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UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY AND CARBON MANAGEMENT

In the Matter of:	**)**	**FE Docket No. 21-131-LNG**
Venture Global CP2 LNG, LLC	**)**	
	)	

COMMENTS OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW

Pursuant to the Department's Notice of Application,[1] the Institute for Policy Integrity at New York University School of Law (Policy Integrity)[2] respectfully submits the following comments on Venture Global CP2 LNG's (CP2 LNG) application for long-term authorization to export LNG from a new natural gas liquefaction and export terminal to be located in Cameron Parish, Louisiana, to Non-Free Trade Agreement Nations.[3] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

CP2 LNG's proposed export capacity, if approved, would be the highest non-FTA export capacity of any LNG project in the U.S.[4] The export of LNG has significant climate impacts associated with upstream and downstream emissions of greenhouse gases. DOE must carefully consider these effects under the National Environmental Policy Act (NEPA) and should fully integrate them into its public interest analysis under Section 3 of the National Gas Act (NGA)

[1] Venture Global CP2 LNG, LLC; Application for Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations, 87 Fed. Reg. 1133 (Jan. 10, 2022).

[2] This document does not purport to present New York University School of Law's views, if any.

[3] Venture Global CP2 LNG, LLC, Docket No. 21-131-LNG, Application for Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations, at 2 (Dec. 2, 2021) [hereinafter CP2 LNG Application].

[4] Currently, the project with the highest approved LNG export capacity to non-FTA nations is Driftwood LNG, LLC, at 1,415.3 Billion cubic feet (bcf) of natural gas per year (or 3.88 Bcf/d). *See Driftwood LNG, LLC*, Order No. 4373, Docket No. 16-144-LNG, Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations, at 5 (May 2, 2019). The proposed project would enable the export of up to 1,446 Bcf/yr, or approximately 3.96 Bcf per day.

before determining whether to grant CP2 LNG an authorization order. This comment provides suggestions for how DOE may better conduct this analysis. Specifically:

- In line with relevant case law, **as part of its NEPA obligations DOE must consider the indirect greenhouse gas emissions associated with the CP2 LNG project**, and weigh the impacts in its NGA assessment.
- **DOE should apply reasonable assumptions to quantify indirect greenhouse emissions** from the CP2 LNG project, such as a full-burn assumption for downstream emissions, and the default estimates proposed by the Environmental Protection Agency (EPA) for upstream emissions. It should also ask CP2 LNG to provide project-specific information relevant to calculating emissions.
- **DOE should better analyze substitution impacts** from LNG exports by recognizing that increased supply of LNG is likely to increase total global fossil-fuel production and combustion.
- **DOE should refrain from applying a categorical exclusion from NEPA review to the CP2 LNG project**, given the severe legal deficiencies with its recent categorical-exclusion rule—including the changes from past practice, the failure to conduct a program wide cumulative impact analysis, and the substantial dispute that exists around the impacts of LNG exports—and the likelihood of near-term repeal of the rule.
- **DOE's and FERC's authorizations for the CP2 LNG project are connected actions under NEPA and must be considered together**, and the Department should work with FERC to ensure that this information is contained in the Commission's EIS.

The Department must take appropriate steps to meets its statutory obligations to fully consider the climate impacts of its authorization and weigh those impacts against project benefits. These recommendations can ensure DOE obtains and uses available information to ensure that CP2 LNG's application is not inconsistent with the public interest.

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I. DOE Must Properly Consider and Weigh the Greenhouse Gas Emissions Resulting from the CP2 LNG Project

In analyzing the environmental effects of agency action, NEPA requires agencies to consider the direct as well as indirect effects of an action.[5] In the case of natural gas exports, this includes the potential upstream and downstream greenhouse gas emissions associated with a project's export authorization. Case law from the U.S. Court of Appeals for the D.C. Circuit clearly establishes that responsibility for assessing such indirect climate impacts from natural gas exports under Section 3 lies solely with DOE. Therefore, DOE must analyze potential indirect greenhouse gas emissions associated with the CP2 LNG project when considering whether to issue the export authorization. After obtaining this information, DOE also must properly weigh climate impacts alongside all other relevant benefits and adverse impacts to ensure the project is not inconsistent with the public interest.

Furthermore, in order to fully comply with its obligation to consider indirect impacts, DOE should use reasonable assumptions, such as a full-burn assumption or the default assumptions used by the EPA, to quantify indirect emissions from the CP2 LNG project. DOE should ask CP2 LNG to provide relevant project-specific information for this purpose.

A. D.C. Circuit Case Law Establishes that DOE Must Consider the Indirect Greenhouse Gas Emissions from Natural Gas Exports

Two lines of case law strongly indicate that DOE must assess indirect greenhouse gas emissions from natural gas exports. First, three D.C. Circuit decisions—*Freeport*,[6] *Sabine Pass*,[7]

[5] 40 C.F.R. § 1508.8.

[6] Sierra Club v. Fed. Energy Regul. Comm'n (*Freeport*), 867 F.3d 36 (D.C. Cir. 2016).

[7] Sierra Club v. Fed. Energy Regul. Comm'n (*Sabine Pass*), 827 F.3d 59 (D.C. Cir. 2016).

and *EarthReports*[8]—discussed whether the Federal Energy Regulatory Commission (FERC), in addition to considering the direct effects from construction and operation of LNG infrastructure, was obligated under NEPA to consider the indirect greenhouse gas emissions from induced natural gas production and combustion. In all three cases, the court found that the impacts associated with the exports fell "squarely and exclusively within the Department of Energy's wheelhouse" and FERC need not assess them "because the Department of Energy, not the Commission, has sole authority to license the export of any natural gas."[9] The Commission, therefore, was not a legally relevant cause of the indirect effects of natural gas exports.[10] The court elaborated on this reasoning in *Sabine Pass*, explaining that "the potential environmental effects flowing from greater natural gas *exports*," including indirect greenhouse gas impacts, are properly directed to the agency that "authorize[s] [applicants] to increase exports"—that is, DOE.[11] The obvious implication of these cases is that the indirect greenhouse gas emissions resulting from natural gas exports fall within DOE's purview and must be considered.

If these cases were not sufficiently clear, D.C. Circuit case law regarding FERC's consideration of indirect greenhouse gas emissions under Section 7 of the NGA should eliminate any ambiguity. Under Section 7, the Commission alone (and not DOE) is responsible for reviewing applications for interstate pipelines and other natural-gas transmission facilities.[12] In that context, pipeline developers have previously claimed "that FERC would [not] be the legally relevant cause of any [indirect] carbon emissions" and thus need not consider those emissions in

[8] EarthReports, Inc. v. Fed. Energy Regul. Comm'n, 828 F.3d 949 (D.C. Cir. 2016). There is also a fourth memorandum decision, *Sierra Club v. Fed. Energy Regul. Comm'n*, 672 Fed. Appx. 38 (D.C. Cir. 2016), which swiftly dismisses the petitions with reference to these three decisions.

[9] *Freeport*, 827 F.3d at 47.

[10] *Id.*

[11] *Sabine Pass*, 827 F.3d at 68.

[12] 15 U.S.C. § 717f.

its analysis.[13] But the D.C. Circuit rejected that argument, explaining that fossil-fuel combustion is the "entire purpose" of the project and thus a legally relevant effect.[14] The same basic logic applies to DOE's analysis under Section 3, and compels the same result.

Until recently, DOE had not argued that indirect emissions are outside the scope of its analysis. Prior to 2020, DOE simply relied on a life cycle analysis comparing U.S. LNG exports to coal and other natural gas.[15] However, in DOE's 2020 categorical exclusion rule for authorizations to export natural gas to non-FTA nations, discussed *infra* in Section IV, the agency argued that indirect effects fall beyond the scope of the agency's consideration.[16] Accordingly, DOE claimed that induced upstream production is not reasonably foreseeable and so the effects of that production (like greenhouse gas emission) are not subject to its analysis, and likewise "downstream emissions at the point of consumption are too attenuated to be reasonably foreseeable."[17]

The contention that indirect greenhouse gas emissions are not reasonably foreseeable or otherwise beyond the scope of analysis runs counter to D.C. Circuit case law finding that such indirect effects of LNG exports must be assessed by DOE. These indirect effects fall "squarely

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[13] Sierra Club v. Fed. Energy Regul. Comm'n (*Sabal Trail*), 867 F.3d 1357, 1372 (D.C. Cir. 2017).
[14] *Id.*
[15] *See* NAT'L ENERGY TECH. LAB'Y, DOE/NETL-2014/1649, LIFE CYCLE GREENHOUSE GAS PERSPECTIVE ON EXPORTING LIQUEFIED NATURAL GAS FROM THE UNITED STATES (2014), https://perma.cc/H6ST-TMPQ; NAT'L ENERGY TECH. LAB'Y, DOE/NETL-2019/2041, LIFE CYCLE GREENHOUSE GAS PERSPECTIVE ON EXPORTING LIQUEFIED NATURAL GAS FROM THE UNITED STATES: 2019 UPDATE (2019), https://perma.cc/Q7R9-YWE5 [hereinafter 2019 LIFE CYCLE REPORT]; *see also Jordan Cove Energy Project L.P.*, Order No. 3413-A, Docket No. 12-32-LNG, Final Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations, at 110 (July 6, 2020) ("To the extent U.S. LNG exports are preferred over coal in LNG-importing nations, U.S. LNG exports are likely to reduce global GHG emissions on per unit of energy consumed basis for power production" and "to the extent preferred over other forms of imported natural gas, they are likely to have only a small impact on global GHG emissions.").
[16] National Environmental Policy Act Implementing Procedures, 85 Fed. Reg. 78,197, 78,197 n.9 (Dec. 4, 2020) [hereinafter DOE Categorical Exclusion Rule] (cabining scope of analytical assessment to activities "starting at the point of delivery to the export vessel, and extending to the territorial waters of the receiving country").
[17] *Id.* at 78,200.

and exclusively" within DOE's purview,[18] and a failure to properly quantify and assess the impact of increased emissions from the CP2 LNG project would render DOE's environmental review arbitrary and capricious. Given that DOE has exclusive authority to consider indirect greenhouse gas emissions associated with the export authorization, if DOE does not consider them, then no federal agency involved in the natural gas export process would consider this environmental impact.

DOE's responsibility here to consider the indirect effects of granting CP2 LNG's export authorization is analogous to FERC's responsibility to consider greenhouse gas emissions under Section 7. Just as courts have concluded indirect emissions are a reasonably foreseeable impact of FERC's certification of interstate pipelines, indirect emissions are a reasonably foreseeable impact of DOE's authorization of new exports by CP2 LNG.[19] DOE could deny the export application on the basis of these environmental concerns, making those effects a legally relevant cause.[20] The harm caused by these emissions must be considered under NEPA and incorporated into DOE's public interest analysis under the NGA.

[18] *Freeport*, 867 F.3d at 46.

[19] Notably, EPA recently provided a succinct explanation of why upstream emissions from production are a reasonably foreseeable indirect effect of FERC certification of a new pipeline—where "the purpose of the proposed project is to transport natural gas for consumption; that natural gas must be produced." Comments of U.S. Env't Prot. Agency at 1–2, *Iroquois Enhancement by Compression Project*, Docket No. CP20-48 (Dec. 20, 2021) [hereinafter EPA Comments on Iroquois FEIS]; *see also* Comments of U.S. Env't Prot. Agency at 4, *Delta Lateral Project*, Docket No. CP21-197 (Dec. 27, 2021) [hereinafter EPA Comments on Delta Lateral EIS]. Likewise, where the purpose of the application is to export natural gas, that natural gas must be produced, and it is reasonably foreseeable that an indirect effect of that production will be upstream greenhouse gas emissions. The quantity of these emissions is independent of where combustion occurs. The impact of these emissions is independent of the location of production. Thus, the upstream greenhouse gas emission and their impact are reasonably foreseeable.

[20] *See Sabal Trail*, 867 F.3d at 1373.

B. DOE Should Apply Reasonable Assumptions to Quantify Indirect Greenhouse Gas Emissions from the CP2 LNG Project

To properly consider indirect greenhouse gas emissions from the CP2 LNG project, DOE should do more than merely acknowledge their existence; it should also use reasonable assumptions to quantify them. In the past, DOE has repeatedly claimed that both upstream and downstream greenhouse gas emissions are speculative and impossible to reasonably quantify. This claim is belied by the experience of other agencies and stands on tenuous legal footing. DOE can and should apply reasonable assumptions to quantify indirect emissions from the CP2 LNG project.

Despite DOE's reticence, other agencies routinely use reasonable assumptions to quantify both downstream and upstream greenhouse gas emissions. One option is to assume full-burn for downstream emissions, which FERC has previously employed to provide an upper-bound estimate of the emissions associated with interstate pipeline facilities.[21] The full-burn assumption presumes a 100% utilization rate—it assumes that the pipeline will continuously transport its full capacity, that all transported gas will be combusted, and that all combusted gas is additional and displaces no other fuels. The Bureau of Land Management has employed a similar assumption for assessing the downstream emissions resulting from natural gas extraction, assuming that all extracted gas will ultimately be combusted.[22] Though not perfect, this approach does provide a reasonable estimate of gross emissions and has been employed by other agencies. And, the full-

[21] *See, e.g.*, *Northern Natural Gas Co.*, 175 FERC ¶ 61,146, at P 32 (2021); *Tuscarora Gas Transmission Co.*, 175 FERC 61,147, at P28 (2021). Before issuing its GHG Policy Statement, *infra* note 23, FERC held a technical conference on the use of reasonable default estimates, including using a full-burn or some other lower utilization rate. *See generally* Transcript of Technical Video Conference, *Greenhouse Gas Mitigation: Natural Gas Act Section 3 and 7 Authorizations*, Docket No. PL21-3 (Nov. 19, 2021); *see also* Comments of the Inst. for Pol'y Integrity at N.Y.U. School of Law, *Greenhouse Gas Mitigation: Natural Gas Act Section 3 and 7 Authorizations*, Docket No. PL21-3 (Jan. 7, 2022).

[22] *See, e.g.*, BUREAU OF LAND MGMT., ENVIRONMENTAL ASSESSMENT FOR THE WYOMING 2022 FIRST QUARTER COMPETITIVE LEASE SALE 30 (2021).

burn assumption is likely a better estimate in the context of LNG exports than for interstate pipelines.

Another option is to assume less than full burn by attempting to assess project utilization. In its new GHG Policy Statement, for instance, FERC endorses a projected utilization rate to determine reasonably foreseeable GHG emissions.[23] While FERC has recognized that a full-burn assumption may overstate emissions because pipelines are planned to meet a peak capacity a few days a year, and thus unlikely to be 100% utilized at most times,[24] this argument does not hold for LNG export terminals. If a full-burn assumption is used as a high-end estimate, DOE can also allow the applicant to provide better project-specific information, either about its plans for exporting less than its full authorization or about substitution given known destinations.[25] This would enable DOE to project gross greenhouse gas emissions based upon reasonable assumptions about the utilization of the export license.

A third option is for DOE to assess greenhouse gas emissions on a net basis accounting for induced changes in global demand and energy substitution between different energy sources. This can be accomplished by formally modeling substitution using available models. The Department of Interior's MarketSim, EPA's Integrated Planning Model, and the Energy Information Administration's (EIA) National Energy Modeling System are all used by the federal government to model international energy market dynamics, and consider how the

[23] Interim Policy Statement, *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, at P 3 (Feb. 18, 2022) [hereinafter GHG Policy Statement].

[24] GHG Policy Statement, *supra* note 23, at PP 49–50.

[25] FERC has taken this approach. While employing a projected utilization rate as the default estimate rather than a full-burn assumption, the Commission has provided developers and other stakeholders the opportunity to provide other project-specific information relevant to quantifying emissions. *See* GHG Policy Statement, *supra* note 23, at PP 50–52.

addition or subtraction of one source of energy will affect other energy sources.[26] While these models each have benefits and drawbacks, their existence and use by other agencies rebuts DOE's prior claims that these market dynamics are too challenging to consider—and downstream emissions too speculative to assess. DOE can make use of these tools to better assess the impact of downstream emissions from the CP2 LNG project.

DOE can also adopt reasonable default estimates for upstream emissions in line with the practices of other agencies. Both the Bureau of Land Management and the EPA routinely estimate upstream emissions from their actions.[27] EPA's estimations are particularly relevant here, as EPA is also applying estimates of upstream emissions outside the context of direct regulation over those emissions while using reasonable modeling assumptions.[28] In fact, EPA uses estimates that DOE initially developed.[29] Furthermore, in recent FERC proceedings involving interstate pipeline infrastructure, EPA has recommended a methodology for calculating the emissions associated with induced upstream production.[30] Specifically, EPA suggested that FERC quantify upstream emissions by (1) looking at total national upstream emissions to get an average of emissions per unit of production, and (2) multiplying that average by the amount of gas to be transported (i.e., the amount of production that will occur).[31] DOE

[26] For a discussion of these models, see PETER HOWARD, INST. FOR POL'Y INTEGRITY, THE BUREAU OF LAND MANAGEMENT'S MODELING CHOICE FOR THE FEDERAL COAL PROGRAMMATIC REVIEW (2016), https://perma.cc/MAH8-ZWHD.

[27] *See supra* note 22 and associated text.

[28] *See, e.g.*, Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 43,726, 43,734 (Aug. 10, 2021) ("We . . . estimate the GHG and non-GHG emission impacts (tailpipe and *upstream*) of the proposed standards." (emphasis added)).

[29] *See* U.S. ENV'T PROT. AGENCY, REVISED 2023 AND LATER MODEL YEAR LIGHT DUTY VEHICLE GHG EMISSIONS STANDARDS: REGULATORY IMPACT ANALYSIS at 5-1 (2021) (estimating and monetizing upstream emissions associated with fuels to power light duty vehicles, both "at the refinery and the electricity generating unit" using emissions factors from DOE's Argonne National Lab).

[30] *See, e.g.*, EPA Comments on Iroquois FEIS, *supra* note 19; EPA Comments on Delta Lateral EIS, *supra* note 19.

[31] EPA Comments on Iroquois FEIS, *supra* note 19, at 3–4.

could similarly apply this methodology here, which would again provide an upper-bound estimate of upstream emissions from the CP2 LNG project because it does not account for substitution effects.

A recent decision involving FERC's regulation under Section 7 also suggests that DOE's usual assessment of indirect emissions is inadequate. In *Birckhead v. FERC*, the Commission declined to quantify a pipeline's upstream and downstream emissions, claiming, as DOE often does in the parallel context of Section 3 certificate proceedings, that it lacked relevant information about the source and final destination of natural gas.[32] The D.C. Circuit noted that it was "troubled . . . by the Commission's attempt to justify its decision to discount downstream impacts based on its lack of information" and stated that the applicant could provide relevant information.[33] To engage in "reasonable forecasting," the court said that FERC must "at least *attempt* to obtain the information necessary" to quantify emissions.[34] Although a lack of jurisdiction prevented the court from striking down FERC's "less-than-dogged efforts," the court made clear that it found those efforts wanting.[35] Today, in *Food & Water Watch v. FERC*, the court reaffirmed this obligation.[36]

Here, CP2 LNG has provided no information about the upstream and downstream emissions associated with its proposed export capacity.[37] DOE should request that the applicant provide relevant information on this issue and it should use reasonable assumptions to better quantify the indirect emissions from this project. DOE might also learn from FERC's application

[32] 925 F.3d 510, 517–18 (D.C. Cir. 2019).
[33] *Id.* at 519–20.
[34] *Id.* at 520.
[35] *Id.* at 520–21.
[36] No. 20-1132 (D.C. Cir. Mar. 11, 2022).
[37] *See* CP2 LNG Application, *supra* note 3.

of its new GHG Policy Statement to determine best practices for estimating upstream and downstream emissions.

II. DOE Should Analyze Important Substitution Considerations from LNG Exports

In addition to claiming that indirect greenhouse gas emissions are too speculative to reasonably assess, DOE has also highlighted a report from the National Energy Technology Laboratory finding that life cycle greenhouse gas emissions from U.S. gas exports is frequently lower than the life cycle emissions of other potential energy substitutes including coal and LNG from European and Asian markets.[38] Based on that finding, the Department has previously claimed that U.S. exports may have "a net positive impact in terms of climate change."[39] CP2 LNG relies on these findings in its application, claiming that LNG exports provide environmental benefits by focusing on their potential to substitute for dirtier fuel sources.[40] However, even assuming that the Life Cycle Report's overarching conclusion is accurate, DOE's and CP2 LNG's suggestion that LNG exports decrease global emissions overlooks economic considerations that federal courts have relied on in rejecting similar conclusions.

In deciding whether to grant CP2 LNG's authorization application, DOE should directly address an important economic consideration overlooked in its Life Cycle Report: that by increasing the global supply of fossil fuels, U.S. exports are likely to increase total fossil-fuel production and combustion. Classical economics posits that a major reason that energy producers want to export gas to foreign countries in the first place is that this is the cheapest option to

[38] 2019 LIFE CYCLE REPORT, *supra* note 15.

[39] U.S. DEP'T OF ENERGY, ADDENDUM TO ENVIRONMENTAL REVIEW DOCUMENTS CONCERNING EXPORTS OF NATURAL GAS FROM THE UNITED STATES 44 (2014), https://perma.cc/E7NB-HSUK [hereinafter DOE ADDENDUM] ("To the extent that unconventional natural gas production replaces the use of other carbon-based energy sources, there may be a net positive impact in terms of climate change."); *accord* DOE Categorical Exclusion Rule, 85 Fed. Reg. at 78,201 ("[T]he use of U.S. LNG exports for power production in European and Asian markets will not increase global [greenhouse gas] emissions from a life cycle perspective.").

[40] CP2 LNG Application, *supra* note 3, at 31–34.

supply the energy demanded.[41] U.S. exports therefore lead to lower prices and increase the quantity of gas demanded, thereby increasing total consumption while also displacing other fuel sources.[42] This possibility has even been acknowledged by FERC, which has previously recognized that denying applications for LNG export could result in "international energy conservation."[43] Carefully modeling these substitution effects enables DOE to predict how U.S. exports affect global greenhouse gas emissions, highlighting the importance of performing such an assessment.

On numerous occasions, in fact, courts have rejected agency analyses that ignored these effects on energy consumption. In one particularly notable decision, the U.S. Court of Appeals for the Eighth Circuit sharply criticized the Surface Transportation Board for "illogical[ly]" concluding that approving new coal railroad lines would not affect coal consumption. The court in that case explained that "the proposition that the demand for coal will be unaffected by an increase in availability and a decrease in price, which is the stated goal of the project, is illogical at best."[44] The same logic holds true here: LNG export authorizations, like coal railroad lines, are intended to facilitate the production and consumption of comparatively low-cost fossil fuels. They too, therefore, stimulate additional supply, lead to lower prices and hence higher consumption. Thus, ignoring those impacts in approving the export is similarly misguided.

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[41] Cheapest, that is, for the energy producer. Externalities borne by the public—such as climate and other environmental and health costs—do not factor into the producer's business decisions unless they are internalized.

[42] *See* Alexander K. Gilbert & Benjamin K. Sovacool., *US Liquefied Natural Gas (LNG) Exports: Boom or Bust for the Global Climate?*, 141 ENERGY 1671, 1676–79 (2017).

[43] *Cameron Liquefaction Project Final Environmental Impact Statement* at 3-2, Docket Nos. CP13-25 & CP13-27 (2014). FERC refused to analyze this possibility further.

[44] Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 549 (8th Cir. 2003); *see also* WildEarth Guardians v. Bureau of Land Mgmt., 870 F.3d 1222, 1236 (10th Cir. 2017) (rejecting an analysis from the Bureau of Land Management analysis finding that fossil-fuel leasing would not affect greenhouse gas emissions, finding the "perfect substitution assumption arbitrary and capricious because" it is "contrary to basic supply and demand principles").

In another notable case, the U.S. Court of Appeals for the Ninth Circuit rejected an analysis from the Department of the Interior finding that offshore oil extraction in the United States would decrease global greenhouse gas emissions.[45] Underlying that "counterintuitive result" was Interior's omission of foreign energy markets from its analysis; in essence, Interior assumed that domestic extraction would not affect international supply and consumption.[46] But as the court explained, increased domestic production causes global fossil-fuel prices to decline, and thus causing "foreign consumers [to] buy and consume more oil."[47] In fact, the court highlighted "credible scientific evidence" showing how increases in domestic production resulted in "increases in foreign oil consumption [that] can be translated into estimates of greenhouse gas emissions."[48]

As these authorities demonstrate, the increase in availability resulting from increased exports would not fully displace other sources of energy supply to international markets, as the Department's prior orders have implied, but instead increase the total supply and consumption of fossil fuel, potentially increasing total greenhouse gas emissions.[49] Moreover, were DOE to eschew analyzing the possibility for increased greenhouse gas emissions by adopting its usual approach to substitution impacts, it would not be shielded from challenge by past case law. While the court in *Sierra Club I* upheld the Department's analysis of life cycle emissions, in that case the challengers focused on the omission of renewables from the Life Cycle Report and did

[45] *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 736–40 (9th Cir. 2020).
[46] *Id.* at 736.
[47] *Id.*
[48] *Id.* at 738.
[49] *See* Gilbert & Sovacool, *supra* note 42, at 1671 (concluding that "emissions are not likely to decrease [from U.S. LNG exports] and may increase significantly due to greater global energy consumption, higher emissions in the US, and methane leakage").

not argue that exports would facilitate additional energy demand and fossil-fuel combustion.[50] *Sierra Club I* thus does not foreclose this challenge to DOE's analysis of substitution impacts and the Department should reevaluate how it conducts this analysis.

In considering CP2 LNG's application, DOE should therefore squarely address the possibility for increased greenhouse gas emissions and adjust its analysis under NEPA and the NGA accordingly. There is now extensive case law recognizing the importance of considering substitution impacts, and models in use by other agencies are available to analyze substitution and increased demand. As discussed in the prior section, other agencies including EPA, the Department of the Interior, and EIA have developed and applied energy market models that analyze these types of substitution effects.[51] Though these models generally do not analyze impacts on foreign supply and demand with the same granularity as they assess domestic markets, they can still be used to model market impacts in foreign countries.[52] A more complete analysis of substitution impacts along these lines would help DOE better assess the potential effects of CP2 LNG's application for export authorization and thus help ensure adequate review under NEPA and the NGA.

III. DOE Should Not Apply a Categorical Exclusion to the CP2 LNG Project

In 2020, DOE finalized a rule that would allow it to apply a categorical exclusion to all authorizations to export natural gas to non-FTA countries.[53] The rule rested on DOE's argument

[50] Sierra Club v. Dep't of Energy (*Sierra Club I*), 867 F.3d 189, 202 (D.C. Cir. 2017).

[51] *See supra* note 26 and accompanying text.

[52] *See, e.g.*, Peter Erickson, *U.S. Again Overlooks Top CO2 Impact of Expanding Oil Supply, But that Might Change*, STOCKHOLM ENV'T INST., (Apr. 30, 2016) https://perma.cc/FPD2-6PQW. The Department of Interior recently, for the first time, applied MarketSim to directly models impacts on foreign consumption and emissions. BUREAU OF OCEAN ENERGY MGMT., REVISED DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR COOK INLET LEASE SALE 258 at 47 (2021) ("MarketSim estimates that under the No Action Alternative, foreign oil consumption would be roughly 86.4 [million barrels] lower than the Proposed Action in total over the 32-year production period estimated for the Proposed Action.").

[53] DOE Categorical Exclusion Rule, 85 Fed. Reg. at 78,197.

that LNG exports "normally do not have significant [environmental] effects."[54] DOE justified this conclusion by claiming that upstream and downstream emissions are not reasonably foreseeable,[55] that the proper scope of DOE's environmental review of exports applications is limited to "marine transport effects" starting at the point of export delivery and extending to the territorial waters of the receiving country,[56] and that LNG exports would not increase global greenhouse gas emissions.[57] As described above in Sections I and II, these claims run contrary to available information, reasonable methodological approaches, and federal case law.

CP2 LNG has not requested a categorical exclusion in its application, and DOE should not apply it. The indirect effects of exports, including the impacts of induced upstream production and downstream consumption, fall within DOE's purview.[58] DOE is thus responsible for considering these indirect impacts and cannot exclude them from the scope of its environmental review. And on that basis, it cannot reasonably conclude, without further evaluation, that the environmental effects of the proposed project are necessarily insignificant.

Were DOE to apply a categorical exclusion to CP2 LNG's application, it would also open itself to legal challenge and create uncertainty for the applicant.[59] DOE's position in the categorical exclusion rule that only "marine transport effects" fall within the agency's purview is wholly inconsistent with both DOE's past position and D.C. Circuit case law.[60] By ignoring case law that clearly indicates that DOE is responsible for considering the indirect effects of exports, including upstream and downstream greenhouse gas emissions, the Department failed to consider

[54] *Id.* at 78,197.
[55] *Id.* at 78,200.
[56] *Id.* at 78,197, n.9.
[57] *Id.* at 78,201.
[58] *See supra* Section I.A.
[59] Alaska Ctr. for the Env't v. U.S. Forest Serv., 189 F.3d 851, 857 (9th Cir. 1999).
[60] *See supra* Section I.A.

an entire category of impacts in issuing its 2020 rule. DOE also failed to properly assess the significance of its action and document its claim that LNG export authorizations normally have insignificant impacts.

As the Ninth Circuit has explained, agencies must conduct a cumulative impacts analysis for the categorical exclusion at issue "as a whole" and "on a programmatic level,"[61] particularly "where the categorical exclusion is nationwide in scope."[62] In issuing the categorical exclusion rule, however, DOE "erred in assessing significance by failing to consider the extent to which the impact [of the export] on the environmental was highly controversial and the risks uncertain."[63] In particular, given the economic considerations that DOE's Life Cycle Report overlooks, and the extensive environmental impacts surrounding increases in LNG exports as recognized by the agency's own Addendum,[64] a court could well find that there is a "substantial dispute" that "casts serious doubt upon the reasonableness of [the] agency's conclusions."[65]

In sum, DOE's categorical exclusion rule was riddled with flaws, and DOE should refrain from applying it when considering CP2 LNG's application.

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[61] Sierra Club v. Bosworth, 510 F.3d 1016, 1027–30 (9th Cir. 2007).

[62] *Id.* at 1028.

[63] *Id.* at 1030–32.

[64] *See* DOE ADDENDUM, *supra* note 39. As noted above, DOE has previously recognized the "environmental concerns" documented in the Addendum, and instead argued that rejecting applications for export on this basis is "too blunt an instrument to address these environmental concerns efficiently." *Cheniere Marketing, LLC & Corpus Christi Liquefaction*, LLC, Order No. 3638, Docket No. 12-97-LNG, Final Opinion and Order Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Proposed Corpus Christi Liquefaction Project to Be Located in Corpus Christi, Texas, to Non-Free Trade Agreement Nations, at 197 (May 12, 2015).

[65] *Bosworth*, 510 F.3d at 1031 (quoting Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 736 (9th Cir. 2000)).

IV. DOE's and FERC's Authorizations for the CP2 LNG Project Are Connected Actions under NEPA that Must Be Considered Together

DOE and FERC should conduct a single review of the impacts of CP2 LNG's exports and facilities—including direct, upstream, and downstream greenhouse gas emissions—because DOE's authorization of LNG exports to non-FTA nations and FERC's authorization of LNG facility construction are connected actions under NEPA regulations. To demonstrate that FERC's approval of the LNG facility and DOE's authorization of LNG exports are connected actions that must be reviewed in the same environmental review document, "the initial task . . . is identifying the 'overall plan' or 'major federal action' that has allegedly been sub-divided."[66] In this instance the larger federal action is federal approval facilitating LNG export. As such, DOE should work with FERC to ensure that this information is contained in the EIS that the Commission will complete for CP LNG's terminal, interstate pipeline, and related facilities.[67] Connected actions must be considered together, and the failure to do so is an improper segmentation of federal action.

Under CEQ's regulations, agencies' environmental reviews must consider "connected actions."[68] Actions are connected if they "(i) Automatically trigger other actions which may require environmental impact statements[;] (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously[; or] (iii) Are independent parts of a larger action and depend on the larger action for their justification."[69] This provision ensures that environmental review encompasses the proper scope of the proposed action and prevents agencies from

[66] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 301 F. Supp. 3d 50, 67 (D.C. Cir. 2018).
[67] Notice of Intent to Prepare an Environmental Impact Statement for the Proposed CP2 LNG and CP Express Project, Request for Comments on Environmental Issues, and Schedule for Environmental Review, *Venture Global CP LNG, LLC*, Docket Nos. CP22-21 & CP22-22 (Feb. 9, 2022).
[68] 40 C.F.R. § 1501.9(e)(1). Previously, the NEPA regulations also required agencies to consider "cumulative" and "similar" actions. *Id.* § 1508.25(a)(2), (a)(3) (1978).
[69] *Id.* § 1501.9(e)(1).

breaking down a project and the associated environmental review into multiple "segments" that "individually [have] an insignificant environmental impact, but which collectively have a substantial impact."[70] The failure to include a connected action in an environmental review can result in a court finding the agency has improperly segmented its review and accordingly vacating the resulting agency action that relied on the improper review.[71]

Case law from both FERC and other agencies provides further detail on what constitutes improper segmentation. In reviewing whether the Commission had improperly segmented its review of modification projects to physically connected parts of a pipeline, the D.C. Circuit in *Delaware Riverkeeper Network v. FERC* noted that one segment could be analyzed independently if it "(1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects."[72] Correspondingly, in deciding whether actions were connected, court decisions involving other agencies have considered such factors as whether "the permits and permissions were 'justified by' a larger federal action" and whether "the federal projects are 'interdependent' and have a 'synergistic' environmental effect."[73] In practice, courts have often focused prominently on the independent utility test to evaluate connectedness, which like the second criteria in the NEPA regulations, centers on whether each project can or will proceed without the other. In *Delaware Riverkeeper*, the court's analysis of this prong focused

[70] Delaware Riverkeeper Network, Inc. v. Fed. Energy Regul. Comm'n, 753 F.3d 1304, 1314 (D.C. Cir. 2014).
[71] *Id.* at 1313.
[72] *Id*. at 1315 (quoting Taxpayer Watchdog v. Stanley, 819 F.2d 294, 298 (D.C. Cir. 1978), which assessed whether a NEPA review of a subway construction project in which plans for a large project were abandoned in favor of a shorter length of rail was sufficient without having analyzed potential further development of the line); *see also* Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430 (5th Cir. 1981) (applying same factors); Swain v. Brinegar, 542 F.2d 364 (7th Cir. 1976) (same).
[73] *Standing Rock*, 301 F.Supp. 3d at 67–68, 70–71 (also applying a substantial independent utility tests and assessing whether alterative consideration was constrained by segmentation).

on whether the projects at issue were "financially interdependent," explaining that "[t]he commercial and financial viability of a project when considered in isolation from other actions is potentially an important factor in determining whether the substantial utility factor has been met."[74] In the Ninth Circuit, "[t]he crux of the test is whether 'each of two projects would have taken place with or without the other."[75]

That standard for establishing whether actions are connected is met here. For one, DOE's and FERC's actions in this case lack independent utility. In the case of LNG exports, the two Section 3 applications are explicitly tied together by the applicant.[76] The export authorization is not sought untethered to a facility; rather, it is a request to export a certain quantity of LNG from a specific facility, based on the operational parameters of that facility.[77] The agencies themselves have also tied their own authorizations to one another's.[78] When DOE issues conditional orders,

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[74] *Delaware Riverkeeper*, 753 F.3d at 1316–17. In *Coalition on Sensible Transportation, Inc. v. Dole*, the regulations applied by the court defined "independent utility or independent significance" to mean a project "is useable and a reasonable expenditure even if no additional transportation improvements in the area are accomplished." 826 F.2d 60, 68 (D.C. Cir. 1987).

[75] Great Basin Mine Watch v. Hankins, 456 F.3d 955, 969 (9th Cir. 2006) (quoting Wetlands Action Network v. U.S. Army Corps of Eng'rs, 2222 F.3d 1105, 1118 (9th Cir . 2000)). For projects completed in phases, the Ninth Circuit has asked whether there is a "dependency . . . such that it would irrational, or at least unwise, to undertake the first phase if the subsequent phases were not also undertaken." Trout Unlimited v. Morton, 509 F.2d 1276, 1285 (9th Cir. 1974).

[76] CP2 LNG Application, *supra* note 3, at 2–3, 7–10.

[77] *Id.* at 10 ("CP2 LNG has included both phases of its Project in its FERC pre-filing proceeding and its formal FERC application. Accordingly, CP2 LNG requests here authorization to export the total volume of both phases of its Project."); *see also, e.g.*, *Sabine Pass Liquefaction, LLC*, Order No. 2961, Docket No. 10-111-LNG, Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas From Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations, at 3 (May 10, 2011) ("The permitted exports would be from liquefaction and related facilities to be constructed at the Sabine Pass LNG Terminal . . . .") [hereinafter Sabine Pass DOE Conditional Order No. 2961]; *Magnolia LNG, LLC*, Order No. 3909, Docket No. 13-132-LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Proposed Magnolia LNG Terminal to Be Constructed in Lake Charles, Louisiana, to Non-Free Trade Agreement Nations, at 1 (Nov. 30, 2016) [hereinafter Magnolia DOE Order No. 3909] ("Magnolia LNG seeks authorization to export the LNG by vessel from the proposed Magnolia LNG Terminal, which Magnolia intends to construct, own, and operate near Lake Charles, Louisiana (Project).").

[78] *See* Sabine Pass DOE Conditional Order No. 2961 ("Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas *From Sabine Pass LNG Terminal* to Non-Free Trade Agreement Nations" (emphasis added)); Magnolia DOE Order No. 3909, *supra* note 77 ("Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel *from the Proposed Magnolia LNG*

FERC relies on DOE's analysis of the public and economic benefits for its own public interest analysis.[79] Similarly, DOE always relies on FERC's analysis of environmental impacts in authorizing facilities.[80] Thus, both the applicant and the agencies already acknowledge how closely related and functionally interdependent the two approvals are.

In addition, while the D.C. Circuit's *Freeport* decision explicitly left the segmentation question open, it offered logical support for the connectedness of these actions. The court said: "[T]he Commission's NEPA analysis was an integral component of authorizing the export construction projects—*without which the DOE's separate authorization would be pointless*."[81] That is, the court in fact recognized in dicta that the DOE's authorization would not have independent utility if the facility itself were not authorized. This is a logical conclusion. The export application, as noted, is for export from a specific facility—the facility that the Commission reviews. If that facility cannot be built due to a lack of federal approval, the export requested in the application likewise cannot occur.

There is also reason to think the interdependence runs the other direction—that CP2 LNG's export terminal will not be built without authorization to export LNG to non-FTA countries. This is because the two authorizations are financially interdependent given the market dynamics of U.S. LNG exports. While FERC has previously argued that the export authorization

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Terminal to Be Constructed in Lake Charles, Louisiana, to Non-Free Trade Agreement Nations" (emphasis added)). Both orders make clear that the authorization is for an export from a specific terminal in the actual title of the order.

[79] *See Sabine Pass Liquefaction, LLC*, 139 FERC ¶ 61,039, at P 28 (2012) ("In conditionally granting long-term authorization to export LNG from Sabine Pass to non-free trade agreement nations, DOE found that there was substantial evidence of economic and public benefits such that the authorization was not inconsistent with the public interest. We recognize DOE's public interest findings in issuing our order.").

[80] *See* Procedures for Liquefied Natural Gas Export Decisions, 79 Fed. Reg. 48,132, 48,133 (Aug. 15, 2014). Given that FERC often relies on DOE's public interest analysis and DOE always relies on FERC's environmental review, the two actions at issue, FERC's construction authorization and DOE's export authorization, always occur contemporaneously. In fact, CP2 LNG submitted its applications to DOE and FERC on the same date. CP2 LNG Application, *supra* note 3, at 3.

[81] Sierra Club v. Fed. Energy Regul. Comm'n (*Freeport*), 867 F.3d 36,45 (D.C. Cir. 2016) (emphasis added).

and the facility are not connected actions because the facility can simply be used to export LNG to FTA countries if an approval to export to non-FTA countries is not granted,[82] this ignores the economics of U.S. LNG exports. Of the top 15 U.S. LNG export destinations in 2020, only three of the countries have free trade agreements with the U.S.[83] South Korea, an FTA country, is currently the top purchaser of U.S. LNG, having received 14.8% of exports since 2016.[84] However, China, a non-FTA country, is a close second (receiving 10.7% of total exports) and recently lowered its tariffs on natural gas imports.[85] Global demand for natural gas is expected to continue to grow, largely driven by the industrial sector in non-FTA countries such as China, India, and other emerging Asian markets.[86] Given these market dynamics, it seems implausible to suggest that a facility would have the same (or even similar) commercial viability were it to be denied approval to export LNG to most of the highest-purchasing nations. That is, whether CP2 LNG's facility would actually be built as proposed may well be functionally and financially dependent on whether it receives authorization from DOE to export gas to non-FTA nations.

Although no case law specifically assesses whether it is improper for FERC and DOE to segment their respective Section 3 analyses (although the issue is presented in a pending

[82] *Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202, at P 181, *reh'g denied*, 171 FERC ¶ 61,136 (2020).

[83] *Top U.S. LNG Destinations – Past 12 Months*, GLOBAL LNG HUB, https://perma.cc/2BKS-LX9M (last visited Jan. 29, 2022) [hereinafter *Top LNG Destinations*] (using DOE LNG Monthly data for the past twelve months through November 2020 to chart export destinations). DOE's LNG Monthly shows the same is true when looking at total exports since 2016, with only South Korea, Chile, and Mexico making the list, and accounting for only 24.7% of exports. U.S. DEP'T OF ENERGY, LNG MONTHLY 2 (Jan. 2022), https://perma.cc/2QK9-WZPJ [hereinafter 2022 LNG MONTHLY].

[84] *Top LNG Destinations*, *supra* note 83; DOE LNG MONTHLY, *supra* note 83, at 4.

[85] 2022 LNG MONTHLY, *supra* note 83, at 4; *Asia Became the Main Export Destination for Growing U.S. LNG Exports in 2020*, ENERGY INFO. ADMIN. (Mar. 15, 2021), https://perma.cc/82FA-6EM7.

[86] INT'L ENERGY AGENCY, GAS MARKET REPORT Q3-2021, at 10–14 (2019), https://perma.cc/2CDY-F38F. The U.S. has free trade agreements that require national treatment of natural gas with the following countries: Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea, and Singapore. *See* Including Short-Term Export Authority in Long-Term Authorizations for the Export of Natural Gas on a Non-Additive Basis, 88 Fed. Reg. 2243, 2243 n. 3 (Jan. 12, 2021).

challenge),[87] the D.C. Circuit has previously indicated that approvals from multiple agencies could be connected. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, petitioners argued that NEPA required a comprehensive action review of the connected and similar actions related to the Dakota Access Pipeline, including permits and permissions granted by the Army Corps of Engineers and the Fish and Wildlife Service.[88] The court agreed that multiple agencies could collectively perform connected actions,[89] although in *Standing Rock* it found the actions at issue there were not connected.[90] Furthermore, because FERC is performing its analysis under authority that was expressly delegated by DOE,[91] the argument for the connectivity of the actions of these two agencies is even stronger.[92] Here, DOE retains all authority under Section 3 and has merely delegated some of that authority to FERC, rather than two agencies exercising independently granted powers.

Thus, there is good reason to believe that construction and export authorizations are connected actions, such that DOE and FERC should perform a single, joint review that assesses

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[87] Petitioners' Opening Brief at 32, Ctr. for Biological Diversity v. Fed. Energy Regul. Comm'n, No. 20-1379 (D.C. Cir. Sept. 13, 2021).

[88] 301 F.Supp.3d 50, 64, 66 (D.C. Cir. 2018).

[89] *Id.* at 67 (citing Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 51 (D.C. Cir. 2015) (agreeing that a "claim that 'the connected action regulation require[s] that the federal actions in this case' . . . should have considered connected and 'analyzed together' under NEPA" was "an accurate statement of the connected actions doctrine")).

[90] Notably, much of the analysis in *Standing Rock* emphasized that there was limited federal involvement (only a few portions of the pipeline crossed jurisdictional land or waters), and that portions could be re-routed if federal approval was denied, and so each permit had independent utility as "each would allow a portion of pipeline to proceed as planned, while any denial would result in re-routing—with no apparent impact on the other federally regulated components of the project." *Id.* at 68–69. As Michael Berger and Jessica Wentz note, however, "the court's decision in *Standing Rock* was clearly wrong, as it failed to substantiate its assumption that the pipeline would be re-routed in the absence of federal approvals." Michael Burger & Jessica Wentz, *Evaluating the Effects of Fossil Fuel Supply Projects on Greenhouse Gas Emissions and Climate Change under NEPA*, 44 WM. & MARY ENV'T L. & POL'Y REV. 423, 474 n.248 (2020). The validity of the court's conclusions may become clearer this year as federal agency complete their new environmental reviews after courts struck down previous approvals.

[91] U.S. Dep't of Energy, Delegation Order No. 0204-112, (a) (Feb. 22, 1984), https://perma.cc/UB9G-4GZJ (delegating authority to FERC, now rescinded); U.S. Dep't of Energy, Delegation Order No. 00-004.00A, § 1.21.A (May 16, 2006), https://perma.cc/N579-U4MF (re-delegating authority from the Secretary to FERC).

[92] If delegation invariably created segmented actions, any agency could delegate partial authority over an issue in order to avoid full NEPA review.

all of the environmental impacts of CP2 LNG's exports and terminal operation.[93] This includes—though is of course not limited to—all greenhouse gas emissions, including direct emissions from the facility along with upstream and downstream emissions resulting from the export license. DOE and FERC should thus produce an environmental review document that assesses the impacts of the increase in exports alongside the impacts of the terminal construction and operation.

Conclusion

DOE should fully consider the environmental and climate impacts of CP2 LNG's proposed exports, including analyzing the potential effects of indirect greenhouse gas emissions and using reasonable assumptions to quantify those emissions. The Department should also conduct a substitution analysis that considers the possibility that increased LNG exports may lead to increased total greenhouse gas emissions. In evaluating CP2 LNG's application, DOE should refrain from applying a categorical exclusion. Finally, DOE and FERC should conduct a single, unified analysis of the environmental effects of CP2 LNG's applications for exports and LNG facility construction.

Respectfully submitted,

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[93] *See also* Sabin Center for Climate Change Law at Columbia Law School, Comment Letter on DOE's Proposed Revisions to its National Environmental Policy Act Implementing Procedures Regarding Natural Gas Exports at 5 (June 1, 2021).