/JapanOnepagerAugust2014.pdf>

⁶⁶ "Environmental Assessment for the Cove Point Project" at 33.

Similarly, DOE must also fulfill its obligations under the National Historic Preservation Act (NHPA) to “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” 16 U.S.C. § 470f; *see also Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) (discussing the requirements of the NHPA). Because “the preservation of this irreplaceable heritage is in the public interest,” 16 U.S.C. § 470(b)(4), it behooves DOE to proceed with caution.

DOE must, therefore, initiate the NHPA section 106 consultation and analysis process in order to “identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.” 36 C.F.R. § 800.1(a). NHPA regulations make clear that the scope of a proper analysis is defined by the project’s area of potential effects, *see* 36 C.F.R. § 800.4, which in turn is defined as “the geographic area . . . within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties,” 36 C.F.R. § 800.16(d). This area is “influenced by the scale and nature of an undertaking,” *Id.* The area of potential effects should sweep quite broadly here because, as in the ESA and NEPA contexts, the reach of DCP’s proposal extends to the entire area in which it will increase gas production. Thus, to approve DCP’s proposal, DOE must first understand and mitigate its impacts on any historic properties which it may affect. *See also* DOE Policy P.141.1 (May 2001) (providing that DOE will fully comply with the NHPA and many other cultural resources preservation statutes).

E. DOE Should Stay Its Authorization Pending Resolution of this Motion for Rehearing and Any Judicial Appeal

DOE regulations provide that “The filing of an application for rehearing does not operate as a stay of the Assistant Secretary’s order, unless specifically ordered by the Assistant Secretary.” 10 C.F.R. § 590.502. Sierra Club therefore requests an immediate order specifically staying DOE’s authorization.

DOE regulations do not provide a standard regarding issuance of stays of DOE orders. DOE should therefore apply the general four-factor test used for stays of agency or judicial orders. *See, e.g., Wash. Met. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 n.1 (D.C. Cir. 1977) (citing *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (1958)). These factors are “(1) the movant’s showing of a substantial likelihood of success on the merits, (2) irreparable harm to the movant, (3) substantial harm to the nonmovant, and (4) public interest.” *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009), *see also id.* at 1292 (discussing *Wash. Met. Area Transit Comm’n*).

Here, Sierra Club is likely to succeed on the merits. Induced production is no less foreseeable than numerous other indirect effects that circuit courts have required agencies to consider under NEPA.

Second, authorization of export will produce immediate and irreparable environmental impacts. As other companies have asserted in their applications for export authorization submitted to DOE, natural gas producers are likely begin to increase their production in anticipation of export, so that the additional production is available for export when construction of the liquefaction facilities is completed and the terminal is ready to commence operation. *See, e.g.,* Freeport LNG, Application for Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Countries, DOE Docket 11-161-LNG, at 20 (Dec. 19, 2011).

Third, a stay would not substantially harm other parties to the proceeding. Construction of the LNG export facilities is a multi-year process. In light of DOE's obligation to respond to a request for rehearing within 30 days, and the circuit court's obligation, under the Natural Gas Act, to review any appeal on an expedited schedule, resolution of the Sierra Club's challenge will impose only a few additional months of delay. When measured against the broader timeframe for the project, this delay will impose a minimal hardship.

Fourth, the public interest warrants a stay. Export of LNG would represent a major shift in the United States' energy policy and marketplace. It serves the public interest to ensure that the ramifications of this sea change are fully understood before the nation commits to LNG export. Conversely, it would be contrary to the public interest to allow DCP to embark on this departure from prior policy while these issues are still being resolved.

Accordingly, each of the traditional stay factors supports issuance of a stay in this case. DOE should stay Order 3331-A pending resolution of this motion for rehearing and any judicial appeal of DOE's decision thereon.

II. Conclusion

Based on the foregoing, Sierra Club respectfully requests that DOE grant this request for rehearing and stay.

Respectfully submitted,

/s/ Nathan Matthews

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UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

IN THE MATTER OF)
)
DOMINION COVE POINT LNG, LP) FE DOCKET NO. 11-128-LNG
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VERIFICATION

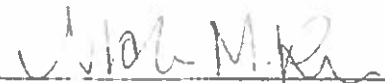
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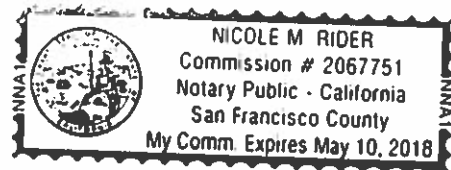
Pursuant to C.F.R. §590.103(b), Pat Gallagher, being duly sworn, affirms that he is authorized to execute this verification, that he has read the foregoing document, and that facts stated herein are true and correct to the best of his knowledge, information, and belief.



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Subscribed and sworn to before me this 4th day of June, 2015.


Notary Public



My commission expires: May 10th, 2018

UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

IN THE MATTER OF)
)
DOMINION COVE POINT LNG, LP) FE DOCKET NO. 11-128-LNG
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CERTIFICATE OF SERVICE

I hereby certify that I caused the above documents to be served on the applicant and all others parties in this docket, in accordance with 10 C.F.R. § 590.017, on June 05, 2015.

Dated at San Francisco, CA, this 5th day of June, 2015.



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