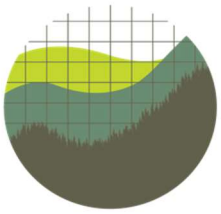

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

December 22, 2022

**To**: U.S. Department of Energy

**Re:** Comments Supporting Rescission of Categorical Exclusion for Discretionary LNG Exports, in Response to Request for Information, 87 Fed. Reg. 68,385 (Nov. 15, 2022)

In response to the Department of Energy's (DOE or the Department) request for information on its categorical exclusions, the Institute for Policy Integrity at New York University School of Law[1] recommends that the Department rescind its 2020 regulation establishing categorical exclusion B5.7 for discretionary authorizations to export liquefied natural gas (LNG Export Categorical Exclusion Rule).[2] 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.

In an era of decarbonization, it is crucial that DOE consider climate change impacts as part of the public-interest review for LNG exports.[3] In particular, long-term expansion of export capacity may lock-in fossil-fuel usage over the long term and thereby impede global decarbonization efforts. But the Department erroneously argued in the LNG Export Categorical Exclusion Rule that indirect climate effects are not relevant to its assessment of applications for export authorization, and based its sweeping categorical exclusion on that improper legal conclusion. As discussed below, a proper understanding of the Department's broad authority compels the agency to rescind the LNG Export Categorical Exclusion Rule and robustly consider impacts on climate change as part of its authorization process.

**DOE Should Rescind the LNG Export Categorical Exclusion Rule**

The LNG Export Categorical Exclusion Rule is contrary to law and rests on a misinterpretation of the Department's authority in natural-gas export permitting. Under Section 3 of the Natural Gas Act (NGA), the Department is responsible for reviewing applications to export natural gas, including liquefied natural gas (LNG).[4] For most applications,[5] that discretion is broad: The Department should weigh the merits of the proposed export and grant the application if "it finds that the proposed exportation" is "consistent with the public interest."[6] This authority creates a duty for the Department to "consider the public interest [that] is broader

[1] This document does not purport to represent the views, if any, of New York University School of Law.
[2] National Environmental Policy Act Implementing Procedures, 85 Fed. Reg. 78,197 (Dec. 4, 2020) [hereinafter LNG Export Categorical Exclusion Rule].
[3] *See* LAURA A. FIGUEROA & SARAH LADIN, INST. FOR POL'Y INTEGRITY, THE PUBLIC INTEREST REVIEW FOR LNG-RELATED AUTHORIZATIONS i (2022), https://perma.cc/8VBZ-WUEY.
[4] 15 U.S.C. § 717b.
[5] The Natural Gas Act provides that applications to export natural gas to a nation with "which there is in effect a free trade agreement requiring national treatment for trade in natural gas . . . shall be granted without modification or delay." *Id.* § 717b(c). Exports to free-trade-agreement nations currently constitute less than 25% of the nation's LNG exports. U.S. DEP'T OF ENERGY, LNG MONTHLY 4 (Nov. 2022), https://perma.cc/G3WE-X3H8.
[6] 15 U.S.C. § 717b(a).

than promoting a plentiful supply of cheap gas."[7] The Department has recognized its "considerable latitude" [8] to account for many "factors bearing on the public interest" under Section 3.[9]

Yet in the LNG Export Categorical Exclusion Rule, the Department relied on a narrow interpretation of its authority that lacks legal justification and is inconsistent with agency practice and judicial precedent. In that rule, the Department claimed it has authority to consider only "marine transport effects" in the environmental reviews of Section 3 exports applications.[10] DOE stated that impacts occurring both before and after the transport itself—including the production and combustion of the transported fossil fuels—fall outside the scope of the agency's NEPA review because the Department allegedly "has no authority to prevent" them.[11] This assertion of authority in the LNG Export Categorical Exclusion Rule was original—prior to 2020, the Department had not argued that its public-interest review was so narrowly focused.

The Department pointed to no specific authority for its claim that it cannot consider the broader effects of LNG exports on the energy system and greenhouse gas emissions. Instead, the Department pointed to two general sources of authority to justify the categorical exclusion: a Council on Environmental Quality ("CEQ") regulation[12] and a Supreme Court decision[13] concerning the scope of NEPA review. But neither citation justifies the Department's sweeping categorical exclusion. The CEQ regulation that the Department relied upon—a regulation issued in 2020 that advised agencies "generally" not to consider effects that are "remote in time, geographically remote, or the product of a lengthy causal chain"[14]—has since been rescinded.[15] In that rescission, CEQ explained that its 2020 rule "unduly limit[ed] agency discretion" to assess the "indirect and cumulative nature of many environmental impacts" that agencies have considered since the inception of NEPA review in the 1970s.[16]

The Supreme Court decision that the Department relied upon, *Department of Transportation v. Public Citizen*, is similarly unpersuasive as a legal justification for the LNG Export Categorical Exclusion Rule. In *Public Citizen*, the Supreme Court confronted the narrow circumstance in which the defendant agency—there, the Federal Motor Carrier Safety

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[7] *Cf.* Fla. Gas Transmission Co. v. Fed. Energy Regul. Comm'n, 604 F.3d 636, 650 (D.C. Cir. 2010) (Brown, J., concurring in part and dissenting in part) (referring to FERC's Section 7 authority).
[8] *The Department of Energy's Strategy for Exporting Liquefied Natural Gas*, 113th Cong. 76 (2013) (statement of Christopher Smith, Acting Assistant Sec'y for Fossil Energy, Office of Fossil Energy, Dep't of Energy), https://perma.cc/L3GC-DB9W.
[9] *E.g.*, *Phillips Alaska Natural Gas Corp. & Marathon Oil Co.*, Order No. 1473, Docket No. 96-99-LNG, Order Extending Authorization to Export Liquefied Natural Gas from Alaska, at 47–56 (Apr. 2, 1999) (recognizing Department's authority to consider "any . . . factors bearing on the public interest").
[10] LNG Export Categorical Exclusion Rule, 85 Fed. Reg. at 78,197.
[11] *Id.* at 78,198.
[12] *Id*. at 78,201 (citing 40 C.F.R. 1508.1(g)). As explained below, 40 C.F.R. 1508.1(g) has since been modified and no longer contains the text that the Department relied upon to justify the LNG Export Categorical Exclusion Rule.
[13] *Id.* at 78,197 (citing Dep't of Transp. v. Pub. Citizen, 541 U.S. 752 (2004)).
[14] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,375 (July 16, 2020) (promulgating revisions to the definition in 40 C.F.R. 1508.1(g) of "effects" to be considered in NEPA analysis).
[15] National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453, 23,469–70 (Apr. 20, 2022) [hereinafter CEQ 2022 Rule] (restoring in pertinent part the pre-2020 definition of "effects" in 40 C.F.R. 1508.1(g)).
[16] *Id.* at 23,466.

Administration (FMCSA)—had no discretion to consider the activity that causes the effect in question: the environmental impacts of international motor travel.[17] Relying on this expressly limited grant of authority, the Supreme Court held that FMCSA was not required to evaluate environmental impacts under NEPA that it lacked authority to consider under its statutory mandate, since assessing those impacts would not be "useful[] . . . to the [agency's] decisionmaking process."[18] Accordingly, *Public Citizen* holds that NEPA does not require an agency to assess environmental impacts that it lacks discretion to weigh in its decision.

That narrow holding does not apply to the Department's reviews under Section 3. As discussed above, Section 3 grants the Department broad authority to consider "the public interest" in deciding whether to grant an export authorization.[19] Unlike the operative statutory provisions in *Public Citizen*,[20] Section 3 of the NGA does not prohibit the Department from considering a broad range of environmental impacts when exercising its statutory discretion. *Public Citizen*'s narrow holding therefore does not limit the Department from considering the full range of environmental impacts in its decisionmaking.[21] As the Council on Environmental Quality recently explained, *Public Citizen* does not limit agencies from "consider[ing] a broad[] range of effects" when exercising statutory authority.[22]

Both judicial and agency precedent confirm the Department's broad authority to consider indirect environmental impacts—including downstream and upstream greenhouse gas emissions—in Section 3 authorizations. The U.S. Court of Appeals for the D.C. Circuit has explicitly stated that "the potential environmental effects flowing from greater natural gas exports," including greenhouse gas emissions from increased consumption and production, are properly directed to DOE under its Section 3 review.[23] And when faced with challenges to the Department's consideration of indirect greenhouse gas emissions under Section 3, the D.C. Circuit has not questioned DOE's authority to consider those impacts.[24] The Department itself has also previously recognized that it may consider downstream and upstream impacts in its

[17] 541 U.S. at 766 (explaining that FMCSA "must certify any motor carrier that can show that it is willing and able to comply with the various substantive requirements for safety and financial responsibility," regardless of environmental impacts).
[18] *Id*. at 767.
[19] 15 U.S.C. § 717b(a). *See also supra* note 7 and accompanying text.
[20] *See supra* note 17 (discussing FMCSA authority under 49 U.S.C. § 13902(a) at issue in *Public Citizen*).
[21] The Department read *Public Citizen* much more broadly in the LNG Export Categorical Exclusion Rule, citing the case for the proposition that an agency should only consider "effects that are reasonably foreseeable and have a sufficiently close causal connection" to the contemplated action. LNG Export Categorical Exclusion Rule, 85 Fed. Reg. at 78,197.
[22] *See* CEQ 2022 Rule, 87 Fed. Reg. at 23,463–64 (explaining that a broad reading of *Public Citizen* "is not compelled by the opinion").
[23] Sierra Club v. Fed. Energy Regul. Comm'n, 827 F.3d 59, 68 (D.C. Cir. 2016) (concluding that a challenge to the consideration of indirect greenhouse gas emissions from increased exports should be directed to DOE's export authorization and not to the Federal Energy Regulatory Commission's related approval of the export terminal). *See also* Sierra Club v. Fed. Energy Regul. Comm'n, 867 F.3d 36, 47 (D.C. Cir. 2016) (same).
[24] Sierra Club v. Dep't of Energy, 867 F.3d 189 (D.C. Cir. 2017) (*Sierra Club I*); Sierra Club v. Dep't of Energy, 703 Fed. Appx. 1 (D.C. Cir. 2017) (*Sierra Club* II). Relatedly, the D.C. Circuit has consistently held that FERC must consider indirect greenhouse gas emissions under Section 7 of the Natural Gas Act. Sierra Club v. Fed. Energy Regul. Comm'n, 867 F.3d 1357, 1372–73 (D.C. Cir. 2017); Birckhead v. FERC, 925 F.3d 510, 518–19 (D.C. Cir. 2019); Food & Water Watch v. FERC, 28 F.4th 277, 285–86 (D.C. Cir. 2022).

environmental review process.[25] And before promulgating the LNG Export Categorical Exclusion Rule, DOE had not asserted that those effects fall beyond its purview.

Given that the Department's justification for the LNG Export Categorical Exclusion Rule does not withstand legal scrutiny, the Department should rescind that rule and fully analyze indirect environmental impacts (including effects on climate change) when evaluating applications for export authorization. Indeed, the long-term climate impacts of increased LNG export can be substantial.[26] In similar contexts, numerous federal courts have held that agencies must consider the greenhouse gas emissions resulting from the increased energy consumption that results from investments in fossil-fuel infrastructure.[27] Other agencies also routinely assess downstream and upstream greenhouse gas emissions; their practices provide guidance on how DOE can do so robustly and consistently.[28]

The attached Policy Integrity report titled "The Public Interest Review for LNG-Related Authorizations" provides further analysis of the deficiencies in the Department's environmental reviews under Section 3 and additional support for rescinding the LNG Export Categorical Exclusion Rule. In particular, Part III.B on pages 28–34 outlines the Department's legal obligations to consider climate impacts under Section 3. As that section explains, the Department must robustly consider downstream and upstream greenhouse gas emissions in its Section 3 reviews.[29] Relying on that discussion, Part VI.A on pages 51–52 provides legal support for rescinding the LNG Export Categorical Exclusion Rule.

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[25] In both *Sierra Club I*, 867 F.3d 189, and *Sierra Club II*, 703 Fed. Appx. 1, the Department defended its consideration of upstream and downstream greenhouse gas emissions without arguing that such consideration lies beyond the scope of the agency's Section 3 authority.

[26] Shuting Yang et al., *Global Liquefied Natural Gas Expansion Exceeds Demand for Coal-to-Gas Switching in Paris Compliant Pathways*, ENV'T RSCH. LETTERS, June 7, 2022, at 6–7 (explaining that LNG exports could increase total greenhouse gas emissions, potentially substantially, over the next three decades if they displace carbon-free sources rather than fossil fuels). *See also* FIGUEROA & LADIN, *supra* note 3, at i ("LNG exports stimulate both natural gas extraction at home and consumption abroad, while locking in capital intensive fossil-fuel infrastructure with the potential to operate (and emit pollution) for decades."); *id*. at 32 ("Beyond displacing other resources, the addition of natural gas to the market also increases the total global supply of fossil-fuel energy.").

[27] FIGUEROA & LADIN, *supra* note 3, at 33–34 (providing NEPA caselaw rejecting agency analyses that had concluded that investment in fossil-fuel infrastructure would not increase greenhouse gas emissions). *See also* 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, 455–76 (explaining that "case law generally supports the treatment of both upstream and downstream emissions as indirect effects of transportation infrastructure"); Jayni F. Hein & Natalie Jacewicz, *Implementing NEPA in the Age of Climate Change*, 10 MICH. J. ENV'T & ADMIN. L. 1, 18–39 (2020) (assessing regulatory and judicial precedent on consideration of downstream and upstream emissions).

[28] FIGUEROA & LADIN, *supra* note 3, at 29–32; Burger & Wentz, *supra* note 27, at 455–76.

[29] This section of the report details how the Department's reviews fell short of the robust analysis required even before the Department promulgated the LNG Export Categorical Exclusion Rule in 2020. *See* FIGUEROA & LADIN, *supra* note 3, at 29–34. Therefore, in addition to rescinding the LNG Export Categorical Exclusion Rule, the Department should take additional steps to improve its assessment of climate impacts under Section 3. These include consistently assessing both downstream and upstream emissions, and considering energy-substitution impacts rather than falsely assuming that the exported gas will simply substitute for other fossil-fuel sources. *Id.*

Sincerely,

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Enclosure: LAURA A. FIGUEROA & SARAH LADIN, INST. FOR POL'Y INTEGRITY, THE PUBLIC INTEREST REVIEW FOR LNG-RELATED AUTHORIZATIONS (2022)