

## PUSHING PAUSE ON LIQUEFIED NATURAL GAS EXPORTS: CAN THE DEPARTMENT OF ENERGY HALT LNG EXPORTS TO SAVE THE PLANET?\*

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The Biden-Harris Administration recently interrupted the normal, export-friendly operation of the Natural Gas Act, triggering a lawsuit against the administration by fifteen states. The White House announced “a temporary pause on pending decisions on exports of Liquefied Natural Gas (LNG) to non-FTA [non-Free Trade Agreement] countries until the Department of Energy can update the underlying analyses for authorizations.”<sup>1</sup> The announcement makes clear from the outset that the pause is motivated by concerns about global climate change, which the Biden Administration has called “the existential threat of our time.” This raises a question: Are the new “environmental analyses” of climate change that the administration is expected to propose actually needed to inform the Department of Energy’s export authorization decisions?

No. Because the environmental analysis contemplated by the announced “pause” on LNG exports would obtain information beyond the Department of Energy’s jurisdiction, that analysis is unnecessary. The Department of Energy lacks statutory authority to consider the putative global climate

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<sup>1</sup> Statement, The White House, Fact Sheet: Biden-Harris Administration Announces Temporary Pause on Pending Approvals of Liquefied Natural Gas Exports (Jan. 26, 2024), *available at* <https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/26/fact-sheet-biden-harris-administration-announces-temporary-pause-on-pending-approvals-of-liquefied-natural-gas-exports/>.

impacts of LNG when determining whether approval of LNG export authorizations to non-Free Trade Agreement countries is in the public interest. In effect, the announcement “pauses” the Department’s statutory mission for the purpose of conducting new environmental analyses that are unnecessary to deciding whether to approve or deny export authorizations. While these analyses are being done, the Department of Energy will neglect to discharge its statutory obligations.

To explain, we first provide high-level background on the Natural Gas Act, or NGA, and the history of U.S. LNG imports and exports. Second, we review the recently announced pause of LNG export authorizations to understand what types of analysis are contemplated by the White House. Third, we examine the NGA and the National Environmental Policy Act, or NEPA, to understand what types of analysis were contemplated by Congress. Fourth, we explain that the upstream and downstream environmental impacts on which the White House is focused lie outside DOE’s authority under the NGA and therefore need not be evaluated by DOE under the NGA or NEPA. Thus, we conclude that there is no statutory basis for the White House to suspend LNG export authorizations pending evaluation of such environmental impacts.

## I. THE NATURAL GAS ACT AND EXPORTS OF LNG

Congress first passed the NGA in 1938, expressly noting that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest.”<sup>2</sup> From the beginning, the NGA included a presumption in favor of exporting natural gas. The Act stated that the government “shall issue [an order authorizing exportation] upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest.”<sup>3</sup> The NGA retains that wording today.<sup>4</sup> The Energy Policy Act of 1992 further solidified the preference for natural gas exportation. It effectively required the government to approve exports to countries with which the United States has a free-trade agreement.<sup>5</sup> In modifying the NGA, Congress expressly stated

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<sup>2</sup> Act of June 21, 1938, 52 Stat. 821, § 1(a).

<sup>3</sup> *Id.* at 822, § 3.

<sup>4</sup> 15 U.S.C. § 717b(a).

<sup>5</sup> Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, § 201.

that “natural gas consumers and producers, and the national economy, are best served by a competitive natural gas wellhead market.”<sup>6</sup>

Nevertheless, the U.S. oil and gas industry in the late 20th century was in decline.<sup>7</sup> At the turn of the 21st century, the focus was on *importing* natural gas. Companies planned to build LNG “import facilities to cope with the expected shortfall.”<sup>8</sup>

Then, in 2003, the “shale gale” came.<sup>9</sup> The efficient application of hydraulic fracturing—or “fracking”—fueled the shale gale.<sup>10</sup> Fracking had existed as a drilling technique since the 1860s, and it first found widespread commercial applications in the 1950s.<sup>11</sup> But in the early 2000s, producers refined fracking techniques, and combined fracking with horizontal drilling, to create ever more efficient production.<sup>12</sup>

U.S. oil and gas—particularly LNG—boomed. “[D]uring the period 2007-2017, natural gas output in the United States grew by more than 40%, in contrast to less than 1% growth during the previous decade.”<sup>13</sup> Global demand for LNG increased by over 1,000 billion cubic meters (bcm) from 2005 to 2021.<sup>14</sup> And “in 2017, natural gas accounted for a ‘record’ 23.4% of global energy consumption.”<sup>15</sup> That same year, U.S. natural gas exports surpassed imports for the first time since 1957.<sup>16</sup> Horizontal hydraulic fracking thus revolutionized the market for U.S. LNG and the world’s energy market.

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<sup>6</sup> *Id.* § 202.

<sup>7</sup> See *A Brief History of Fracking*, NES FIRCREFT (July 31, 2022), <https://www.nesfircroft.com/resources/blog/a-brief-history-of-fracking/>.

<sup>8</sup> Robert Rapier, *How the Shale Boom Turned the World Upside Down*, FORBES (Apr. 21, 2017), <https://www.forbes.com/sites/rpapier/2017/04/21/how-the-shale-boom-turned-the-world-upside-down/?sh=58f29c3e77d2>.

<sup>9</sup> *Id.*; *A Brief History of Fracking*, *supra* note 7.

<sup>10</sup> *A Brief History of Fracking*, *supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> Rapier, *supra* note 8.

<sup>13</sup> Scott Linn, *The Shale Gale and the Future of Liquefied Natural Gas*, U. Okla., Price Coll. of Business, Energy Inst., <https://www.ou.edu/price/energyinstitute/news/future-of-natural-gas> (last accessed Feb. 18, 2024).

<sup>14</sup> International Energy Agency, *Evolution of Global Gas Demand, 2005-2021*, IEA 50 (Apr. 15, 2021), <https://www.iea.org/data-and-statistics/charts/evolution-of-global-gas-demand-2005-2021>.

<sup>15</sup> Linn, *supra* note 13.

<sup>16</sup> U.S. Energy Info. Admin., *In 2021, Both U.S. Natural Gas Production and Exports Set New Records*, TODAY IN ENERGY (Oct. 21, 2022), <https://www.eia.gov/todayinenergy/detail.php?id=54339>.

The global growth of LNG has led to reductions in greenhouse gas emissions. In the United States, improvements in LNG production technology have reduced domestic greenhouse gas emissions even as production of natural gas has increased.<sup>17</sup> From 1990 to 2020, annual U.S. methane emissions decreased from over 780 million metric tons to around 650 million metric tons.<sup>18</sup> In that same time period, U.S. natural gas production increased from around 18,000,000 million cubic feet to nearly 35,000,000 million cubic feet.<sup>19</sup> Much of that benefit comes from switching away from higher-carbon coal. “According to [U.S. Energy Information Administration (EIA)] data, coal to gas switching accounted for as much as 61% of the U.S. emissions reductions over the period 2005-2020.”<sup>20</sup>

Globally, the effects from switching to U.S.-produced LNG are similar: “Studies consistently show that coal-to-liquefied natural gas (LNG) switching provides net greenhouse gas emissions reductions, usually between 40-50%, meaning the extent of global emissions reductions from coal displacement will be in part determined by how much U.S. liquefied natural gas reaches overseas coal-using nations.”<sup>21</sup> Furthermore, “[d]ue to low lifecycle emissions of methane, U.S. liquefied natural gas delivered to China has, on average, at least 30% lower lifecycle greenhouse gas emissions than Chinese coal does, and according to many measures, U.S. LNG has about 50% less or even lower lifecycle emissions than older Chinese coal-fired plants.”<sup>22</sup> Some of that benefit goes away, however, when “[l]imiting oil production in the U.S.” because LNG production then “shifts . . . to countries who, for the most part, have significantly lower environmental standards.”<sup>23</sup>

An increase in global supply of U.S. LNG will likely be necessary to match an increase in the global demand for electricity. Growth in population,

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<sup>17</sup> David W. Kreutzer & Paige Lambermont, *The Environmental Quality Index: Environmental Quality Weighted Oil and Gas Production*, INST. FOR ENERGY RSCH., at 15 (Feb. 2023), available at <https://www.instituteforenergyresearch.org/wp-content/uploads/2023/02/IER-EQI-2023.pdf>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 15.

<sup>20</sup> Paul Bledsoe, *The Climate Case for Expanding U.S. Natural Gas Exports*, PROGRESSIVE POL’Y INST. (Jan. 19, 2023), <https://www.progressivepolicy.org/publication/the-climate-case-for-expanding-us-natural-gas-exports/>.

<sup>21</sup> *Id.* See also Study: *New Lifecycle Analysis of U.S. LNG Exports*, AM. PETROL. INST. (last visited Feb. 18, 2024) (reporting on study “finding that using U.S. liquefied natural gas (LNG) rather than coal for electricity generation produces on average 50.5 percent fewer greenhouse gas (GHG) emissions in all base case scenarios studied”).

<sup>22</sup> Bledsoe, *supra* note 20.

<sup>23</sup> Kreutzer & Lambermont, *supra* note 17, at 6.

increased living standards, and the proliferation of computers, smart phones, and electric cars will place increased strain on the electrical grid.<sup>24</sup> The EIA has predicted annual growth rates in electricity demand ranging from “0.5% to 1.6%.”<sup>25</sup> That translates to a total growth of “somewhere between 16% and 57% by 2050 compared with 2022.”<sup>26</sup>

To be sure, wind and solar have displaced some coal. More efficient electricity storage, when available, may make wind and solar more stable features of electrical grids.<sup>27</sup> But LNG is currently and increasingly a critical component of energy, not just for the United States but also for the world. The EIA predicts that U.S. “annual natural gas production from 2022 through 2050 will grow by 52% on the Gulf Coast and 50% in the Southwest.”<sup>28</sup> Consistent with that prediction, Shell recently announced that it expects “the global demand for [LNG] to rise by more than 50% by 2040 as the Chinese industrial sector pivots from coal to gas, and South Asian and Southeast Asian countries use more LNG to support their economic growth.”<sup>29</sup> Thus, at least for the foreseeable decades, LNG will remain a critical component of the world’s energy supply.

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<sup>24</sup> Laura Sanicola & Stephanie Kelly, *Global Energy Consumption to Increase Through 2050, Outpace Efficiency Gains, EIA Says*, REUTERS (Oct. 11, 2023), <https://www.reuters.com/business/energy/global-energy-consumption-increase-through-2050-outpace-efficiency-gains-eia-2023-10-11/> (“Global population growth, increased regional manufacturing and higher living standards will contribute to the increase in [electricity] consumption.”); Bledsoe, *supra* note 20 (“Electricity demand will grow significantly, in part due to the electrification of transportation through the adoption of electric vehicles, which could raise U.S. electric power demand alone by as much as 38%.”).

<sup>25</sup> Press Release, U.S. Energy Info. Admin., *EIA Projections Indicate Global Energy Consumption Increases Through 2050, Outpacing Efficiency Gains and Driving Continued Emissions Growth* (Oct. 11, 2023), <https://www.eia.gov/pressroom/releases/press542.php>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; Bledsoe, *supra* note 20.

<sup>28</sup> U.S. Energy Info. Admin., *U.S. Natural Gas Production and LNG Exports will Likely Grow Through 2050 in AEO 2023*, TODAY IN ENERGY (Apr. 27, 2023), <https://www.eia.gov/todayinenergy/detail.php?id=56320>.

<sup>29</sup> Christian Moess Laursen, *Shell Sees Global LNG Demand UP at Least 50% by 2040*, WALL STREET J. (Feb. 14, 2024), <https://www.wsj.com/finance/commodities-futures/shell-sees-global-lng-demand-up-at-least-50-by-2040-f63aa45d>.

## II. THE ENVIRONMENTAL ANALYSIS REQUIRED BY THE BIDEN-HARRIS ADMINISTRATION

The White House’s January 26, 2024, press release makes clear that the pause on LNG export authorizations is motivated by concerns about climate change.<sup>30</sup> It begins by emphasizing the President’s view that “climate change is the existential threat of our time—and we must act with the urgency it demands to protect the future for generations to come.”<sup>31</sup> It ends by promising, “the Biden-Harris Administration will continue to lead the way in ambitious climate action while ensuring the American economy remains the envy of the world.”<sup>32</sup> In its substantive explanation of the reason for requiring DOE to conduct new analyses, the announcement cites “an evolving understanding of . . . the perilous impacts of methane on our planet.” The announcement also points to the “risks to the health of our communities, especially frontline communities in the United States who disproportionately shoulder the burden of pollution from new export facilities.”<sup>33</sup>

The announcement implies that this pause is necessary. It says that DOE’s export authorizations rely on environmental analyses that are “roughly five years old and no longer adequately account for . . . the latest assessment of the impact of greenhouse gas emissions.”<sup>34</sup> Though the announcement flags additional issues for consideration—such as “potential energy cost increases for American consumers and manufacturers”—the announcement begins and ends with climate considerations.<sup>35</sup>

Are the potential global effects of climate change an appropriate basis to pause DOE’s approval process? Indeed, are these effects relevant to DOE’s export authorizations at all? The announcement does not make clear the legal basis for requiring DOE to consider climate impacts that occur upstream (i.e., in the production of LNG and transport to the export facility) or downstream (i.e., in the subsequent distribution and use of LNG following shipment abroad) from the LNG-export process before acting on LNG export

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<sup>30</sup> The White House, *supra* note 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

applications.<sup>36</sup> As explained below, a sound explanation cannot be provided. Upstream and downstream environmental effects lie outside of DOE's authority from Congress. If DOE wishes to voluntarily assess the global effects of climate change while timely accomplishing its mission, it isn't generally prohibited from doing so. But DOE need not pause and disrupt its congressionally-assigned mission for this extra information.

### III. THE PUBLIC INTEREST AND ENVIRONMENTAL ANALYSIS REQUIRED BY THE NGA AND NEPA

An evaluation of the relationship between the pause announced by the Biden administration and the requirements legislated by Congress requires a close look at DOE's relevant statutory rights and obligations. DOE's authority to approve or deny LNG exports to non-FTA countries derives from Section 3 of the Natural Gas Act, which confers on DOE discretionary authority to regulate only the act of exporting LNG to non-FTA countries. The obligation to account for environmental considerations primarily comes from NEPA, which requires an analysis that corresponds to DOE's regulatory authority under the NGA.

#### *A. The NGA: DOE's Narrow Authority to Block Only Non-FTA LNG Exports*

The Supreme Court has long emphasized that a principal policy of the NGA is to ensure "development of plentiful supplies of . . . natural gas" for combustion to produce energy.<sup>37</sup> The text of the NGA thus imposes a congressional presumption in favor of all imports and exports of LNG.<sup>38</sup>

Section 3 of the NGA governs the export and import of LNG, including the construction of LNG terminals. Administration of Section 3 is divided between the Federal Energy Regulatory Commission (FERC) and DOE. FERC has "the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."<sup>39</sup> The Biden-Harris Administration's announcement does not address FERC's authority.<sup>40</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669–80 (1976).

<sup>38</sup> *See* 15 U.S.C. § 717b(a), (c).

<sup>39</sup> *Id.* § 717b(e).

<sup>40</sup> *See* The White House, *supra* note 1.

DOE administers the portion of NGA Section 3 governing LNG import and export authorizations.<sup>41</sup> The NGA gives DOE very narrow authority to deny Section 3 import/export applications.

Section 3(c) mandates that DOE must approve all imports of LNG.<sup>42</sup> It has no discretion to deny import authorization. Thus, between FERC's construction authority and the mandate to approve imports, DOE's discretionary authority is limited to only the act of export.

The NGA divides the world of LNG exports in two: (1) countries with which the United States has a free trade agreement (FTA countries) and (2) countries with which the United States does not have a free trade agreement (non-FTA countries).<sup>43</sup> DOE's responsibilities vary depending on which part of that world is involved in an application.

*DOE cannot deny export applications to FTA countries:* Section 3(c) mandates that DOE approve LNG exports to FTA countries.<sup>44</sup> As with imports, DOE has no discretion to refuse authorization for FTA exports.

*DOE cannot deny export applications to non-FTA countries unless the authorization is inconsistent with the public interest:* Section 3(a) states that DOE must approve exports to non-FTA countries "unless . . . it finds that the proposed exportation . . . will not be consistent with the public interest."<sup>45</sup> Thus DOE's only discretion under Section 3 is with respect to export applications to non-FTA countries.

Because DOE must grant all export authorization to FTA countries, it cannot prevent LNG from being exported from the United States. Its discretion lies in analyzing whether it is not in the public interest for LNG that could be exported to FTA countries to also export to non-FTA countries. Thus, DOE's non-FTA export approvals concern the markets *where* LNG may go, not *whether* it may go at all. For this reason, DOE's analyses have long focused on economic criteria, not environmental factors unaffected by the authorization. Those economic factors include:

the domestic need for the gas to be exported; whether the proposed exports pose a threat to the security of domestic natural gas supplies; and any other issue determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace

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<sup>41</sup> 15 U.S.C. § 717b.

<sup>42</sup> *Id.* § 717b(c).

<sup>43</sup> *Id.* § 717b(a), (c).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* § 717b(a).



by allowing commercial parties to freely negotiate their own trade arrangements.<sup>46</sup>

DOE “applies the principles described in the Secretary’s natural gas import policy guidelines[,] which presume the normal functioning of the competitive market will benefit the public.”<sup>47</sup> Under these guidelines, DOE thus examines whether the proposed exports will be conducted on a market-responsive, competitive basis.<sup>48</sup> DOE’s export policies were “designed to establish natural gas trade on a market-competitive basis and to provide immediate as well as long-term benefits to the American economy from this trade.”<sup>49</sup>

*B. NEPA: DOE’s Obligation to Consider Only Environmental Impacts It Has Authority to Prevent*

Although the White House announcement does not make clear the basis for the DOE pause, the most plausible basis is a purported need to gather additional information for NEPA analyses. NEPA generally requires agencies to consider the environmental effects caused by an agency’s action.

NEPA requires a federal agency to prepare an Environmental Impact Statement, or EIS, when it undertakes “major Federal actions significantly affecting the quality of the human environment.”<sup>50</sup> The Council of Environmental Quality, or CEQ, “has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement.”<sup>51</sup> If the proposed action would not “clearly require the production of an EIS,” it may be the subject of a more limited Environmental Analysis, or EA.<sup>52</sup> “If, pursuant to the EA, an agency determines that an EIS is not required under applicable CEQ regulations, it must issue a ‘finding of no significant impact,’ which briefly presents the reasons why the proposed agency action will not have a significant impact on the human

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<sup>46</sup> *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, FE Docket No. 10-111-LNG (May 20, 2011).

<sup>47</sup> *Phillips Alaska*, Order No. 1473, at 42 (citation omitted).

<sup>48</sup> 49 Fed. Reg. 6684-01 (Feb. 22, 1984) (hereinafter “Policy Guidelines”). DOE has repeatedly reaffirmed the continued applicability of the guidelines and has consistently held that they apply equally to export applications (though written to apply to imports). *Yukon Pacific*, Order No. 350; *Phillips Alaska*, Order No. 1473; *ConocoPhillips Alaska*, Order No. 2500; GR0013 (*Sabine Pass*, Order No. 2961).

<sup>49</sup> Policy Guidelines, *supra* note 48, at 6684.

<sup>50</sup> *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004) (quoting 42 U.S.C. § 4332(2)(C)).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (citing 40 C.F.R. § 1501.4(a)).

environment.”<sup>53</sup> Alternatively, if the proposed action would not “clearly require the production of an EIS,” it may be categorically excluded from this requirement.<sup>54</sup>

“In considering whether the effects of *the proposed action* are significant, agencies shall analyze the potentially affected environment and degree of the effects of *the action*.”<sup>55</sup> Thus, the appropriate level of NEPA analysis—categorical exclusion, EA, EIS, or nothing—depends on the specific “action” before an agency and the effects that are “caused by” agency action and “reasonably foreseeable.”<sup>56</sup>

The causal standard here is analogous to “the ‘familiar doctrine of proximate cause from tort law.’”<sup>57</sup> There must be a “reasonably close causal relationship”—beyond mere “but-for” causation—“between the environmental effect and the alleged cause.”<sup>58</sup> Thus “the underlying policies or legislative intent [help] draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.”<sup>59</sup>

When “authorizing exports of domestically produced natural gas to foreign countries [that do not have free trade agreements with the United States],” DOE conducts NEPA environmental reviews.<sup>60</sup> Nevertheless, it is important to note that “NEPA’s core focus” is “improving agency decisionmaking,” and thus it doesn’t require information-gathering that does not bear on decisions within an agency’s control.<sup>61</sup> Under the “rule of reason,” agencies must scope their NEPA analyses “based on the usefulness of any new potential information to the decisionmaking process.”<sup>62</sup> “Where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant

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<sup>53</sup> *Id.* at 757–58.

<sup>54</sup> *Id.* at 757 (citing 40 C.F.R. § 1501.4(a)).

<sup>55</sup> 40 C.F.R. § 1501.3(b) (emphases added).

<sup>56</sup> 40 C.F.R. § 1508.8(b).

<sup>57</sup> *Pub. Citizen*, 541 U.S. at 767 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

<sup>58</sup> *Id.*; *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016) (*Freeport I*).

<sup>59</sup> *Pub. Citizen*, 541 U.S. at 767.

<sup>60</sup> National Environmental Policy Implementing Procedures, 85 Fed. Reg. 78,197, at 78,197 (Dec. 4, 2020) [hereinafter “NEPA Rule”] (citing 42 U.S.C. § 4332(C)).

<sup>61</sup> *Pub. Citizen*, 541 U.S. at 769 n.2.

<sup>62</sup> *Id.* at 754.

‘cause’ of the effect.”<sup>63</sup> The agency “need not consider” such effects under NEPA or the implementing CEQ regulations.<sup>64</sup> As the D.C. Circuit has put it, “a decision over which the [agency] has no regulatory authority” “breaks the NEPA causal chain and absolves the [agency] of responsibility to include in its NEPA analysis considerations that it ‘could not act on’ and for which it cannot be ‘the legally relevant cause.’”<sup>65</sup> Accordingly, the tiered structure of NEPA review does not require agencies to conduct environmental reviews of actions or effects outside the agency’s authority. DOE’s NEPA obligations extend only as far as its authority under the NGA.

#### IV. DOE’S ENVIRONMENTAL EVALUATION RESPONSIBILITIES UNDER THE NGA AND NEPA

Because the NGA limits DOE’s discretionary authority to regulating the act of exporting LNG to non-FTA countries, DOE’s obligation to conduct environmental analyses under NEPA is likewise limited. Accordingly, in notice-and-comment rulemaking, DOE itself interpreted its statutory authority as foreclosing consideration of upstream, downstream, and cumulative environmental effects.<sup>66</sup> The only environmental effect that may be relevant to and within DOE’s public interest authority arises from the marine transport of LNG to non-FTA countries. But the pause announcement contemplates far broader environmental analysis, seemingly including the environmental effects due to new export facilities, which are regulated by FERC. The pause announcement therefore suspends DOE’s statutory obligations without any statutory need for doing so. The announced pause invites entirely voluntary and legally unnecessary environmental analysis.

##### *A. The NGA Requires DOE to Grant Export Authorizations Regardless of Upstream and Downstream Environmental Impacts*

“It is axiomatic” that an agency’s power “is limited to the authority delegated by Congress.”<sup>67</sup> Congress’s mandate to DOE is that the agency “shall” authorize natural gas exports to non-FTA countries “unless . . . it finds

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<sup>63</sup> *Id.* at 770.

<sup>64</sup> *Id.*

<sup>65</sup> *Freeport I*, 827 F.3d at 48 (quoting *Pub. Citizen*, 541 U.S. at 769).

<sup>66</sup> NEPA Rule, *supra* note 60, at 78,198.

<sup>67</sup> *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

that the proposed exportation . . . will not be consistent with the public interest.”<sup>68</sup> The NGA contains no definition of the “public interest.” Nevertheless, the NGA’s text, structure, and purpose, as well as DOE’s own regulatorily enacted interpretation, confirm that the upstream and downstream environmental effects of export authorizations to non-FTA countries lie outside the scope of the statute’s public-interest analysis.

*First*, the NGA’s “principal purpose” is the “development of plentiful supplies of . . . natural gas” for combustion to produce energy.<sup>69</sup> Consistent with its principal purpose, the NGA’s text imposes a congressional “presumption” in favor of “proposed exportation” of natural gas.<sup>70</sup> DOE “shall” authorize exports to non-FTA countries “*unless* . . . it finds that the proposed exportation . . . will not be consistent with the public interest.”<sup>71</sup> The statute thus starts with a heavy thumb on the scale in favor of the export of natural gas—which Congress knows and contemplates is intended to be combusted for energy or feeder stock for other products.

After first enactment, Congress repeatedly amended the text of the NGA. These amendments furthered Congress’s policy to import and export plentiful quantities of natural gas. Congress constrained DOE’s discretion to determine whether LNG imports or exports are not consistent with the public interest. Under NGA Section 3(e), FERC “shall have the *exclusive* authority to approve or deny an application for the siting, construction, *expansion, or operation* of an LNG terminal.”<sup>72</sup> Thus, the NGA itself facially halts DOE’s authority to look upstream and prevents DOE from second-guessing FERC’s evaluation of upstream impacts. DOE has only a narrow scope of authority over non-FTA export authorizations.

*Second*, the NGA provides no textual indication that DOE can allow environmental considerations to override the statute’s “primary purpose” when determining what would not be consistent with the public interest. And reading authority to do so into the sliver of discretion that DOE retains over non-FTA export authorizations makes no sense. As DOE recently explained to the D.C. Circuit in defense of export authorizations it approved, such “non-additive” export authorizations “do not increase the total volume of LNG the [LNG producers] may export, but only increase the number of

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<sup>68</sup> 15 U.S.C. § 717b(a).

<sup>69</sup> NAACP v. Fed. Power Comm’n, 425 U.S. 662, 669–80 (1976).

<sup>70</sup> Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017) (*Freeport II*).

<sup>71</sup> 15 U.S.C. § 717b(a) (emphasis added).

<sup>72</sup> *Id.* § 717b(e)(1) (emphasis added).

countries to which exports are authorized.<sup>73</sup> Congress has thus by statute already made the policy decision to authorize exports of LNG abroad—whatever the volumes—and thereby to accept the economic benefits of the use of that gas regardless of any global environmental effects.

To be sure, “public interest” is a malleable term. But Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”<sup>74</sup> DOE’s discretion to determine what is “not” in the “public interest” cannot logically be stretched to allow consideration of environmental effects of non-additive quantities of LNG that Congress has already authorized for export by statute.

*Third*, interpretative canons of statutory construction reinforce the conclusion that DOE’s authority should be limited. Based on “the principle of constitutional avoidance,”<sup>75</sup> Section 3(a) should be construed in a manner that avoids any nondelegation problem.<sup>76</sup> And a nondelegation problem arises if DOE is allowed to set aside Congress’s primary purpose for the NGA and instead prioritize environmental effects with no intelligible principle to guide it. There is also a presumption against the extraterritorial application of federal law.<sup>77</sup> U.S. statutes do not apply in foreign territory unless Congress “clearly expressed” this intention.<sup>78</sup> Conferring on DOE the obligation to consider the downstream *effects* of LNG use implicitly assumes the authority to regulate downstream (and hence foreign) *use* of LNG. But international use of U.S. LNG lies outside of DOE’s jurisdiction under the NGA, and the NGA does not authorize DOE to restrict such use as incompatible with global climate goals by refusing authorization. Federal courts “expect Congress to speak clearly” if it wishes to assign to an executive agency a decision “of vast economic and political significance.”<sup>79</sup> Allowing DOE to wield expansive power—beyond the largely economic and energy-security

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<sup>73</sup> Brief for Respondent U.S. Dep’t of Energy at 23, *Sierra Club v. U.S. Dep’t of Energy*, No. 22-1218 (D.C. Cir. Apr. 20, 2023). In full disclosure, the authors of this article represented an industry intervenor on the side of DOE in this case.

<sup>74</sup> *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001).

<sup>75</sup> See *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 206 (2009).

<sup>76</sup> See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (“Congress must ‘lay down by legislative act an intelligible principle,’ and the agency must follow it.” (quoting *Mistretta v. United States*, 488 U.S. 361, 374 (1989))).

<sup>77</sup> *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247, 255 (2010).

<sup>78</sup> *Id.*

<sup>79</sup> *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022).

considerations relevant to the act of export—to potentially deny applications for non-additive exports because of upstream, downstream, or cumulative worldwide environmental effects would do exactly that.

*Fourth*, even if one assumes that DOE has some discretion to consider certain environmental effects (such as from the marine transport of gas), that authority is limited. DOE’s notice-and-comment regulation confirms this.<sup>80</sup> When modifying Categorical Exclusion B5.7 in its regulations, DOE explained that its assessment of environmental impacts under NEPA “is properly focused on potential environmental impacts resulting from the exercise of its NGA section 3 authority.”<sup>81</sup> And “[t]he *only* decision *for which DOE has authority* is with respect to the export of the commodity itself.”<sup>82</sup> Thus, upstream, downstream, and cumulative environmental effects that are removed from the actual export of LNG are beyond DOE’s authority under Section 3(a) and lie within the jurisdiction of other agencies or foreign sovereigns.

*B. NEPA Does Not Require DOE to Evaluate Upstream and Downstream Environmental Impacts*

Under NEPA, an agency need not consider environmental effects when it “has no regulatory authority.”<sup>83</sup> Because upstream, downstream, and cumulative greenhouse gas emissions are beyond DOE’s Section 3(a) authority, consideration of such impacts is also outside DOE’s NEPA obligations.<sup>84</sup> Furthermore, DOE more than adequately addressed the NEPA requirements for LNG export authorizations to non-FTA countries by promulgating Categorical Exclusion B5.7.

A categorical exclusion is an environmental analysis of a category of agency actions that allows such actions to be exempted from project-specific NEPA review absent “extraordinary circumstances.”<sup>85</sup> Categorical Exclusion B5.7 is an environmental analysis of “[a]pprovals or disapprovals of new authorizations or amendments of existing authorizations to export natural gas

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<sup>80</sup> 10 C.F.R. Pt. 1021, Subpt. D, App. B, B5.7; *see also* NEPA Rule, *supra* note 60, at 78,198.

<sup>81</sup> NEPA Rule, *supra* note 60, at 78,198.

<sup>82</sup> *Id.* at 78,199 (emphases added).

<sup>83</sup> *Freeport I*, 827 F.3d at 48 (quoting *Pub. Citizen*, 541 U.S. at 769).

<sup>84</sup> *Id.*

<sup>85</sup> NEPA Rule, *supra* note 60, at 78,199 (citing 40 C.F.R. § 1501.4(b)).

under section 3 of the Natural Gas Act and any associated transportation of natural gas by marine vessel.”<sup>86</sup>

Because NEPA analysis should focus on matters within the agency’s jurisdiction, DOE determined that it could consider only “potential environmental impacts starting at the point of delivery to the export vessel, and extending to the territorial waters of the receiving country.”<sup>87</sup> Based on “some 50 years of experience” and after examining various studies, along with “prior NEPA reviews and . . . technical reports,” DOE found that there was “no information to indicate that natural gas export authorizations pose the potential for significant environmental impacts.”<sup>88</sup>

In promulgating by rule Categorical Exclusion B5.7, DOE enshrined its regulatory interpretation of the NGA confirming that upstream, downstream, and cumulative greenhouse gas emissions are beyond DOE’s statutory authority. In DOE’s words:

NEPA do[es] not include effects that the agency has no authority to prevent. DOE’s discretionary authority under Section 3 of the NGA is limited to the authorization of exports of natural gas to non-FTA countries. Therefore, DOE need not review potential environmental impacts associated with the construction or operation of natural gas export facilities because DOE lacks authority to approve the construction or operation of those facilities.<sup>89</sup>

Thus, DOE determined the scope of its authority under the NGA and conducted a thorough analysis of all environmental considerations that it found relevant.

### *C. The Pause Suspends DOE’s Execution of Congress’s Directives Without Statutory Authority*

The administration’s stated justification for pausing DOE’s consideration of LNG export applications pending additional environmental analysis does not align with the scope of DOE’s limited authority over exports to non-FTA countries.<sup>90</sup> The announcement does not explain how evaluating the impact

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<sup>86</sup> *Id.* at 78,205; 10 C.F.R. Pt. 1021, Subpt. D, App. B, B5.7.

<sup>87</sup> NEPA Rule, *supra* note 60, at 78,199–78,200.

<sup>88</sup> *Id.* at 78,198, 78,201–02.

<sup>89</sup> *Id.* at 78,198.

<sup>90</sup> Compare The White House, *supra* note 1, with 15 U.S.C. § 717b(a), (c).

of LNG on global greenhouse gas emissions falls within the scope of DOE's authority.

Nor does the announcement address DOE's own interpretation of the NGA as limiting its authority to consider only "potential environmental impacts starting at the point of delivery to the export vessel, and extending to the territorial waters of the receiving country."<sup>91</sup> The announcement also does not suggest that the last three years since the NEPA Rule was promulgated have led to the discovery of significant new problems that demand evaluation.

The announcement's reliance on the "risk to the health of our communities, especially frontline communities in the United States who disproportionately shoulder the burden of pollution from new export facilities" also conflates the authority of FERC and DOE.<sup>92</sup> FERC, not DOE, has "the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."<sup>93</sup> Pausing DOE's authority to approve exports to non-FTA countries does not affect FERC's authority to approve construction of "new export facilities."

Nor does DOE's limited authority over LNG exports offer any basis for thinking that DOE could act to reduce the environmental impacts of LNG production, transportation, or use based on the analyses suggested by the administration's announcement. Because the full quantity of American LNG can (and, if the broader world market demands it, will) be exported to FTA countries, the announcement merely pauses direct exports to non-FTA countries. Nothing in the NGA gives DOE authority to examine whether terminals in FTA countries might, in turn, resell natural gas to non-FTA countries. And the demand for LNG in non-FTA countries will remain. Thus, the inability to directly export to non-FTA countries increases the chance that U.S. LNG will be first exported to FTA countries and then relayed on to non-FTA countries. Such indirect export adds length and expense to shipping routes. That's an ironic result because it adds to the environmental impact of marine transport of LNG—the only environmental effect that DOE presently has the authority to regulate.<sup>94</sup>

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<sup>91</sup> Compare The White House, *supra* note 1, with NEPA Rule, *supra* note 60, at 78,199–78,200.

<sup>92</sup> Compare The White House, *supra* note 1, with 15 U.S.C. § 717b(a), (c), (e).

<sup>93</sup> *Id.* § 717b(e).

<sup>94</sup> NEPA Rule, *supra* note 60, at 78,205; 10 C.F.R. Pt. 1021, Subpt. D, App. B, B5.7.



## V. CONCLUSION

The recent pause to seek unnecessary information is contrary to DOE's statutory duties. There is no identified legal requirement to reassess these environmental issues. DOE has no authority to regulate upstream or downstream environmental effects of LNG use. So the contemplated new environmental analyses are unnecessary. Regardless of the pause and regardless of any new environmental analysis, DOE will continue to be required to approve natural gas exports to FTA countries. And the announcement does not affect FERC's authority to authorize new export facilities. While there may be political and policy reasons for updating DOE's assessments of the environmental effects of natural gas exports, there is no legal need to do so. The pause announcement runs counter to the NGA and to Congress's preference for DOE to ensure plentiful supplies of natural gas.

## Other Views:

- Statement, The White House, Fact Sheet: Biden-Harris Administration Announces Temporary Pause on Pending Approvals of Liquefied Natural Gas Exports (Jan. 26, 2024), *available at* <https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/26/fact-sheet-biden-harris-administration-announces-temporary-pause-on-pending-approvals-of-liquefied-natural-gas-exports/>.
- Dep't of Energy, *Unpacking the misconceptions surrounding the DOE's LNG update* (Feb. 8, 2024), <https://www.energy.gov/articles/unpacking-misconceptions-surrounding-does-lng-update>.
- Osha Davidson, *Why Biden's pause on new LNG export terminals is a BFD*, YALE CLIMATE CONNECTIONS (Feb. 14, 2024), <https://yaleclimateconnections.org/2024/02/why-bidens-pause-on-new-lng-export-terminals-is-a-bfd/>.