

ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1186

IN THE
**United States Court of Appeals for
the District of Columbia Circuit**

SIERRA CLUB,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,

Respondent.

DOMINION COVE POINT LNG, LP
AMERICAN PETROLEUM INSTITUTE

Respondent-intervenors

On Petition for Review of Orders of the Department of Energy

**BRIEF FOR RESPONDENT-INTERVENOR
AMERICAN PETROLEUM INSTITUTE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**A. PARTIES**

1. The parties to the proceeding are listed in Petitioners' opening brief.

2. Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the American Petroleum Institute (API) states that it is a not-for-profit trade association based in Washington, D.C. charged with promoting the interests of its over 650 members in the United States and around the world. API is not a publicly held corporation, has no parent companies, and no companies have a ten percent or greater ownership interest in API.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the previously submitted briefs of Petitioner and Respondent.

C. RELATED CASES

Respondent DOE's brief, at ii, lists the related cases.

/s/ John Longstreth

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GLOSSARY

API	Respondent-Intervenor the American Petroleum Institute
Authorizing Order	DOE Office of Fossil Energy, <i>Dominion Cove Point LNG, LP</i> , DOE/FE Docket No. 11-128-LNG, Order No. 3331-A (May 7, 2015)
DOE	United States Department of Energy
Dominion Cove Point	Respondent-Intervenor Dominion Cove Point LNG, LP
Dom'n Cove Pt. App'n	Application of Dominion Cove Point LNG, LP for Long-Term Authorization to Export Liquefied Natural Gas, DOE/FE Docket No. 11-128-LNG (Oct. 3, 2011)
DOE	Department of Energy
EA	Environmental Assessment for the Cove Point Liquefaction Project, FERC Docket No. CP13-113-000 (May 15, 2014)
FERC	Federal Energy Regulatory Commission
JA	Joint Appendix
LNG	Liquefied natural gas
NEPA	National Environmental Policy Act
Rehearing Order	DOE Office of Fossil Energy, <i>Dominion Cove Point LNG, LP</i> , FE Docket No. 11-128-LNG, Order No. 3331-B (Apr. 18, 2016)

INTRODUCTION

Petitioner Sierra Club frames its petition as a challenge to the adequacy of the Department of Energy (DOE)'s environmental review of the Cove Point LNG export project, but its true goal is to slow or eliminate development of all forms of fossil fuels and related infrastructure. Sierra Club has branded this tri-partite campaign “Beyond Natural Gas,” “Beyond Coal” and “Beyond Oil.”¹ As these names suggest, Sierra Club's ultimate concern is not the adequacy of reviews under the National Environmental Policy Act (NEPA), but instead slowing (if not ending) the development of fossil fuels and infrastructure to transport or use fossil fuels – despite decades of safe and reliable use of these fuels and their continued need to serve the public interest. Sierra Club has thus protested in nearly all of the LNG export project dockets pending before DOE, this Court, and other agencies.²

The environmental review of a single LNG project is not the proper vehicle to debate or decide whether our country should transition from fossil fuels to other

¹ See Sierra Club website, <http://www.sierraclub.org/beyond-fossil-fuels> (last visited Jan. 4, 2017).

² Sierra Club unsuccessfully challenged the Federal Energy Regulatory Commission (FERC)'s approval of the Cove Point LNG export facility, *see EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016), and a number of other facilities, *see, e.g., Sierra Club v. FERC*, 827 F. 3d 36 (D.C. Cir. 2016), and has several pending challenges to other DOE approvals of LNG exports, all styled *Sierra Club v. DOE*, *see* Nos. 15-1489 (Freeport), 16-1252 (Sabine Pass I), 16-1253 (Corpus Christi), and 16-1426 (Sabine Pass II).

energy sources. Sierra Club attempts to make it so by wrongly suggesting that exporting LNG from Cove Point and other facilities will be the *cause* of dramatic increases in domestic natural gas production and demand for its use overseas, rather than their *result*. Sierra Club would have DOE engage in a fruitless effort to speculate how much incremental natural gas production would be stimulated in particular locations by the incremental overall demand created by access to overseas markets via the Cove Point project, and then try to assess the alleged environmental impacts of this speculative incremental production increase. Sierra Club ultimately has no interest in whether this guesswork would lead to a meaningful or useful analysis, as its goal is to stop the activity altogether, not to mitigate its environmental impacts.

The export capacity at issue in this proceeding is one of literally thousands of potential incremental drivers of natural gas supply and demand on the fully integrated and interconnected North American natural gas grid. DOE properly recognized that the specific upstream effects of this one source were too uncertain and indefinite to inform its analysis meaningfully, and properly limited the analysis to the reasonably foreseeable consequences of the project. Because DOE's review fully complied with NEPA, the petition for review should be denied.

STATEMENT OF FACTS

API adopts the facts stated in DOE's brief, at 7-30, adding the following facts relevant to API's participation.

API's members comprise the very oil and natural gas industry that Sierra Club seeks to eliminate. Throughout its nearly 100-year history, API has encouraged the safe and responsible development of oil and natural gas resources by, among other things, developing, publishing and revising nearly 700 consensus-based industry standards to guide development of America's natural gas resources in an environmentally responsible manner.

According to the U.S. Energy Information Administration, U.S. natural gas production increased from 24.7 trillion cubic feet in 2007 to 32.9 trillion cubic feet in 2015, an increase of nearly 33 percent in only eight years.³ Production from shale formations rose from 1.3 trillion cubic feet in 2007 to 5.3 trillion cubic feet in 2010, and then to 15.2 trillion cubic feet in 2015.⁴ This significant expansion of natural gas production has led to a number of proposals to export natural gas as LNG. In September 2011, well after this substantial increase in production was underway, Dominion filed its LNG export application.

³ U.S. ENERGY INFORMATION ADMIN., U.S. Natural Gas Gross Withdrawals, <http://www.eia.gov/dnav/ng/hist/n9010us2A.htm> (last visited Jan. 4, 2017).

⁴ U.S. ENERGY INFORMATION ADMIN., U.S. Shale Production, http://www.eia.gov/dnav/ng/hist/res_epg0_r5302_nus_bcfa.htm (last visited Jan. 4, 2017).

Using interconnections to major interstate pipelines operated by Transcontinental Pipeline Co. (Transco) and others, Dominion Cove Point's existing and future customers will be able to source their gas from a wide range of U.S. locations, depending on market forces and circumstances at any given time. EA at 18, JA __; Dom'n Cove Pt. App'n at 8-9.⁵ The Transco pipeline system, one of the largest natural gas transmission systems in the United States, transports approximately 8.4 million dekatherms of natural gas produced in the Gulf Coast, Mid-Continent, and Appalachian regions across approximately 10,500 miles of pipeline.⁶

SUMMARY OF ARGUMENT

DOE correctly concluded that NEPA does not require it to evaluate specific potential environmental impacts of incremental natural gas production that might occur somewhere at some time solely to provide fuel for liquefaction and export via the Cove Point project. Wrongly asserting that DOE "fail[ed] to provide any NEPA analysis of exports' effects whatsoever," Pet. Br. at 42, Sierra Club argues that since the "exported gas must come from somewhere," *id.* at 38, DOE was

⁵ DOE adopted FERC's EA on November 5, 2014. Authorizing Order at 82, JA __.

⁶ THE WILLIAMS COS., INC., Transco, <http://co.williams.com/operations/atlanticgulf-operations/transco/> (last visited Jan. 4, 2017).

required to undertake an analysis of the environmental effects of this natural gas production at the level of “individual gas plays.” *Id.* at 46.

DOE acknowledged that the Cove Point and other LNG export authorizations might induce additional domestic production, and discussed the nature of these indirect “upstream” impacts, but correctly concluded that U.S. natural gas production is expected to rise with or without exports, Authorizing Order at 85, JA ___, and that it cannot predict with any reasonable certainty where or by how much production would increase as a result of exports as opposed to all of the other economic factors driving production decisions. *See id.* at 83, JA ___. DOE thus properly did not attempt a quantitative analysis of the environmental impacts of the unknowable marginal additional natural gas development activities associated with exports. *Id.* at 83-84, JA ___.

By suggesting that LNG exports from Cove Point are the cause, rather than the result, of significant increased natural gas production, Sierra Club reverses the arrow of causation. Dominion’s investment of billions of dollars in an LNG facility is not based on the hope of additional production, but on the recognition that substantial production increases have *already* occurred, making natural gas available for export. Even if the option to export induces incremental production, DOE correctly concluded that any assessment as to the actual location and quantity of that incremental production, as opposed to the very significant production

growth already taking place in the highly interconnected natural gas markets, would be highly speculative and could not contribute meaningfully to an environmental analysis.

Sierra Club also ignores that federal and state agencies other than DOE are responsible for regulating the exploration for and production of natural gas in the United States. These agencies will regulate any incremental increase stimulated by Cove Point or any other LNG export project.

ARGUMENT

I. NEPA Does Not Require DOE To Engage In Unfounded Speculation About The Location And Quantity Of Incremental Upstream Production.

A. The development of LNG export projects is the result of substantial increases in domestic natural gas production, not its cause.

NEPA requires that a federal agency evaluate the potential environmental effects of its decision before taking a federal action. 42 U.S.C. § 4332(2)(C). Implementing regulations require evaluation of “indirect effects” that are “*caused by the action and are later in time or further removed in distance, but are still reasonably foreseeable.*” 40 C.F.R. § 1508.8(b) (emphases added).

Sierra Club incorrectly asserts that DOE’s environmental review of the Cove Point project should have considered, as “indirect effects” of the project, specific incremental upstream gas production activities “induced” by Cove Point. Pet. Br.

at 36-55. As noted, however, domestic natural gas production has increased approximately 33% since 2007, and shale gas production more than quadrupled between 2007 and 2010, then nearly tripled again by 2015, thus causing LNG exports rather than the other way around.

LNG project developers began moving toward LNG exports in 2010, some three years after the shale boom began. Two export applications were filed with DOE in 2010, and five more, including Dominion Cove Point's, followed in 2011.⁷ Dominion Cove Point's application confirms that "plentiful, inexpensive supplies of domestic gas" discouraged LNG imports, causing infrastructure developers "to consider plans to offer services for the export of domestic natural gas." Dom'n Cove Pt. App'n, at 3-4, JA __. No project developer or lender would risk investing billions of dollars to construct liquefaction and export facilities without reasonable certainty that the necessary feed gas was already available.

DOE also properly assessed potential downstream environmental impacts through its Life Cycle analysis, and properly determined that a more specific comparative analysis would be "too speculative to inform the public interest." Authorizing Order at 93, JA __. Such speculation would include how the use of

⁷ Sabine Pass Liquefaction, LLC, filed the first application at to export LNG from the Lower 48 States on August 11, 2010. DOE/FE Docket No. 10-85-LNG. All of the long-term LNG export applications are available at https://energy.gov/sites/prod/files/2016/12/f34/Summary%20of%20LNG%20Export%20Applications_0.pdf (last visited Jan. 4, 2017).

various fuel types might be affected worldwide by these exports, and the degree to which non-combustive uses would be made of exported natural gas (for example, API members use natural gas overseas as a feedstock to manufacture chemicals, and also store natural gas abroad). It would also entail uncertain predictions about the actions and policies of foreign governments with respect to the combustion and use of natural gas within their territories. DOE properly determined that such broad speculation was beyond its reasonable NEPA obligations.

B. Sierra Club's position is unsupported in the case law.

Even if there were some incremental production stimulated by exports, that activity is not “caused by” the Dominion Cove Point project for NEPA purposes. The scope of NEPA review is governed by the familiar doctrine of proximate causation, requiring the agency to “draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not,” and requiring a reviewing court to defer to this line-drawing unless it is arbitrary and capricious. *See Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004). This Court has confirmed that an agency need not “examine everything for which the [project] could conceivably be a but-for cause.” *Sierra Club v. FERC*, 827 F. 3d at 47.

DOE reasonably applied this standard in approving the Cove Point project. Recognizing that particular sources of feed gas for the project are neither

reasonably foreseeable nor quantifiable, DOE concluded that NEPA does not require a full quantitative analysis of these upstream activities, Authorizing Order at 83-84, JA ___, and recognized that substantial quantities of natural gas will be produced in the U.S. “regardless of how [DOE] rules on Dominion Cove Point’s Application.” Rehearing Order 20, JA ___. DOE’s reasoning on the point is also fully consistent with the Second Circuit’s decision in *Coal. for Responsible Growth and Res. Conservation v. FERC*, 485 Fed. Appx. 472, 474 (2nd Cir. 2012), which held that such upstream activities are not closely enough related to a natural gas infrastructure project to warrant, or even permit, a meaningful NEPA analysis of them.

DOE’s legal analysis of the causation issue is also fully consistent with the facts outlined above: a substantial increase in U.S. natural gas production predated and led to the LNG export trend, and is expected to continue whether or not particular LNG export projects go forward, for reasons including increased domestic demand for natural gas. DOE’s conclusions that any incremental increases in production would not be closely enough linked to the project to require their analysis, and that particular incremental sources could not be identified to allow for meaningful analysis, are reasonable and command deference.

II. There Is No Gap In Regulation If DOE Does Not Quantify The Environmental Impacts of Induced Production In This Case.

State and federal agencies have directly regulated natural gas production for decades, including by referencing technical standards that API has developed based on years of experience in natural gas operations.⁸ For example, in Pennsylvania, the Department of Environmental Protection oversees natural gas production on state and private lands. *See* 58 Pa. Const. Stat. § 3211(a)(requiring permit to drill any natural gas well). In addition to operating under a state's general oversight of natural gas production, well operators must comply with a myriad of state regulatory programs, including water quality standards, waste water management, programs mandating disclosure of the chemicals that operators use in hydraulic fracturing, regulations for emissions of excessive gas through venting or flaring, and standards for drilling, operation and abandonment of natural gas wells.⁹

⁸ SEE CONG. RESEARCH SERV., AN OVERVIEW OF UNCONVENTIONAL OIL AND NATURAL GAS: RESOURCES AND FEDERAL ACTIONS at 10 (Apr. 22, 2015) (“States are the principal regulators of oil and gas production activities on state and private lands ... The federal government ... has responsibility for overseeing oil and gas development on federally managed lands”).

⁹ RESOURCES FOR THE FUTURE, THE STATE OF STATE SHALE GAS REGULATION (2013), available at http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-Rpt-StateofStateRegs_Report.pdf (last visited Jan. 4, 2017).

III. Sierra Club's Position Makes Sense Only In The Context Of An Effort To Limit Or Eliminate Natural Gas Production And Not In The Context Of Improving The Environmental Review Of The Cove Point Project.

As set out above, at 1 & nn.1-2, Sierra Club has made clear its goal to limit or eliminate domestic natural gas production and related infrastructure. Hamstringing the development of LNG projects already found to be in the public interest by forcing DOE to engage in impossible, fruitless or duplicative environmental review might further that goal. It would not, however, further NEPA's goal that DOE consider the effects of the particular activities whose causal connection to the project is close enough that they can be identified with sufficient concreteness and specificity to permit useful analysis. By urging that speculative and indefinite purported effects also must be analyzed, Sierra Club seeks to contort NEPA's focus on process into a weapon allowing a broad assault on the use of fossil fuels. Such a result is inconsistent with NEPA, its implementing regulations, the case law interpreting them, and the very purpose of the statute requiring consideration of only the reasonably foreseeable environmental effects of a federal action.

CONCLUSION

For the foregoing reasons, and those in the briefs submitted by DOE and Dominion Cove Point, this Court should deny the petition for review.

Respectfully submitted,

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January 5, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), I certify that the foregoing brief was produced using the Times New Roman 14-point proportionally spaced typeface and contains 2,454 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

/s/ John Longstreth

CERTIFICATE OF SERVICE

I certify that on January 5, 2017, the foregoing Brief for Respondent-Intervenor American Petroleum Institute was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ John Longstreth