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 and AMERICAN PETROLEUM INSTITUTE,

Intervenors.

On Petition for Review of Orders of the Department of Energy

INITIAL BRIEF FOR INTERVENOR DOMINION COVE POINT LNG, LP

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January 5, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

1. The parties to the proceeding are listed in Sierra Club's opening brief.

2. Dominion Cove Point LNG, LP is a Delaware limited partnership that owns the Cove Point, Maryland liquefied natural gas terminal and the 88-mile Cove Point pipeline. Dominion Cove Point LNG, LP is an indirect subsidiary of Dominion Resources, Inc., a publicly traded company. The partners of Dominion Cove Point LNG, LP are Cove Point GP Holding Company, LLC; Dominion Cove Point, Inc.; and Dominion Gas Projects Company, LLC.

B. RULINGS UNDER REVIEW

The rulings under review are listed in Sierra Club's opening brief.

C. RELATED CASES

Other than those listed in Sierra Club's opening brief, there are no related cases of which counsel is aware within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Catherine E. Stetson
Catherine E. Stetson

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GLOSSARY

the Department	Department of Energy
Dominion	Dominion Cove Point LNG, LP
EPA	Environmental Protection Agency
FERC or the Commission	Federal Energy Regulatory Commission
LNG	Liquefied natural gas
NEPA	National Environmental Policy Act

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JURISDICTIONAL STATEMENT

Sierra Club timely filed its petition for review following the Department of Energy's order denying rehearing. *See* 15 U.S.C. § 717r(b). But this Court lacks jurisdiction to resolve several contentions because Sierra Club did not raise them on rehearing before the Department. *See Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1107 (D.C. Cir. 1989).

INTRODUCTION

The country is in the midst of an ongoing debate about the future of energy. Many—including the Department of Energy—take the view that liquefied natural gas (LNG) exports can help both the U.S. economy and the environment by creating jobs, spurring investment, and potentially replacing dirtier fuels used overseas. Others—including the Sierra Club—believe that LNG exports may lead to additional nontraditional natural-gas production that will hurt the environment. Rather than take its concerns to the appropriate federal, state, and local regulators that directly manage environmental policy and land use, Sierra Club has invoked the National Environmental Policy Act (NEPA) in an effort to tie up LNG export projects—including Dominion Cove Point LNG, LP's—in the courts.

But NEPA is not a substantive policymaking tool. It instead ensures that when agencies like the Department make policy choices, they take a hard look at the potential environmental impacts of those choices. And in taking that hard look, agencies need only do the practicable. Every agency's resources are limited, and NEPA does not require that an agency model speculative and far-flung impacts that will have, at best, a minimal impact on its ultimate decisions.

Sierra Club's arguments in this case flounder on this fundamental precept. The Department, working in cooperation with the Federal Energy Regulatory Commission, spent two years and hundreds of pages examining the environmental

impacts of LNG exports from Dominion's marine terminal in Maryland. Sierra Club wanted more. It wanted the Department to consider not just the direct environmental effects of Dominion's LNG export operations, but also the systemic environmental impacts of natural-gas production and consumption, here and abroad. To Sierra Club, the Department would not have done its job under NEPA unless it modeled the water, air, and land effects of natural-gas production in every region in the country, and predicted how increased LNG exports would influence electricity generation in both the United States and in every LNG-importing nation.

The Department explained in detailed orders why the sprawling NEPA analysis Sierra Club had requested was not reasonable, or, in some instances, even possible. Sierra Club's brief takes issue with the Department's choices—including throwing in some arguments it did not even present to the Department on rehearing—but NEPA grants the Department broad latitude in deciding which environmental impacts to consider and how deeply to examine them. The Department's point-by-point response to Sierra Club's arguments is more than enough to satisfy NEPA's requirement that the Department make rational decisions regarding the scope and depth of its environmental analysis.

Sierra Club's petition for review should be dismissed in part and otherwise denied.

STATEMENT OF THE CASE

The Cove Point Terminal. Dominion owns and operates the Cove Point LNG marine terminal in Calvert County, Maryland. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 952 (D.C. Cir. 2016). The Cove Point Terminal historically has been used to receive LNG imports. *Id.*

With increasingly abundant and inexpensive natural-gas supply now available in the United States, LNG is becoming predominantly an export commodity; foreign customers purchase domestic natural gas, liquefy it, and ship it on tankers overseas. JA__-__ [Dominion App. 3-4]. Dominion therefore sought federal authorization to make the Cove Point Terminal bi-directional—capable of LNG import *and* export—and for its customers to ship LNG internationally. *EarthReports*, 828 F.3d at 952-953.

Dominion's plans for the Cove Point Terminal required authorization under the Natural Gas Act from two federal agencies. The Federal Energy Regulatory Commission had to approve Dominion's plan to construct and operate liquefaction and related facilities within the Terminal's existing footprint. *Id*. The Department of Energy had to approve Dominion's request to export the LNG. *Id.*; *see also* 15 U.S.C. § 717b(a). Dominion therefore submitted an application for construction authorization to FERC and an application for long-term LNG export authorization to the Department. *EarthReports*, 828 F.3d at 952; JA__-__ [Dominion App.].

Sierra Club intervened in both proceedings. *EarthReports*, 828 F.3d at 951; JA__-__ [Sierra Club Intervention Mot.]

FERC and the Department's Environmental Reviews. The Department must approve export applications like Dominion's "unless . . . it finds that the proposed exportation . . . will not be consistent with the public interest." 15 U.S.C. § 717b(a). The Natural Gas Act thus "sets out a general presumption favoring such authorization." *EarthReports*, 828 F.3d at 953 (quoting *West Va. Pub. Servs. Comm'n v. Department of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982)). The Department's public-interest review considers (1) the country's need for the natural gas the applicant proposes to export; (2) whether the proposed exports would threaten the security of domestic natural-gas supplies; (3) whether the proposed exports are consistent with the Department's free-market policies; and (4) "any other factors bearing on the public interest," including environmental concerns. JA__ [Final Order 11].

The Natural Gas Act designates FERC as the "lead agency" for "purposes of complying with" NEPA, and directs that other agencies "cooperate with" the Commission. 15 U.S.C. § 717n(b). FERC therefore took the lead in reviewing the environmental impacts of Dominion's proposals, with the Department cooperating in that review. JA__ [Rehearing Order 4].

The Commission "devoted almost two years to preparing an environmental assessment of over 200 pages" evaluating the impacts of Dominion's export project, with numerous opportunities for public input. *EarthReports*, 828 F.3d at 953; *see also* JA__-__ [EA]. After considering Sierra Club's and others' comments, Commission staff concluded that the project would not significantly harm the environment if it were carried out in accordance with certain recommended mitigation measures. *EarthReports*, 828 F.3d at 953; JA__-__ [Rehearing Order 2-3]. The Commission approved its staff's assessment and authorized Dominion to construct and operate its liquefaction and related facilities, subject to 79 specific conditions. *EarthReports*, 828 F.3d at 954; JA__ [Rehearing Order 3]; *see also Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244 (2014).

The Department, after an independent review, adopted the Commission's environmental assessment as its own. JA__-__ [FONSI]. The Department also commissioned two studies to address arguments from some—like Sierra Club—that the Department should consider the potential broader environmental consequences of LNG exports. The first, an "Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States," considered the environmental impacts of nontraditional natural-gas production from shale deposits and other sources. JA__-__ [Addendum]. The second, a "Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the

United States," considered the greenhouse-gas emissions potentially induced by LNG exports. JA__-__ [Life Cycle Analysis]. The Department notified both the parties to the proceedings and the public of the studies' release, and allowed comment before finalizing them. JA__ [AR 54]. Sierra Club availed itself of the opportunity, commenting extensively. JA__-__, __-__ [AR 65, AR 66].

After considering the Commission's environmental assessment, the reports, and the comments on them, the Department issued a finding of no significant impact for Dominion's export project. JA__-__ [FONSI]. The Department's finding was based not only on its adoption of the Commission's environmental assessment, but also on the contents of Addendum, though the Department concluded that NEPA did not strictly require it. JA__-__ [*Id.* at 2-3].

The Department's Final Order. The Department then issued a final order granting Dominion's export application. JA__-__ [Final Order]. The Final Order addressed comments on the Addendum and the Life Cycle Analysis and rejected Sierra Club's challenges to the Department's environmental analysis. JA__-__ [*Id.* at 46-94].

The Department first explained that it could not meaningfully evaluate the environmental impacts of so-called "induced" natural-gas production—that is, production that would not have occurred but for LNG exports. JA__-__ [*Id.* at 85-87]. The Department found that increased nontraditional natural-gas production

would occur with or without LNG exports like Dominion's. JA__ [*Id.* at 85]. But the Department acknowledged that LNG exports could "accelerate" that development, so it commissioned the Addendum to consider the "most significant issues associated with unconventional gas production, including impacts to water resources, air quality, greenhouse gas emissions, induced seismicity, and land use." JA__-__ [*Id.* at 85-86].

After considering these issues, the Department determined that although there are "potential environmental issues associated with unconventional natural gas production that need to be carefully managed," forbidding LNG exports was "too blunt an instrument to address these environmental concerns efficiently." JA__-__ [*Id.* at 86-87]. Forbidding LNG exports would deprive the United States of their economic and international benefits "but would have little more than a modest, incremental impact on the environmental issues identified by Sierra Club." JA__ [*Id.* at 87]. The Department therefore concluded that the public interest would be "better served by addressing these environmental concerns directly—through federal, state, or local regulation, or through self-imposed industry guidelines where appropriate—rather than by prohibiting exports of natural gas." JA__ [*Id.* at 86].

The Department also found unpersuasive Sierra Club's challenges to its greenhouse-gas analysis. JA__-__ [*Id.* at 87-94]. The Department found that

proposed Environmental Protection Agency rules would likely mitigate—if not eliminate—any increased emissions from domestic power suppliers replacing exported natural gas with increased coal use. JA__-__ [*Id.* at 89-90]. It further concluded that exported natural gas would reduce or only minimally increase greenhouse-gas emissions in other countries to the extent exported LNG displaced use of local coal or local natural-gas supplies. JA__-__ [*Id.* at 90-92].

The Department concluded that it could not determine whether LNG exports would increase or decrease greenhouse-gas emissions overall; such an analysis, it found, would be too speculative because it would require the Department to model innumerable market factors in countries across the globe. JA__-__ [*Id.* at 92-93]. But the Department found that its model was useful, accurate, and did "not support the conclusion that U.S. LNG exports will increase global [greenhouse-gas] emissions in a material or predictable way." JA__-__ [*Id.* at 93-94].

The Department's Rehearing Order. Sierra Club sought rehearing. The Department denied the petition. JA__-__ [Rehearing Order]. The Department first disagreed that it had to examine the environmental impacts of the marginal natural-gas production potentially induced by Dominion's application. JA__-__ [*Id.* at 18-25]. The Department explained that it could not pin down where any induced production would occur—either at a local or regional level—and that it was therefore too speculative to try to do so. JA__-__ [*Id.* at 18-23]. The Department

emphasized, however, that its Addendum qualitatively took account of the impacts of induced natural-gas production to the best of the Department's ability. JA__-__ [*Id.* at 23-25].

The Department found Sierra Club's arguments about induced coal production even more tenuous. JA__-__ [*Id.* at 25-26]. The Department noted that attempting to analyze the environmental impacts of both induced natural-gas production and induced coal consumption—coal being a commodity with which natural gas competes—would be unmanageable. *Id.* The Department further noted that recent EPA rulemakings rendered outdated Sierra Club's assumptions regarding increased coal consumption because of LNG exports. JA__ [*Id.* at 26].

The Department also rejected Sierra Club's attacks on the Department's climate analysis. JA__-__ [*Id.* at 38-41]. The Department reaffirmed its previous finding that it would be too burdensome to attempt to model the possibility that LNG exports would displace renewable and other sources of energy in other countries but that its more-limited comparison cases were still useful. JA__-__ [*Id.* at 40-41].

Finally, the Department concluded that it correctly balanced the benefits and burdens of LNG exports and properly found that the public interest did not weigh against approving Dominion's application. JA__-__ [*Id.* at 45-49]. The Department acknowledged that the benefits and burdens of LNG exports might not

fall equally across society. JA__ [*Id.* at 48]. But it concluded that—on balance—the negative distributional consequences of LNG exports did not outweigh their benefits to the U.S. economy as a whole. *Id.*

Sierra Club's petition for review followed.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are attached to the Department's brief.

STANDARD OF REVIEW

This Court reviews the Department's Natural Gas Act orders under the same standard it uses for FERC Natural Gas Act orders: It will "set aside a decision . . . only if it is arbitrary and capricious or otherwise contrary to law." *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 671 (D.C. Cir. 2007) (citation omitted); *see* 42 U.S.C. § 7192(a). The Court upholds the Department's conclusions if they are "based on a consideration of the relevant factors," and gives an "extreme degree of deference" to the Department's evaluation of "scientific data within its technical expertise." *National Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (citations omitted).

SUMMARY OF ARGUMENT

I. The Department's thorough environmental analysis complied with NEPA. By adopting the Commission's environmental assessment, the Department adequately considered all of the environmental impacts caused by Dominion's

expansion of the Cove Point Terminal to accommodate export operations. And through its Addendum and Life Cycle Analysis, the Department qualitatively assessed—to the best of its ability—the environmental impacts caused by natural-gas production and coal consumption induced by LNG exports.

Sierra Club demands that the Department's environmental analysis be quantified and specifically linked to each LNG export application it approves. But the Department reasonably explained why that granular analysis was neither possible nor practicable. The Department does not know where in the lower 48 States the natural gas exported by each project will come from, and nearly all environmental impacts occur at the local level. As a result, the Department would have to model the hypothetical impacts of each export application across each and every natural-gas-producing region in the country. The Department reasonably concluded that such a Herculean task was not warranted, particularly because other agencies are primarily responsible for regulating natural-gas production's environmental impacts.

The Department also reasonably explained why it declined to model the environmental and climate impacts of a potential switch from natural-gas to coal power generation in the United States and from renewable to natural-gas power generation overseas. In the United States, it would be impracticable to have to model the environmental impacts of not only natural-gas exports, but also all

potential domestic substitutes for natural gas. In addition, the Department lacked the data to model the potential switch to coal-power generation from natural-gas power generation given recent regulatory changes applicable to coal-fired power plants. Overseas, meanwhile, whether LNG imports would replace renewables depends on which country the gas goes to, what the energy market is like in that country, and what the country's public policies are—factors the Department had no reliable way to model. The Department thus reasonably concluded that although its existing modeling was accurate and useful, it could not fully answer the greenhouse-gas questions posed.

The Department properly declined to prepare a full environmental impact statement. An environmental impact statement is required when *foreseeable* environmental impacts will be significant. But the Department reasonably concluded that it could not foresee any significant environmental impacts. Any failure to prepare an environmental impact statement was harmless, anyway. The Department included all of the impacts it could reasonably forecast in its environmental assessment, and so issuing a separate document labeled "environmental impact statement" would make no substantive difference.

II. The Department justifiably concluded that Sierra Club had not affirmatively shown that Dominion's exports would be contrary to the public interest. The Department considered Sierra Club's argument that the benefits of

LNG exports would accrue to a smaller group than the burdens of increased natural-gas prices and other impacts, but concluded that the overall benefits of LNG exports outweighed the distributional costs. The Department also considered the environmental impacts of LNG exports, but concluded that the benefits of those exports exceeded their environmental costs—particularly because other agencies, including the Environmental Protection Agency, are better situated to manage the environmental impacts of natural-gas production and associated activities. Sierra Club may disagree with the Department's policy judgment, but this Court has no warrant to overturn it.

ARGUMENT

I. THE DEPARTMENT'S NEPA ANALYSIS WAS ADEQUATE AND REASONABLY DID NOT ATTEMPT TO MODEL SPECULATIVE ENVIRONMENTAL IMPACTS.

Under NEPA's implementing regulations, an agency must evaluate environmental impacts that are "caused" by its actions. 40 C.F.R. § 1508.8. That assessment includes the "[i]ndirect effects" of the agency's actions, which are those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* § 1508.8(b).

The regulation's foreseeability standard requires that an agency engage in "[r]easonable forecasting," *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)—but it does not compel an agency

to conduct "a 'crystal ball' inquiry." *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977) (citation omitted). In striking that balance, an agency's environmental assessment need "furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible " *Id.* (citation omitted). An agency, in other words, "need not foresee the unforeseeable"; it need only do the best it can under all the circumstances. *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (citation omitted).

The Department's careful review and adoption of the Commission's environmental assessment, its thorough Addendum and Life Cycle Analysis reports, and its detailed final and rehearing orders hit the requisite marks. Sierra Club's attempts to flyspeck the Department's comprehensive efforts should be rejected.

A. The Department Adequately Considered The Non-Climate Environmental Impacts Of Induced Natural-Gas Production.

Sierra Club argues that the Department had to consider the indirect, non-climate effects of natural-gas production induced by LNG exports. Sierra Club Br. 36-55. But in its adopted environmental assessment, in its separate environmental Addendum, and in its final and rehearing orders, the Department detailed what

non-climate impacts it could foresee and reasonably explained why it could not forecast the remainder. Department Br. 37-48.

Sierra Club contends that the Department did not consider the environmental impacts of induced natural-gas production because it erroneously concluded that it did not know whether any LNG exports or induced natural-gas production would occur. Sierra Club Br. 39-42. Not at all. The Department agreed with Sierra Club that LNG export authorizations "could accelerate" natural-gas production "by some increment." JA__ [Final Order 85]. The Department "[f]or that reason . . . prepared and received public comment on the Addendum," which considered the environmental impacts of nontraditional natural-gas production. JA__-__ [*Id.* at 85-86]; *see also* JA__-__ [Rehearing Order 23-24]. Sierra Club's sweeping assertion (Br. 42) that the Department "effectively determined that *no* exports were reasonably foreseeable" is not true.

The Department's uncertainty finding was much more modest. The Department noted that a company like Dominion that receives export authorization for a certain volume of natural gas will not necessarily export the full authorized amount. JA__-__, __ [Final Order 83-84, Rehearing Order 20]. Furthermore, it was unclear how much exported gas would come from new nontraditional natural-gas wells, whether those wells would have been built even without Dominion's exports, or where any new nontraditional production would take place. JA__-__,

__ [Final Order 83-84, Rehearing Order 20]. The Cove Point Terminal is connected to the interstate natural-gas pipeline grid that interconnects the lower 48 States, meaning that exported gas could come from almost anywhere in the contiguous United States. JA__ [Rehearing Order 22].

That uncertainty, in turn, prevented the Department from meaningfully forecasting the non-climate environmental effects of induced natural-gas production caused by Dominion's export application. Nearly all environmental effects of nontraditional natural-gas production are local, "affecting local water resources, local air quality, and local land use patterns." JA__, __ [Final Order 84, Rehearing Order 20]. Without knowing where the gas would come from, the Department could not model the non-climate environmental effects from it. *Id.*

Sierra Club argues that the Department knows where that gas that will be exported from the Cove Point Terminal will come from because Dominion's export customers have entered into contracts with two natural-gas suppliers—Cabot Oil and Gas Corporation and WGL Midstream—with operations in certain regions. Sierra Club Br. 47-50. But Sierra Club's rehearing petition did not argue that the location of Cove Point Terminal gas was known. Nor did it mention the press releases it now cites in its brief. *See* JA__-__ [Sierra Club Rehearing Pet.]. The Court therefore does not have jurisdiction to consider these arguments on appeal. *See* 15 U.S.C. § 717r(b); *Wabash Valley Power Ass'n, Inc. v. FERC*, 268

F.3d 1105, 1114 (D.C. Cir. 2001) (calling this an "unusually strict requirement that will not be ignored by the courts").

True, Sierra Club's *environmental-assessment* comments mentioned the possibility that Cove Point Terminal gas might come from Cabot wells in Pennsylvania. *See* JA__ [EA Comments 34]. But the Natural Gas Act requires that arguments be raised twice: Once before a final order and again in a rehearing petition. *ASARCO, Inc. v. FERC*, 777 F.2d 764, 773-774 (D.C. Cir. 1985). And Sierra Club concedes that its WGL Midstream-related documents are not even part of the administrative record. Sierra Club Br. 49 n.13. Sierra Club cannot spring these arguments on the Department again—or, in the case of WGL Midstream, for the first time—in its opening brief, after having forgone them on rehearing. *See ASARCO*, 777 F.2d at 774 (Natural Gas Act's rehearing requirement allows the Department "to assume, in recasting its final order . . . that those issues which a party did not consider important enough to raise cannot form a basis for that party's" later judicial challenge); *EarthReports*, 828 F.3d at 959 (rejecting Sierra Club's reliance on extra-record documents because "[t]he court's review is limited to the administrative record before the agency at the time of its decision"). And in any event, as the Department explains (Br. 43-44), even knowing that the gas exported from the Cove Point Terminal will come from a specific area would not give the Department it data it would need for environmental modeling.

Perhaps recognizing these weaknesses, Sierra Club pivots to the argument it *did* make in its rehearing petition: That the Department could have modeled the ozone effects of induced natural-gas production on a "play"—or regional—basis. Sierra Club Br. 49-53. But the Department gave two rational reasons why even a play-level attempt to model ozone would not help it "ensure that environmentally informed decisions are made." *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243 (D.C. Cir. 1980).

First, although play-level models are "more reliable" than ones considering a more-local level, the Department did not know *where* in a play incremental natural-gas production will occur. JA__-__ & n.91 [Rehearing Order 21-22 & n.91]. A play, after all, can stretch hundreds of miles and cut across several States. *See Beardslee v. Inflection Energy, LLC*, 761 F.3d 221, 224 (2d Cir. 2014) (noting that the Marcellus Shale region runs an estimated 600 miles north to south, "from Ohio and West Virginia northeast into Pennsylvania and southern New York") (citation omitted). And that rendered play-level ozone models impossible. Ozone, the Department explained, "largely concentrate[s] in the local area in which [it is] emitted," meaning "[w]ithout knowing where in relation to existing ozone concentrations the incremental production would occur, the play-level modeling Sierra Club urges would not enable" the Department "to characterize [its] environmental and human health impacts." JA__ n.91 [Rehearing Order 22 n.91].

Knowing that *some* incremental production of natural gas will occur *somewhere* in the Marcellus Shale region, for instance, would not help the Department determine whether the ozone from that production will harm human health. The effect of additional ozone is likely to be different in eastern Pennsylvania than in southwest West Virginia. *See id.* (explaining that ozone non-attainment areas "appear near urban areas and bear little recognizable relationship to the subsurface geology").

Sierra Club responds that the Department could nonetheless measure ozone and other impacts in specific natural-gas production areas within a play, pointing to the Addendum's citation of a model assessing ozone impacts in the Haynesville Shale area along the Texas-Louisiana border. Sierra Club Br. 52-53 (citing JA__-__ [Addendum 28-29]). But the Department explained that because it would not know where any incremental natural-gas production that will be exported from a particular project will occur, Sierra Club's argument would require the Department to model the potential ozone impacts of natural-gas production in *every* natural-gas producing region. JA__-__ [Rehearing Order 22-23]. That, to put it mildly, "would impose an unreasonable and unrealistic burden on the Department's ability to act on the LNG export applications before it." JA__ [*Id.* at 22].

And it is not a burden that NEPA requires the Department to shoulder. Every NEPA analysis is limited by a "rule of reason" that "ensures that agencies determine whether and to what extent to prepare an [environmental analysis] based

on the usefulness of any new potential information to the decisionmaking process." *Department of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). The rule of reason, moreover, governs both which environmental impacts the Department must analyze "and the *extent* to which it must discuss them." *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (D.C. Cir. 2016) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991)). So long as the Department "look[s] hard at the factors relevant" to its analysis, this Court defers to the Department's decision regarding how deeply to consider an issue. *Id.* (citation omitted and alteration in original).

The Department took the requisite hard look here. On one hand, modeling the potential increase in natural-gas production in every corner of the Nation and the impacts of that production on every possible natural-gas-producing locality every time a company requested export authorization would be a Herculean task. JA__-__ [Rehearing Order 22-23]. On the other, investing the significant resources those models would require would not much inform the Department's ultimate export-authorization decisions. *Id.* The Department does not regulate natural-gas production the way that other local, state, and federal agencies do, *id.*, and forbidding natural-gas exports outright would be "too blunt an instrument to address . . . environmental concerns efficiently." JA__-__ [Final Order 86-87]. The Department therefore reasonably concluded that the resource-intensive

modeling Sierra Club had requested was not justified by its minimal value to the Department's overall policymaking function. *See Public Citizen*, 541 U.S. at 767.

Sierra Club's cases (Br. 54-55) are not to the contrary. In some, the agency did not explain why it concluded that the claimed environmental impacts could not or should not be analyzed. *See California Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1097-98 (9th Cir. 2011) (faulting agency's "conclusory statement" that no environmental impacts would occur); *Scientists' Inst. for Pub. Info.*, 481 F.2d at 1093-97 (agency did "not give[] reasons for its decision" not to consider environmental impacts). In others, the agency refused to perform modeling that it agreed was both feasible and helpful. The Eighth Circuit has explained that *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549 (8th Cir. 2003), Sierra Club's favorite case (Br. 54), was one where "computer 'programs could be used to forecast the effects of th[e] project,' " *Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 555 (8th Cir. 2006) (quoting *Mid States*, 345 F.3d at 550), and where the agency "stated that a particular outcome was reasonably foreseeable and that it would consider its impact, but then failed to do so." *Arkansas Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096, 1102 (8th Cir. 2005).

This case is nothing like those. The Department explained at length in its orders why detailed models like Sierra Club had requested were not practicable: A

granular impacts analysis in every natural-gas producing region would be such a difficult task and of such dubious use as to be not worthwhile. *See* JA__-__, __-__ [Final Order 85-87, Rehearing Order 18-23]. Sierra Club may want the Department to have done more, but its assessment of the burdens and benefits of nationwide environmental-impacts modeling was reasonable. *See Union Neighbors United*, 831 F.3d at 575.

Though the Sierra Club barely acknowledges it, the Department *did* consider the environmental effects of induced natural-gas production. It prepared a 151-page Addendum thoroughly exploring the impacts of unconventional natural-gas production, including its effects on water quality, air quality, seismic activity, and land-use patterns. JA__-__ [Addendum]. Although it was impractical for the Addendum to consider the environmental impacts connected with particular export projects in particular regions, the Addendum still "inform[ed] [the Department's] consideration of the effects of [Dominion's] proposal in its description of how unconventional gas production impacts various resource areas and, where relevant, how those impacts vary geographically." JA__ [Rehearing Order 25].

After the Department considered the Addendum, it concluded that although "there are potential environmental issues associated with unconventional natural gas production that need to be carefully managed," the "public interest is better served by addressing these environmental concerns directly—through federal,

state, or local regulation . . . —rather than by prohibiting exports of natural gas." JA__ [Final Order 86]; *see also* JA__-__ [Rehearing Order 23-24]. The Addendum was thus more than adequate to achieve NEPA's goal that the Department "examine the environmental effects of proposed federal actions" and "inform the public of the environmental concerns that were considered in the agency's decisionmaking." *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir. 2001). NEPA requires nothing more.

B. The Department Reasonably Rejected Sierra Club's Non-Climate Coal Arguments.

The Department also properly rejected Sierra Club's arguments that natural-gas exports would lead to increased domestic coal consumption and that the Department's environmental analysis had to take account of that consumption's environmental impact.

First, it was unreasonable to ask the Department to model not just the direct environmental effects of extracting and consuming natural gas, but also the environmental effects of consuming *substitutes* for natural gas. JA__ [Rehearing Order 26]. To Sierra Club, if the Department authorized the export of pens, it would have to analyze not only the environmental impacts of induced pen production, but also the environmental impacts of induced *pencil* production. After all, as pen prices rise because of exports, consumers might replace pen purchases with pencil purchases. In Sierra Club's view of the world (*cf.* Br. 65-

66), the Department therefore would need to quantify all of the impacts of induced pencil production, such as timber felling and graphite mining. *See generally* Leonard E. Read, *I, Pencil* (1958).[1] "[N]o rule of reason worthy of that title" would require the Department to produce such a sprawling environmental assessment. *Public Citizen*, 541 U.S. at 767; *see also Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (the Department need not "examine everything for which the [exports] could conceivably be a but-for cause"). Yet that is essentially what Sierra Club demands here. *See* JA__ [Rehearing Order 26].

Even if the Department were required to try to analyze the impacts of induced coal consumption, it reasonably explained why it could not. JA__-__, __ [Final Order 89-90, Rehearing Order 26]. The Department explained that its 2012 Energy Information Agency study—which predicted that some domestic power generators would switch from natural gas to coal because of increased natural-gas prices—was no longer a reliable source for natural-gas-to-coal-switching estimates. *Id.* In the years since the study, the Environmental Protection Agency has issued two rules limiting emissions from coal-fired plants, including the Clean Power Plan. *Id.* The 2012 study, however, did not account for these rules, which would make it less likely that a power plant would switch from natural gas to coal

[1] *Available at* http://fee.org/files/doclib/20150601_ipencilpdfupdatecolor.pdf.

even in the face of rising natural-gas prices. *Id.* Nor could the 2012 study take into account the legal challenges to the Clean Power Plan, including the stay entered by the Supreme Court. *See Chamber of Commerce v. EPA*, 136 S. Ct. 999 (2016) (mem.).

Sierra Club grouses that if the 2012 study was good enough to justify the economic benefits of Cove Point exports, it should be good enough to measure environmental impacts. Sierra Club Br. 56. But an agency can "chang[e] course" so long as it "provide[s] a reasoned explanation for its decision." *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012). The Department reasonably explained that although the economic assumptions underlying the 2012 study remained valid, the study's coal-switching aspect—which "reflect[ed] current laws and regulations in place" at the time, JA__ n.7 [2012 EIA Study 12 n.7]—was no longer useful for the Department's NEPA analysis. *See* JA__, __-__ [Final Order 89-90, Rehearing Order 26]. The legal and regulatory environment has simply changed too much.

Worse still, there was no new information to replace it. NEPA requires only that an agency use the "best scientific data *available*, not the best scientific data *possible*." *Building Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001) (citation and alterations omitted). In other words, there is no obligation for the Department to "conduct independent studies" to gather the data

needed to undertake a quantitative analysis. *Southwest Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000). The Department therefore did not abuse its discretion in declining to do so for the potential domestic switch from natural-gas to coal-fired power plants.

Sierra Club contends (Br. 56-57) that the Department could have used information contained in its 2014 export study. But like Sierra Club's complaints about Cabot, it never mentioned the 2014 export study as an available modeling tool in its rehearing petition. JA__-__ [Rehearing Pet.]. The Court therefore cannot consider the argument for the first time on appeal. *Wabash Valley Power Ass'n*, 268 F.3d at 1114. Moreover, as the Department points out (Br. 49-50), the 2014 export study no more accounts for the current regulatory landscape concerning coal usage than the 2012 study did. The Department reasonably explained why it did not model the non-climate impacts of natural-gas-to-coal switching as thoroughly as Sierra Club would have liked.

C. The Department Sufficiently Considered The Climate Impacts Of Dominion's Exports.

The Department also adequately analyzed the climate impacts of Dominion's exports. Its adopted environmental assessment calculated greenhouse-gas emissions from Dominion's construction and liquefaction operations, its Energy Information Administration studies model carbon-dioxide emissions across a range of LNG export volumes, and its Addendum details the nature of methane

emissions and provides estimates of methane-emission rates. Department Br. 50. The Department's Life Cycle Analysis goes even further, quantifying potential total cradle-to-grave greenhouse-gas emissions from LNG exports on a global scale. Department Br. 51.

Sierra Club wanted even more. Even though the Life Cycle Analysis attempted to model the potential shifts from coal to natural-gas-fired power plants in major natural-gas-importing countries (JA__-__ [Life Cycle Analysis 8-18]), Sierra Club demanded that it also consider the potential shift to natural-gas-fired power plants from renewable-energy sources. Sierra Club Br. 61-62. As the Department explained, however, renewable-to-natural-gas switching would depend on where the gas exported from the Cove Point Terminal will go, what the energy market is like in those unknown countries, and what the unknown countries' policies are regarding renewable-energy use—all factors that the Department could not reliably model. *See* JA__-__, __-__ [Final Order 92-94, Rehearing Order 40-41].[2] The Department nonetheless considered the most prevalent switching it could—from coal to natural gas—and gave examples of the overall impact on greenhouse-gas emissions. *See* JA__-__ [Life Cycle Analysis 8-18]; *see also*

[2] Although Dominion's export customers are based in India and Japan, the LNG they buy could go anywhere. *See* JA__-__ [Rehearing Order 40-41].

Sierra Club Br. 60 (conceding that the Department's report "provides an illustrative example").

The Department did not, contrary to Sierra Club's arguments (Br. 61), fail to inform decision makers and the public about the potential effects of renewable-to-natural-gas switching. Rather, the Department acknowledged that its analysis—as extensive as it was—could not "answer the ultimate question of how U.S. LNG exports would affect the global [greenhouse-gas] balance because U.S. LNG could compete with other resources as well." JA__ [Rehearing Order 40]. Yet the Department found that its Life Cycle Analysis, because it considered the most-prevalent forms of electricity generation overseas, "provided useful information." *Id.* Sierra Club may "take a different position," but it "provide[s] no reason to doubt the reasonableness of the [Department's] conclusion." *EarthReports*, 828 F.3d at 956.

D. The Department Reasonably Declined To Prepare An Environmental Impact Statement.

Finally, the record supports the Department's finding of no significant impact and the Department reasonably decided not to prepare an environmental impact statement. Department Br. 52-55. The Court's review of the Department's decision not to issue an environmental impact statement "is a 'limited' one." *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006) (quoting *Public Citizen v. National Highway Traffic Safety Admin.*, 848 F.2d 256,

267 (D.C. Cir. 1988)). The Court will set aside a finding of no significant impact only "if the decision was arbitrary, capricious, or an abuse of discretion." *Id.* at 861 (citation omitted).[3]

Sierra Club argues (Br. 68-70) that the Department's finding of no significant impact is arbitrary and capricious because it failed to quantify certain impacts and was uncertain about the existence of others. But a finding of no significant impact depends on whether "it is *reasonable to anticipate* a cumulatively significant impact on the environment." 40 C.F.R. § 1508.27(b)(7) (emphasis added). For all the reasons explained above, the Department reasonably concluded that it could not anticipate significant environmental impacts from induced natural-gas production or coal use. *Supra* at 14-29. Sierra Club's objection to the Department's finding of no significant impact is just another gloss on its objections to the Department's impacts analysis. It fails for the same reasons.

The only impact that Sierra Club contends is both foreseeable and significant under the Department's analysis is the impact on local water resources from

[3] Sierra Club contends that the Department had to make a "convincing case" for its finding of no significant impact. Sierra Club Br. 67 (quoting *Grand Canyon Tr. v. FAA*, 290 F.3d 339, 340-341 (D.C. Cir. 2002)). But this Court has explained that while cases have "repeated the phrase 'convincing case' . . . [the Court's] scope of review is in fact the usual one." *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011) (citation omitted).

induced natural-gas production. Sierra Club Br. 68-69 (citing JA__ [Addendum 19]). But the Department reasonably concluded that water impacts could not be analyzed beyond broad generalities (*supra* at 15-24), and so an environmental impact statement attempting to further consider those impacts would be an empty formality. *See* 40 C.F.R. § 1500.1(c) ("NEPA's purpose is not to generate paperwork—even excellent paperwork.").

Besides, the Addendum found that water impacts would be minimal if natural-gas production were conducted in accordance with applicable regulations and best practices, JA__ [Addendum 19], and a finding of no significant impact is warranted where an agency finds that "safeguards in the project sufficiently reduce the impact to a minimum." *Town of Cave Creek v. FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003) (citation omitted). Sierra Club complains (Br. 68-69) that the Department never considered how often pollution-control regulations are followed, but this Court has before doubted that "general attacks" on mitigation measures "could ever justify . . . disregard of" those measures. *Van Antwerp*, 661 F.3d at 1154. And unlike in *New York v. Nuclear Regulatory Commission*, 681 F.3d 471, 481 (D.C. Cir. 2012), the mitigation measures to which the Addendum referred are not "untested." They are current, existing regulations and compliance programs. *See* JA__ [Addendum 19]; *see also EarthReports*, 828 F.3d at 957 (deferring to the

Commission's conclusion that other regulators would better address certain environmental impacts at the Cove Point Terminal).

Sierra Club's argument (Br. 67-68) that the Department's regulations presumptively require an environmental impact statement for all LNG export projects is likewise meritless. The Department adequately explained why Dominion's export application did not involve "construction of major new natural gas pipelines or related facilities" or "major operational changes." 10 C.F.R. pt. 1021, subpt. D, App'x D, D8-D9. The new construction will all occur within the Cove Point Terminal's existing industrial footprint, which is buffered by hundreds of acres of undeveloped land. JA__ [Rehearing Order 16]. There will be no new permanent marine facilities, and the 85 LNG tanker ships per year expected at the Terminal are many fewer than FERC already considered and approved for previous import operations. *Id.* In short, the LNG export operations the Department has authorized are not meaningfully different from the LNG import operations FERC approved in the past. And this Court defers to the Department's finding that, under its own regulations, Dominion's exports do not involve major new facilities or major operational changes. *See Akzo Nobel Salt, Inc. v. Federal Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1303 (D.C. Cir. 2000).

More fundamentally, Sierra Club's complaints about the Department's decision to issue an environmental assessment rather than an environmental impact

statement make no substantive difference. The Department used the Addendum and Life Cycle Analysis to consider the induced-production and other impacts Sierra Club brought to its attention, and explained why a more thorough analysis would not be practicable. *See supra* at 14-29. The Department also took public comment on both documents and incorporated the Addendum into its finding of no significant impact. JA__, __-__ [AR 54, FONSI]. NEPA allows incorporation by reference of this sort, Department Br. 53, and Sierra Club does not explain what more the Department could have gained by formally labeling its hundreds of pages of environmental analysis an "environmental impact statement."[4]

Any Department failure, then, to prepare a document with an "environmental impact statement" label on it is harmless. *See Nevada v. Department of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006) (Administrative Procedure Act's harmless-error rule applies to claimed NEPA errors). To remand for the Department to switch titles on its environmental-review documents or copy-and-paste the Addendum and Life Cycle Analysis into a single environmental impact statement document "would be a meaningless gesture, not necessary to

[4] Indeed, Sierra Club has not been satisfied in cases where the Department *has* prepared an environmental impact statement. Sierra Club is making substantially the same arguments in two other appeals, and in both the Department adopted FERC's environmental impact statement. *See* Final Brief of Petitioner at 5, 41-76, *Sierra Club v. Department of Energy*, No. 15-1489 (D.C. Cir. July 5, 2016); Proof Brief of Petitioner at 30, 37-71, No. 16-1253 (D.C. Cir. Nov. 30, 2016).

guarantee that the [Department] will consider environmental concerns when it authorizes" Dominion's exports. *Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1257 (D.C. Cir. 1988) (per curiam). In its many hundreds of pages of environmental assessments, reports, and orders, the Department took a hard look at the environmental impacts of Dominion's LNG exports. That is enough for NEPA. *See Nevada*, 457 F.3d at 90 (failure to prepare environmental assessment harmless where the agency "had considered environmental consequences" in its decisionmaking).

II. THE DEPARTMENT REASONABLY FOUND THAT SIERRA CLUB DID NOT AFFIRMATIVELY SHOW THAT DOMINION'S EXPORTS WILL BE INCONSISTENT WITH THE PUBLIC INTEREST.

Sierra Club's throwaway argument (Br. 75-79) challenging the Department's public-interest analysis is as meritless as it is underdeveloped. Denial of a Section 3 export application requires "an affirmative showing of inconsistency with the public interest." *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin.*, 822 F.2d 1105, 1111 (D.C. Cir. 1987). The Department reasonably found that Sierra Club did not make such an affirmative showing.

A. The Department Considered The Potential Unequal Distribution Of Exports' Impacts.

Sierra Club asserts (Br. 75) that the Department's public-interest analysis must focus on the interest of "all or most of the people"—that is, the broadest

swatch of the American public. But "[t]he term 'public interest' has not been defined by statute or regulation," *New England Fuel Inst. v. Economic Regulatory Admin.*, 875 F.2d 882, 883 (D.C. Cir. 1989), and the Department understands it to encompass *any* factor that bears on the benefit or harm of the proposed exports, *see* JA__ [Final Order 11].

Applying that standard, the Department sufficiently considered the benefits and harms of Dominion's proposed exports. On the one side, the Department found that Dominion's exports would lead to direct and indirect job creation, enhance tax bases, and increase overall economic activity. JA__ [Conditional Order 136]. The Department also found that Dominion's exports were consistent with the country's National Export Initiative and the Department's commitment to free-market solutions for energy distribution, and would improve key allies and trading partners' energy security. JA__-__ [*Id.* at 140-141]. On the other, the Department acknowledged that natural-gas exports would on balance increase domestic natural-gas and energy prices and volatility, and it considered those impacts "most seriously." JA__ [*Id.* at 141]. Indeed, the Department acknowledged that "exports would be accompanied by a shifting of income sources, and . . . that some segments of the economy are likely not to participate in the benefits of LNG exports but are likely to face increased energy costs." JA__ [*Id.* at 101].

After balancing these considerations, the Department concluded that "[w]hile there may be circumstances in which the distributional consequences of an authorizing decision could be shown to be so negative as to outweigh net positive benefits to the U.S. economy as a whole," it did "not see sufficiently compelling evidence that those circumstances are present here." JA__, __ [*Id.* at 101; Rehearing Order 48]. Sierra Club claims that the Department "refused to look" for such compelling evidence (Br. 76), but the Department dedicated an entire section of its orders to discussing the evidence and analyzing the issue. JA__-__, __-__ [Conditional Order 100-102; Rehearing Order 45-49].

Sierra Club's complaint is that it disagrees with the Department's weighing of the relevant factors. But the Department considered the available evidence, and this Court will not "substitute its judgment for that of" the Department. *National Comm. for the New River*, 373 F.3d at 1327.

B. The Department Reasonably Concluded That The Potential Environmental Impacts Of LNG Exports Did Not Render Dominion's Application Contrary To The Public Interest.

Finally, Sierra Club's attempt (Br. 77-79) to repackage its NEPA claims with a Natural Gas Act Section 3(a) public-interest label fails for three reasons.

First, as the Department explains (Br. 57), Section 3(a) does not impose greater environmental-assessments obligations than NEPA. Under the Department's long-standing policy governing Section 3(a) review—which Sierra

Club does not challenge—environmental consequences of proposed exports are considered only as a portion of the fourth, catch-all public-interest prong. *See* JA__ [Final Order 11]. If the environmental impacts of induced natural-gas and coal production and use are too speculative for NEPA's specific environmental-assessment requirements—and they are—then those impacts are certainly too speculative to have much weight in the Natural Gas Act's broader Section 3(a) analysis.

Second, Sierra Club cites no case—and we are not aware of any—suggesting that Section 3(a) requires the Department to formally "weigh" the interests on each side, such as through a cost-benefit analysis. Indeed, NEPA, which requires a closer look at environmental impacts than the Natural Gas Act, explicitly does not require a quantified analysis. *See Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 687-688 (D.C. Cir. 2004). The benefits and costs of Dominion's exports are not even commensurable. Although the Department quantified *some* aspects of Dominion's exports, others were entirely qualitative. What is the price of increased energy security for important trading partners and global allies? Or the dollar value of an export authorization's consistency with the Department's policy favoring free-market allocation of natural resources? *Cf.* JA__-__ [Conditional Order 140-141]. Nothing in Section 3(a) requires the Department to hypothesize those answers.

Finally, the Department correctly balanced the benefits of LNG exports against their potential environmental harms. As it found, forbidding LNG exports would do away with all of their economic and international-policy benefits, while producing only a "modest, incremental" environmental benefit. *See* JA__ [Final Order 87].

That makes perfect sense. Recall that the Department estimated that exports would at most accelerate natural-gas development that would occur with or without exports. *See* JA__-__ [*Id.* at 85-86]. Viewed that way, forbidding natural-gas exports would have only a modest, incremental environmental benefit because it would only delay the inevitable impacts, not prevent them altogether. Furthermore, the Department catalogued all of the steps the Environmental Protection Agency was taking to make nontraditional natural-gas production more environmentally friendly. *See id.* Against that backdrop, the Department exercising its authority to halt LNG exports would have only a modest, incremental effect over what EPA was already accomplishing—particularly when weighed against the benefits of LNG exports that the Department found to be in the public interest. *See id.*

As the Department ultimately concluded, although the environmental impacts of nontraditional natural-gas production should be "carefully managed," cutting off LNG exports entirely is "too blunt an instrument to address . . .

environmental concerns efficiently." JA__-__ [Final Order 86-87]. Sierra Club obviously disagrees with that policy decision. But this Court is not permitted to overturn it. *National Comm. for the New River*, 373 F.3d at 1327.

CONCLUSION

For the foregoing reasons and those in the Department's brief, the petition for review should be dismissed in part and otherwise denied.

Respectfully submitted,

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I certify that on January 5, 2017, the foregoing brief was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

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