



June 1, 2020

**Office of NEPA Policy and Compliance
Attn: NEPA/NG Procedures (RIN 1990-AA49)
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585**

Submitted Electronically

**Re: Docket No. DOE-HQ-2020-0017 - DOE's Proposal to Update NEPA
Implementing Procedures for Authorizations to Export Natural Gas and
Associated Transportation By Marine Vessel**

To the Office of NEPA Policy and Compliance, U.S. Department of Energy:

On behalf of the Center for Biological Diversity, please accept these comments on the U.S. Department of Energy's (DOE) proposal to update its National Environmental Policy Act (NEPA) implementing procedures regarding authorizations issued under section 3 of the Natural Gas Act. The Center for Biological Diversity is a non-profit organization that works through science, law, and advocacy to secure a future for all species, great and small, hovering on the brink of extinction, with a focus on protecting the lands, waters, and climate that species need to survive.

NEPA procedures "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken . . . Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). DOE's proposal to radically revise the scope of Categorical Exclusion (CE) B5.7 ignores and undercuts these requirements of public disclosure and accountability. Through this rulemaking, DOE will vastly broaden the kind of activity that may be categorically excluded from analysis and public input. DOE is expanding CE B5.7 to cover new liquefied natural gas (LNG) export authorizations, amendments of existing authorizations, and "associated transportation of natural gas by marine vessel." DOE will use this CE to avoid analyzing the serious environmental consequences of LNG export authorizations, including the direct and indirect greenhouse gas emissions that will result from those export authorizations and the production, shipment, and burning of natural gas they enable. DOE will also use this CE to avoid analyzing the effects that marine vessels transporting export natural gas will have on sensitive wildlife.

DOE proposes this change under the guise of "improv[ing] . . . efficiency by saving time and money in the NEPA review process and eliminating unnecessary environmental

documentation.”¹ Yet DOE provides no evidence to support the claim that avoiding environmental review will improve efficiency. Nor, as explained below, does DOE have any factual or legal basis to make the changes it recommends.

DOE should abandon this rulemaking effort and focus instead on thorough, science-based review of LNG export decisions that discloses their true environmental impacts, including the greenhouse gas emissions of those projects in recognition that the climate crisis is “the most important environmental consideration of our time.”² Informed and open decision-making will increase agency effectiveness in the long run and restore the public’s trust in DOE’s export authorization actions.

I. The Proposed Rule is Arbitrary and Capricious and Contrary to Law.

Under the Administrative Procedure Act, 5 U.S.C. § 706, agency actions are unlawful “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (summarizing judicial review under the Administrative Procedure Act). An agency’s rationale for its new policy must be genuine: the agency cannot rely on a pretextual or contrived explanation to avoid legal or political accountability for its actions. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019) (“The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.”).

In addition, agencies are entitled to deference only when they are interpreting a statute that they are uniquely responsible for administering. *Ardestani v. INS*, 502 U.S. 129, 148 (1991) (“[C]ourts do not owe deference to an agency’s interpretation of statutes outside its particular expertise and special charge to administer.”). Because NEPA applies broadly to federal agencies, DOE will receive no deference in the interpretation of its requirements. *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 740 (D.C. Cir. 2019); *Grand Canyon Trust v. Federal Aviation Admin.*, 290 F.3d 339, 341-42 (D.C. Cir. 2002) (“[B]ecause NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to [any one agency] . . . the court owes no deference to [an agency’s] interpretation of NEPA or the CEQ regulations.”); *Park County Resource Council, Inc. v. United States Dep’t of Agric.*, 817 F.2d 609, 620 (10th Cir. 1987) (“[D]eference to agency expertise is inapplicable in the NEPA context.”).

¹ U.S. Department of Energy, Office of General Counsel, Notice of Proposed Rulemaking: National Environmental Policy Act Implementing Procedures, 85 Fed. Reg. 25340-25344 (May 1, 2020) at 25340, <https://www.federalregister.gov/d/2020-08511>.

² U.S. Federal Energy Regulatory Commission, Order Granting Authorization under Section 3 of the Natural Gas ACT re Alaska Gasline Development Corporation under CP17-178, Commissioner Glick Dissent (May 21, 2020) at 5 ¶ 7, <https://www.ferc.gov/whats-new/comm-meet/2020/052120/C-7.pdf>.

A. The proposed rule is not based on an accurate identification of DOE’s responsibilities under NEPA or the Natural Gas Act

DOE states that its Categorical Exclusion (CE) revision is “consistent with the legal principle that potential environmental effects considered under NEPA do not include effects that the agency has no authority to prevent, because they would not have a sufficiently close causal connection to the proposed action,” citing *Sierra Club v. Federal Energy Regulatory Comm’n*, 827 F.3d 36 (D.C. Cir. 2016). DOE neglects to mention that this case considered the *Federal Energy Regulatory Commission’s* responsibility to consider the environmental consequences of exporting natural gas from the natural gas terminal. *Sierra Club v. FERC*, 827 F.3d at 40. In the very same case, the court stated that such “objections [related to the environmental consequences of the exported gas] should be raised in [a] challenge to the Department of Energy’s order authorizing Freeport to export natural gas.” *Id.*

In the companion case that DOE also failed to cite, the D.C. Circuit Court of Appeals further confirmed that DOE is “independently required to consider the environmental impacts of its export authorization decision under NEPA and determine whether it satisfied the Natural Gas Act’s ‘public interest’ test.” *Sierra Club v. DOE*, 867 F.3d 189, 192 (2017). While the D.C. Circuit in that case did not second guess DOE’s explanation as to why the indirect environmental effects related to increased gas production were not reasonably foreseeable in that case, the Court *did not* hold that DOE is excused from examining the environmental effects of export authorizations. The agency’s ability to forecast indirect environmental effects—including greenhouse gas emissions associated with induced gas production in the U.S. and gas usage abroad—will change over time and is dependent on the circumstances of the export terminal in question. In various contexts, courts have repeatedly held that greenhouse gas emissions and associated climate change impacts must be adequately disclosed during the environmental review process. *See, e.g., Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008) (holding that the impact of greenhouse gas “emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”); *Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017); *Wildearth Guardians v. United States BLM*, 870 F.3d 1222, 1237-38 (10th Cir. 2017); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003); *San Juan Citizens All. v. United States BLM*, 326 F. Supp. 3d 1227, 1243-44 (D.N.M. 2018); *Mont. Env’tl. Info. Ctr. v. United States Office of Surface Mining*, 274 F. Supp. 3d 1074, 1090-91 (D. Mont. 2017). And, as discussed below, other significant environmental effects associated with gas shipment must be examined.

B. The Technical Support Document and other government studies do not support DOE’s determination that “transportation of natural gas by marine vessel normally does not pose the potential for significant environmental impacts.”³

The Technical Support Document selectively cherry-picks information from reports in an attempt to rationalize the Department of Energy’s (DOE) proposal and downplay significant spill and terrorism-related safety concerns. For example, the 2009 Congressional Research Service

³85 Fed. Reg. 25340 at 25342.

report referenced on page 2 of the Technical Support Document detailed the unique dangers posed by the transport of liquefied natural gas (LNG). DOE chose excerpts to emphasize the safety of LNG tankers, but the Congressional Research Service also found that “a major spill would likely result in a . . . serious fire.”⁴ In its review of the literature it noted that a safety zone of more than 4,000 feet distance from an LNG spill could be required.⁵ It also pointed out that counterterrorism advisors have “asserted that terrorists have both the desire and capability to attack LNG shipping with the intention of harming the general population.”⁶ The Department of Transportation Study referenced on page 2 of the Technical Support Document likewise notes that emergencies on vessel or at berthing locations can lead to fires and cascading failures.⁷

Another report by the United States Government Accountability Office found that research gaps on the effects of an LNG spill remain and continue to go unaddressed by government research into LNG safety. The report provides a metanalysis of six other significant LNG release studies, concluding that the LNG safety literature is still marked by uncertainties regarding heat impact distances and cascading failures.⁸

C. DOE completely ignores other significant environmental impacts associated with marine vessel transportation, especially those related to noise and ship strikes

NEPA requires federal agencies to take a “hard look” at environmental consequences before taking an action. *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976); see also 40 C.F.R. § 1500.1. In this way, NEPA ensures that federal agencies “will have available, and will carefully consider, detailed information concerning significant environmental impacts” and that such information “will be made available to the larger [public] audience that may play a role in both the decision-making process and the implementation of the decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

DOE must consider and disclose the effects that the transportation of natural gas by marine vessel will have on wildlife. The noise associated with ship traffic is known to cause behavioral disturbances for fish and marine mammals—such as reduced foraging, reduced ability to avoid predators, and increased flight/avoidance behavior—and to cause neurological stress and hearing threshold shifts. In addition, ship strikes associated with these marine vessels would harm threatened and endangered species. These impacts are completely unaddressed in the proposal and Technical Support Document, as are impacts associated with the emission of air pollutants and greenhouse gas emissions from the marine vessels while transporting LNG and

⁴ Parfomak, Paul & Adam Vann, Liquefied Natural Gas (LNG) Import Terminals: Siting, Safety, and Regulation, Congressional Research Service (Dec. 14, 2009) at 6, <https://fas.org/sgp/crs/misc/RL32205.pdf>.

⁵ *Id.* at 7.

⁶ *Id.* at 23.

⁷ U.S. Department of Transportation, Transportation Study: Impacts Associated with New and Emerging Natural Gas Liquefaction Facilities, Phase 1 Whitepaper (Jan. 1, 2016) at 10, <https://rosap.ntl.bts.gov/view/dot/36455>.

⁸ U.S. Government Accountability Office, Maritime Security: Public Safety Consequences of a Terrorist Attack on a Tanker Carrying Liquefied Natural Gas Need Clarification, GAO-07-316 (Feb. 2007) at 8, 17, <https://www.gao.gov/new.items/d07316.pdf>.

the impacts from invasive species that travel in ballast water and lead to pollution.⁹

DOE cannot rely on other agencies to avoid its duties under NEPA. In the Technical Support Document, DOE points to certifications from the U.S. Coast Guard and other requirements set out by the Federal Energy Regulatory Commission, Department of Transportation, Department of Homeland Security, and International Maritime Organization that are applicable to the LNG industry. Presumably this alphabet soup of agencies is referenced to justify DOE's refusal to look at the environmental impacts associated transportation of LNG by marine vessel. But under NEPA, DOE must look at *all* environmental impacts, and an agency cannot excuse itself from its hard look duty because a "facility operates pursuant to a . . . permit" or because the impacts have been discussed in a non-NEPA document. *S. Fork Band of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009). Even if an action is compliant with other laws and regulations, the agency still must review the action's impacts. *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Env't*, 104 F. Supp. 3d 1208, 1229 (D. Colo. 2015) *order vacated and appeal dismissed as moot* by 652 F. App'x 717 (10th Cir. 2016).

Noise Impacts

Marine vessels associated with LNG exports substantially increase the amount of ship-related noise in the water, posing a significant risk to marine mammals and other wildlife, including endangered species. The sound frequency range within which whales communicate corresponds to the frequency range of ship noise, and ships hundreds and even thousands of miles away interfere with the acoustic space of these animals.¹⁰ With more ship traffic, the ability of whales and dolphins to communicate, search for prey, and avoid predators will be compromised.

Oceans are much louder today than they were a century ago, primarily due to increased anthropogenic noise, and they are expected to become even noisier due to commercial ships.¹¹ The greatest source of human-caused marine noise is ship propeller cavitation, which accounts for as much as eighty-five percent of human caused noise in the world's oceans.¹² Diesel

⁹ U.S. Environmental Protection Agency, Proposal to Designate an Emission Control Area of Nitrogen Oxides, Sulphur Oxides and Particulate Matter, EPA-420-R-09-007 (Apr. 2009), <https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/420r09007.pdf>; U.S. Coast Guard, Mandatory Ballast Water Management Program for U.S. Waters, 69 Fed. Reg. 44952-44961 (Sep. 27, 2004), <https://www.govinfo.gov/content/pkg/FR-2004-07-28/pdf/04-17096.pdf>.

¹⁰ Hildebrand, J.A., *Impacts of Anthropogenic Sound*, in Marine Mammal Research: Conservation Beyond Crisis, 101-124 (J.E. Reynolds III et al. eds. 2005) ("Hildebrand 2005"), <http://cetus.ucsd.edu/sio133/PDF/HildebrandJHU-MMR2005.pdf>; Weilgart, L.S., The Impacts of Anthropogenic Ocean Noise on Cetaceans and Implications for Management, 85 Can. J. Zool., 1091 (2007), available at <https://www.nrcresearchpress.com/doi/abs/10.1139/Z07-101#.XtV3SzpKiUl>.

¹¹ Erbe, Christine et al., The Effects of Ship Noise on Marine Mammals—A Review, 6 Frontiers in Marine Science 606 (Oct. 2019), <https://www.frontiersin.org/articles/10.3389/fmars.2019.00606/full>.

¹² Cox, Joseph, Chamber of Shipping of America, Presentation, Evolving Noise Reduction Requirements in the Marine Environment at the Marine Mammal Commission Congressional Briefing on Impacts of Sound on Marine Mammals and their Environment (Sept. 25, 2014) at slide12, https://www.mmc.gov/wp-content/uploads/cox_capitolhill_briefing_0914.pdf.

engines and other onboard machines also cause vibrations that migrate underwater.¹³ Ocean noise pollution has created an “omnipresent hum” in our ocean.¹⁴ National Oceanic and Atmospheric Administration (“NOAA”) maps show that marine noise levels have increased significantly in the Pacific and Atlantic Oceans, as well as in the Gulf of Mexico.¹⁵

NOAA and legislative leaders have recognized the threat to ocean species posed by increased anthropogenic ocean noise levels.¹⁶ NOAA has stated:

Rising noise levels can negatively impact ocean animals and ecosystems in complex ways. Higher noise levels can reduce the ability of animals to communicate with potential mates, other group members, their offspring, or feeding partners. Noise can reduce an ocean animal’s ability to hear environmental cues that are vital for survival, including those key to avoiding predators, finding food, and navigation among preferred habitats.¹⁷

In addition to “masking” effects that reduce an animal’s ability to detect relevant sounds,¹⁸ marine mammals display a suite of stress-related responses to increased ambient and local noise levels. These include “rapid swimming away from [] ship[s] for distances up to 80 km; changes in surfacing, breathing, and diving patterns; changes in group composition; and changes in vocalizations.”¹⁹ Noise exposure increases stress hormone levels,²⁰ and stress due to noise can lead to long-term health problems. Over time, noise may pose increased health risks for populations by weakening the immune system and potentially affecting fertility, growth rates, and mortality.²¹ Some avoidance responses to localized marine sounds may even lead to individual or mass strandings.²²

Anthropogenic sounds may also lead to temporary or permanent hearing loss in marine

¹³ *Id.* at 11.

¹⁴ McDonald, Mark A. et al., Increases in Deep Ocean Ambient Noise in the Northeast Pacific West of San Nicolas Island, California, 120 *Journal of the Acoustical Society America* 2, 711 (2016), *available at* <https://asa.scitation.org/doi/10.1121/1.2216565>.

¹⁵ See National Oceanic and Atmospheric Administration, Cetacean & Sound Mapping: Phase 1—CetSound, <http://cetsound.noaa.gov/cetsound> (last visited May 20, 2020).

¹⁶ *Id.*; Marine Mammal Commission, Congressional Briefing – Impacts of Sound on Marine Mammals and their Environment, Sept. 25, 2014, <https://www.mmc.gov/events-meetings-and-workshops/legislative-briefings/congressional-briefing-impacts-sound-marine-mammals-environment/> (last visited May 20, 2020).

¹⁷ National Oceanic and Atmospheric Administration, Cetacean & Sound Mapping: Underwater Noise and Marine Life, <http://cetsound.noaa.gov/index> (last visited May 20, 2020).

¹⁸ National Resource Council, Ocean Noise and Marine Mammals (2003) (“NRC 2003”) at 96, <https://www.nap.edu/download/10564>.

¹⁹ *Id.* at 94.

²⁰ Romano, T.A. et al., Anthropogenic Sound and Marine Mammal Health: Measures of the Nervous and Immune Systems Before and After Intense Sound Exposure, 61 *Can. J. Fish. Aquat. Sci.*, 1124 (2004) (“Romano 2004”), <https://www.nrcresearchpress.com/doi/abs/10.1139/f04-055#.XtFPCzpKiUk>.

²¹ *Id.* See also Rolland, Rosalind S. et al., Evidence that Ship Noise Increases Stress in Right Whales, 279 *Proc. R. Soc. B* 1737, 2363 (Feb. 8, 2012), *available at* https://royalsocietypublishing.org/doi/full/10.1098/rspb.2011.2429?url_ver=Z39.88-2003&rft_id=ori%3Arid%3Acrossref.org&rft_dat=cr_pub++0pubmed&.

²² Romano 2004.

mammals.²³ For marine mammals that rely heavily on their acoustic environment, both permanent and temporary hearing loss is a serious threat that can impact communication; increase vulnerability to predators; and interfere with foraging, mating, and migration.²⁴ The threat of vessel noise is especially immediate for endangered whales that range in the vicinity of proposed future LNG export terminals. For example, the National Marine Fisheries Service has identified “reduc[tion of] the threat of anthropogenic noise” in Cook Inlet beluga whale habitat to be critical to the recovery of the endangered whale.²⁵

Noise impacts to marine mammals are predicted to increase with global climate change. Researchers predict that ocean acidification will reduce the intrinsic ability of surface seawater to absorb sound at frequencies important to marine mammals by forty percent and that sounds will travel seventy percent further by 2050.²⁶

Ship Strikes

Ship strikes involving large vessels are the “principal source of severe injuries to whales.”²⁷ Most ship strikes to large whales are deadly.²⁸ Ship strike-related mortality is a documented threat to endangered whales like sperm whales,²⁹ blue whales,³⁰ and right whales,³¹ as well as other cetaceans found in the Gulf of Mexico and off the coast of Alaska, where future LNG export facilities are proposed.³² For imperiled populations, “death from vessel collisions

²³ Kastak, David et al., Noise-Induced Permanent Threshold Shift in a Harbor Seal, 123 *The Journal of Acoustical Society of America* 5, 2986 (2008), <https://doi.org/10.1121/1.2932514>; NRC 2003.

²⁴ Hildebrand 2005.

²⁵ National Marine Fisheries Service, *Species in the Spotlight, Priority Actions: 2016–2020, Cook Inlet Beluga Whale (Delphinapterus leucas)* (2015) at 4, <https://repository.library.noaa.gov/view/noaa/10747>. *See also* National Marine Fisheries Service, *Recovery Plan for the Cook Inlet Beluga Whale (Delphinapterus leucas)* (Dec. 27, 2016) at II-52, <https://repository.library.noaa.gov/view/noaa/15979> (“high auditory sensitivity . . . and dependence upon sound to navigate, communicate, and find prey and breathing holes in the ice make belugas vulnerable to noise pollution, which may mask beluga signals or lead to temporary or permanent hearing impairment.”).

²⁶ Hester, Keith C. et al., Unanticipated Consequences of Ocean Acidification: A Noisier Ocean at Lower pH, 35 *Geophysical Research Letters* 19 (Oct. 2008), <https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2008GL034913>.

²⁷ Laist, David W. et al., Collisions Between Ships and Whales, 17 *Marine Mammal Science* 1, 35 (Jan. 2001), <https://www.mmc.gov/wp-content/uploads/shipstrike.pdf>.

²⁸ Jensen, Aleria S. & Gregory K. Silber, Large Whale Ship Strike Database, NOAA Technical Memorandum NMFS-OPR-25, National Oceanic and Atmospheric Administration (Jan. 2004), https://tethys.pnnl.gov/sites/default/files/publications/Jensen_Silber_2003.pdf.

²⁹ Waring, et al., U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments – 2012, Volume 1, NOAA Technical Memorandum NMFS-NE-223, National Oceanic and Atmospheric Administration (Mar. 29, 2013), available at <https://nefsc.noaa.gov/publications/tm/tm223/>.

³⁰ National Marine Fisheries Service, *Draft Recovery Plan for the Blue Whale (Balaenoptera musculus)* (2018), <https://www.fisheries.noaa.gov/webdam/download/82274557>.

³¹ Muto, M.M. et al., *Alaska Marine Mammal Stock Assessments, 2018*, NOAA Technical Memorandum NMFS-AFSC-393, National Oceanic and Atmospheric Administration (June 2019) at 247, *available at* <https://repository.library.noaa.gov/view/noaa/20606>.

³² U.S. Federal Energy Regulatory Commission, *North American LNG Export Terminals Proposed* (Mar. 19, 2020), <https://www.ferc.gov/industries/gas/indus-act/lng/lng-proposed-export.pdf>.

may be a significant impediment to population growth and recovery.”³³

Ship strikes also affect Endangered Species Act-listed sea turtles in the Gulf of Mexico. Like cetaceans, sea turtles cannot breathe under water and must regularly ascent to the surface for air, which makes them highly susceptible to vessel collisions.³⁴ Commercial vessels are major hazards to sea turtles, particularly in shipping lanes and during peak tourism months when millions of recreational boaters congregate in coastal areas. Even if ship collisions do not result in immediate death, they can increase stress, which ultimately affect a species’ ability to forage, migrate, escape from predators, and reproduce.

II. DOE’s Overall Approach to Developing the CE is Arbitrary and Capricious.

Identification of new Categorical Exclusions (CEs)³⁵ must comply with the requirements Ninth Circuit Court of Appeals identified in *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007), which found the Forest Service’s promulgation of a NEPA categorical exclusion for fuel reduction and prescribed burn projects to be arbitrary and capricious because the Forest Service failed to show that it made a reasoned decision based on all the relevant information, failed to properly assess significance, and failed to define the CE with requisite specificity.

First, DOE must conduct scoping to determine the range of potential issues and impacts related to the activities covered by the contemplated CE. *See id.* at 1027 (“The determination that a categorical exclusion was the proper path to take should have taken place after scoping, reviewing the data call, and determining that the proposed actions did not have individually or cumulatively significant impacts.”). No scoping has been proposed here.

Second, DOE must analyze whether the impact of the actions encompassed by the CE will individually or cumulatively have a significant environmental impact. 40 C.F.R. § 1508.4 (“‘Categorical exclusion’ means a category of actions which do not individually or cumulatively have a significant effect on the human environment *and which have been found to have no such effect.*”) The Court in *Sierra Club v. Bosworth* made clear that the proper question when undertaking this analysis is “whether the evidence supports the [agency’s] determination that the identified category of actions in the [challenged] CE do not individually or cumulatively have a significant impact on the environment.” *Bosworth*, 510 F.3d 1027-1028, 1026 (citing Mandelker, NEPA Law & Litigation § 7:10 for the proposition that “[t]he effect of this method of defining categorical exclusions is to apply the same criteria for determining whether an impact statement is necessary to the categorical exclusion decision”). The determination of significance must be made in light of the same context and intensity factors that are implicated in evaluating individual actions. *Id.* at 1030-31. Here, DOE has made absolutely no attempt to provide

³³ Rockwood R. Cotton et al., High Mortality of Blue, Humpback and Fin Whales from Modeling of Vessel Collisions on the U.S. West Coast Suggests Population Impacts and Insufficient Protection, 12 PLoS ONE 8: e0183052 (Aug. 21, 2017), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0183052>.

³⁴ National Oceanic and Atmospheric Administration Fisheries, Understanding Vessel Strikes (June 25, 2017), <https://www.fisheries.noaa.gov/insight/understanding-vessel-strikes>.

³⁵ Through this rulemaking, DOE is effectively creating a new CE. The revision proposed CE applies to an entirely new and expanded class of export facility activities. Whereas the CE previously applied to authorizations that do “not involve new construction and only require[] operational changes,” it now explicitly covers authorizations involving new construction and associated transportation of natural gas.

relevant data or otherwise determine the impacts of the actions covered by the revised CE. The only “evidence” provided in the Technical Support document is incomplete and misleading, as discussed above, and entirely ignores the climate change impacts environmental groups have raised in multiple export authorization proceedings. It also ignores the other significant environmental impacts associated with marine vessel transportation described above. As a result, DOE’s proposed rulemaking arbitrary and capricious. 5 U.S.C. § 706(2)(A).

DOE cannot evade this analysis of individual and cumulative impacts by asserting that the evaluation of cumulative impacts is impractical or infeasible, because the use of a CE is improper where such impacts cannot practically or feasibly be assessed. *See id.* at 1028. Nor can DOE satisfy its obligation with conclusory assertions. *Id.* at 1030; *see also Heartwood, Inc. v. U.S. Forest Serv.*, 73 F. Supp. 2d 962, 975 (S.D. Ill. 1999) (CE was arbitrary and capricious where “FS did not provide any rationale for why [the] magnitude of timber sales [under the CE] would not have a significant effect of the environment” and record lacked “any evidence . . . to support the [new increased] limit, except to refer to the FS’ expertise and prior experience with timber sales having ‘these characteristics’”).

Third, any new CE must be written with sufficient specificity to distinguish between actions likely to have significant impacts and those properly covered within a CE. *Bosworth*, 510 F.3d at 1032-33 (noting that [Council on Environmental Quality] regulations require that agency procedures on categorical exclusions include “[s]pecific criteria for and identification of those typical classes of action . . . [w]hich normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)),” and further criticizing the Forest Service for failing to “take specific account of the significant impacts identified in prior hazardous fuels reduction projects and their cumulative impacts in the design and scope of any future Fuels CE so that any such impacts can be prevented.”) Here, DOE made no attempt to look at impacts associated with prior export authorizations and use that information to inform the CE currently at issue. DOE also did not use criteria to define classes of export terminals that may seek authorization. The proposed CE excuses *all* new export authorizations from environmental review, without discussion of what “extraordinary circumstances related to the proposal” may affect the significance of the environmental impacts and warrant analysis. In effect, the proposal bars any possibility that the environmental impacts of any export authorization will be analyzed, regardless of the amount of the LNG to be exported, the characteristics of the area where marine vessels will travel, or the foreseeability of induced production in a particular gas field. There is no logical reason given for why any new export authorizations should escape NEPA review, so there is no metric by which to assess whether a particular export authorization may merit special consideration due to extraordinary circumstances. In the absence of any sort of rational fact- and science-based approach to developing the CE, the proposed rule is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

In addition, DOE has failed to conduct the required consultation pursuant to Section 7 of the Endangered Species Act to ensure that the action will not jeopardize the continued existence or adversely modify the critical habitat of any listed species. DOE has further failed to conduct a NEPA analysis of the effects of the rule itself.

For the reasons described in this comment and in the Sierra Club’s concurrently-

submitted comment, which the Center for Biological Diversity incorporates by reference, DOE has not provided an acceptable factual and legal basis for amending its NEPA regulations. DOE should abandon this rulemaking effort and focus instead on a thorough, science-based review of LNG export decisions that disclose their true environmental impacts, including the greenhouse gas emission-related climate impacts and marine species impacts. We welcome the opportunity to explore these issues further with DOE.

Sincerely,

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Due to upload limitations, not all of the references in the reference list are attached to the comment letter. All non-weblinked references have been uploaded and attached along with key weblinked references. All additional references weblinked in the comment letter are incorporated by reference into the letter.