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U.S. Department of Energy
Office of NEPA Policy and Compliance (GC-54)
ATTN: NEPA/NG Procedures (RIN 1990-AA49)
1000 Independence Avenue SW
Washington, DC 20585

Submitted via Regulations.gov, Docket No. DOE-HQ-2020-0017

Secretary Brouillette,

Please accept these comments on the Department of Energy's (DOE) recent proposed rulemaking and request for comment titled "National Environmental Policy Act Implementing Procedures." Existing DOE regulations provide that proposals to export liquefied natural gas (LNG) will "normally require" a full environmental impact statement when the proposal requires either a major new or expanded facility or a major operational change at an existing facility. 10 C.F.R. § Pt. 1021, Subpt. D, App. D8-D9. DOE proposes to flip this presumption, repealing these sections and instead expanding a "categorial exclusion" to create a presumption that DOE can approve LNG exports without any National Environmental Policy Act (NEPA) review whatsoever. 85 Fed. Reg. 25,340, 25,341-42 (May 1, 2020). This proposal is arbitrary and unlawful, and should be abandoned. These comments are submitted on behalf of Sierra Club, 198 methods, Center for Biological Diversity, Earthjustice, Earthworks, Environmental Protection Information Center, Klamath Forest Alliance, Livelihoods Knowledge Exchange Network, Living Rivers & Colorado Riverkeeper, Natural Resources Defense Council, New York Public Interest Research Group (NYPIRG), Ocean Conservation Research, Oil Change International, Rainforest Action Network, Southern Utah Wilderness Alliance, Virginia Citizens Consumer Council, and Western Environmental Law Center.

A categorical exclusion is only appropriate for "category[ies] of actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. Here, DOE offers two flawed arguments in support of the proposal:

1. DOE argues that it has no authority to consider impacts occurring before gas is loaded onto ships, *i.e.*, upstream of the terminal, and that such impacts are therefore irrelevant. DOE has authority to consider the environmental impacts of export-induced changes in gas production; indeed, it has previously argued that it is the *exclusive* holder of such authority. DOE has previously and correctly observed that LNG exports will foreseeably increase gas production, and that this additional production may have significant impacts on ground-level ozone and other resources.

2. DOE argues that effects occurring after LNG is loaded on ships, downstream of the terminal, are insignificant, in part because DOE has concluded that when U.S. LNG displaces regional coal, this does not increase global greenhouse gas emissions. Downstream effects are not limited to greenhouse gas impacts, and DOE unlawfully ignores other foreseeable effects such as increased vessel strikes on marine mammals. And DOE further ignores the fact that, by DOE's own admission, U.S. LNG foreseeably competes with conservation and renewables as well as other fossil energy sources.

Because DOE's approval of LNG exports has foreseeable and significant environmental impacts, a categorical exclusion is inappropriate. If DOE wants to streamline the NEPA process for LNG exports, DOE can prepare a programmatic environmental impact statement regarding exports, and

tier off of this statement in individual proceedings, as Sierra Club has previously and repeatedly requested.

I. LNG Exports Cause Pertinent and Significant Impacts Upstream of the Point of Export

The Notice of Proposed Rulemaking argues that DOE need not consider "environmental impacts resulting from actions occurring [before] the point of export" because "the agency has no authority to prevent" these impacts, citing *Sierra Club v. FERC,* 827 F.3d 36 (D.C. Cir. 2016) ("*Freeport I*"). 85 Fed. Reg. at 25,341. This is the exact opposite of *Freeport I*'s explicit and central holding.

Under *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), "An agency has no [NEPA] obligation to gather or consider environmental information if it has no statutory authority *to act on that information*." *Sierra Club v. FERC,* 867 F.3d 1357, 1372 (D.C. Cir. 2017) (emphasis in original). *Public Citizen* permits an agency to exclude impacts from the scope of NEPA review only when the agency has "*no legal authority to prevent* the adverse environmental effects" at issue. *Id.*

In *Freeport I,* Sierra Club argued that the Federal Energy Regulatory Commission (FERC) had violated NEPA by approving the construction and operation of LNG export infrastructure without NEPA analysis of the impacts of export-induced increases in gas production. The D.C. Circuit held that *FERC* lacked authority to consider these impacts. DOE has

> delegated to the Federal Energy Regulatory Commission the authority to '[a]pprove or disapprove the construction and operation of particular [export] facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of * * * exit for [natural gas] exports,'

Freeport I, 827 F.3d at 40-41. However, *DOE* "maintains exclusive authority over the export of natural gas as a commodity." *Id.* at 40. The court held that FERC therefore had "no authority" to consider the impacts of export-induced gas production because "the Natural Gas Act places export decisions squarely and exclusively within the Department of Energy's wheelhouse." *Id.* at 46.

When Sierra Club subsequently challenged *DOE's* failure to consider these impacts in *Sierra Club v. United States Dep't of Energy*, 867 F.3d 189 (D.C. Cir. 2017) ("*Freeport II*"), DOE did not contend, and the court did not hold, that DOE lacked authority to deny exports based on environmental impacts occurring upstream of the point of export, or that these impacts were therefore outside the scope of NEPA review. All that the court held was that DOE had engaged in the required hard look at the environmental impacts of export-induced increases in gas production,[1] discussing these impacts qualitatively and showing that, on the record before it, DOE properly determined that further details regarding these impacts could not be reasonably foreseen. *Id.* at 198-201.

Impacts occurring upstream of the point of export are not only within the scope of DOE's authority, they are central to it. The Natural Gas Act's "principle aim[s]" are "encouraging the orderly development of plentiful supplies of natural gas at reasonable prices and protecting consumers against exploitation at the hands of natural companies," with the "subsidiary purposes" of addressing "conservation, environmental, and antitrust issues." *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) (internal quotations,

[1] The court did not address whether DOE violated NEPA by providing these analyses in an "environmental addendum" that was prepared separate from the formal NEPA review, holding that Sierra Club had waived claims on this issue. 867 F.3d at 197.

citations, and modifications from original omitted). DOE's own precedent states that when reviewing export applications, DOE will consider:

> (i) the domestic need for the natural gas proposed to be exported,
> (ii) whether the proposed exports pose a threat to the security of domestic natural gas supplies,
> (iii) whether the arrangement is consistent with DOE/FE's policy of promoting market competition, and
> (iv) any other factors bearing on the public interest ….

DOE/FE Order No. 3357-B at 10 (Nov. 14, 2014).[2] DOE's principal concern has been whether exports will cause domestic gas shortages or price impacts harmful to domestic consumers. To that end, in reviewing exports, DOE had tasked the U.S. Energy Information Administration (EIA) with forecasting how domestic energy markets will respond to LNG exports. EIA has predicted that the principal response will be an increase in gas production,[3] and DOE has pointed to that increase as the justification for approving increased exports. For DOE to now contend that it has no authority to consider these impacts would both be contrary to the statute and an unexplained reversal in position, *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502 (2009).

DOE not only has the authority to consider environmental effects occurring before the point of export: DOE has already determined that many of these effects are reasonably foreseeable, and that they may be significant. DOE's environmental "addendum" prepared to support its review of LNG export applications concludes that LNG exports could "accelerate" unconventional natural gas development, and that this could foreseeably "create new or expanded

[2] *Available at* https://www.energy.gov/sites/prod/files/2014/11/f19/ord%203357-B.pdf.
[3] *See, e.g.*, https://www.eia.gov/analysis/requests/fe/.

... non-attainment areas" violating national ambient air quality standards for ozone.[4] In litigation before the D.C. Circuit, DOE has argued that, in reviewing the environmental impacts of DOE's authorization of LNG exports, "DOE *did not find* that associated adverse environmental impacts necessarily will be insignificant. To the contrary, DOE disclosed potentially significant impacts, including, *e.g.*, that new gas developments could lead to new ozone nonattainment areas."[5]

In summary, the Notice of Proposed Rulemaking is incorrect when it states that "the only source of potential environmental impacts associated with DOE's decision regarding authorizations under section 3 of the [Natural Gas Act]" are impacts of "associated transportation of natural gas by marine vessel." 85 Fed. Reg. at 25,342. Impacts occurring before or upstream of the point of export are squarely within the scope of DOE's authority, have routinely been considered by DOE, are reasonably foreseeable, and are potentially significant. On these facts, DOE cannot adopt a categorical exclusion.

II. Downstream Impacts Are Also Potentially Significant

Unlike with upstream impacts, DOE does not dispute that it has authority consider impacts occurring downstream of the point of export.

DOE concedes that it has authority to consider impacts associated with "associated transportation by marine vessel," 85 Fed. Reg. at 25,342, but provides no discussion of those impacts, nor any justification for concluding that these impacts will be individually and cumulatively insignificant. They will not be. As explained in the Center for Biological

[4] DOE, Addendum To Environmental Review Documents Concerning Exports Of Natural Gas From The United States, 27, 32 (August 2014), https://www.energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf.

[5] Answering Brief for Respondent Department of Energy, D.C. Case No. 15-1489, Doc. 1623073 at 16 (July 5, 2016) (emphasis added).

Diversity's concurrently-submitted comment, marine vessel traffic has numerous potentially significant impacts, including impacts of vessel strikes on marine mammals. Thus, even within the unlawfully cabined scope of review DOE acknowledges that it must consider, there are potentially significant impacts that preclude adoption of a categorical exclusion.

DOE is further mistaken in concluding that the impacts associated with end use of exported LNG are "beyond the scope of DOE's NEPA review." 85 Fed. Reg. at 25,341. DOE offers no authority for this proposition, nor could it. Nor is DOE correct in suggesting that the impacts of end-use are insignificant. DOE cites its two "life cycle greenhouse gas perspective" studies. However, both of these studies merely compared emissions of US LNG with emissions from coal and other fossil fuels. As Sierra Club explained in comments on both the 2014 and 2019 "perspectives," U.S. LNG exports will foreseeably compete with and displace conservation and renewables in addition to other fossil fuels.[6] As time progresses, and nations take increasing efforts to reduce emissions and combat climate change, competition with coal is likely to become increasingly irrelevant. Meanwhile, tools to foresee the extent and consequences of U.S. LNG's competition with or displacement of renewables and conservation are likely to be further developed. DOE has no basis for excluding these impacts from the scope of its NEPA review, for determining that these impacts are now and forever will be unforeseeable, or that they are insignificant.

III. Conclusion

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,

[6] *See* https://fossil.energy.gov/app/DocketIndex/docket/DownloadFile/180. and https://fossil.energy.gov/app/DocketIndex/docket/DownloadFile/604.

science-based review, conducted through the robust, well-developed, and legally required NEPA procedures, of LNG export decisions. This review must encompass the true environmental impacts of LNG exports, including the upstream and downstream 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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