

## D.C. Circuit Denies Sierra Club's Petition Challenging DOE's Orders Authorizing Exports for the Freeport LNG Terminal

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On August 15, 2017, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) denied Sierra Club’s petition challenging the United States Department of Energy’s (“DOE”) decision to authorize the export of liquefied natural gas (“LNG”) from the Freeport LNG Terminal (“Freeport”) in Texas. The D.C. Circuit’s opinion in *Sierra Club v. Department of Energy*, No. 15-1489 (D.C. Cir. Aug. 15, 2017) (“*Sierra Club*”) resolves important questions regarding the level of analysis required under the National Environmental Policy Act (“NEPA”) to adequately evaluate the indirect and cumulative effects of DOE decisions to authorize LNG exports—particularly effects related to induced gas production and greenhouse gas (“GHG”) emissions. The decision is important for LNG developers because the D.C. Circuit affirmed DOE’s approach to considering such effects, which will provide more certainty for LNG projects undergoing NEPA review. It also sets potential precedent for upcoming cases challenging other export approvals the D.C. Circuit is slated to hear this year.

### Background

Under of the Natural Gas Act (“NGA”), an entity seeking to export natural gas to other countries must obtain DOE’s authorization. 15 U.S.C. § 717b. Section 3 of the NGA requires that DOE “shall issue” such authorization unless it finds that the proposed export “will not be consistent with the public interest.” *Id.* The statute thus creates a general presumption in favor of export authorization. In addition to DOE, the Federal Energy Regulatory Commission (“FERC”) plays a prominent role in authorizing LNG export projects. While DOE is responsible for authorizing exports of natural gas as a *commodity*, FERC has been delegated the responsibility for authorizing the construction and operation of export terminal *facilities*. Accordingly, approvals are often needed from both agencies for LNG export projects.

Before granting their respective approvals, FERC and DOE must evaluate the environmental effects of their LNG authorization actions under NEPA. NEPA requires agencies to analyze a variety of environmental effects, including direct, indirect, and cumulative effects. Indirect effects “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Cumulative impacts are “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions.” *Id.* § 1508.7.

Where multiple federal agencies are involved in the authorization of a project, the agencies can coordinate their NEPA review and rely on one another's analyses. For the Freeport LNG project, FERC served as the "lead agency" for complying with NEPA, while DOE participated as a "cooperating agency." However, although DOE was allowed to rely on FERC's NEPA analysis, DOE also was required to independently review FERC's work and ensure that DOE satisfied its own responsibilities. Following their coordinated NEPA review, DOE and FERC each granted the required authorizations to Freeport. Sierra Club petitioned for review of both approvals in the D.C. Circuit, arguing that each agency failed to sufficiently consider certain indirect and cumulative effects resulting from Freeport's export of LNG.

In the challenge to FERC's authorization, petitioners argued that FERC failed to consider two important indirect effects of increased LNG exports: (i) increased induced production of natural gas upstream, and (ii) increased burning of coal downstream due to higher domestic gas prices. In *Sierra Club v. FERC*, 827 F.3d 36 (2016), the D.C. Circuit rejected these arguments, emphasizing that the indirect effects identified by Sierra Club stem from increased gas exports—which are authorized by DOE—rather than from FERC's authorization of the export facilities. Because DOE, not FERC, has sole authority to authorize LNG exports, FERC could not be considered the legally relevant or proximate cause of the alleged effects of those exports. *Sierra Club v. FERC*, 827 F.3d at 47-48 (citing *DOT v. Public Citizen*, 541 U.S. 752 (2004)). Accordingly, FERC did not need to consider these effects in its NEPA analysis. However, the D.C. Circuit left open the question of the extent to which DOE had to consider these effects, and stated that "[t]o the extent the [petitioners] complain about the environmental consequences of exporting natural gas from Freeport's terminal, those objections should be raised in the pending challenge to the [DOE]'s order authorizing Freeport to export[.]" *Id.* at 40. The D.C. Circuit's decision this past week in *Sierra Club v. DOE* resolves those objections.

### **The D.C. Circuit's Decision in *Sierra Club v. DOE***

In the case against DOE, like the previous case against FERC, Sierra Club argued that DOE did not adequately consider (i) the indirect effects of exports on induced natural gas production; (ii) the potential for utilities in the U.S. to use more coal due to higher domestic gas prices; or (iii) the cumulative effects of Freeport's authorization in conjunction with the effects of other LNG export proposals. Sierra Club also challenged the sufficiency of DOE's evaluation of GHG emissions resulting from the exports.

#### ***Effects Related to Induced Gas Production***

As the cooperating agency, DOE adopted FERC's environmental impact statement ("EIS"). Although the EIS had not evaluated the indirect effects of exports, DOE supplemented the EIS with additional studies. One of the studies generally evaluated the various ways export-induced gas production might impact the environment, but made no attempt to specifically forecast where or to what extent the impacts might occur. Sierra Club argued that DOE should have evaluated the degree to which an incremental increase in exports would result in an incremental increase in gas production and associated impacts on specific resources. DOE concluded that such indirect effects were not reasonably foreseeable. Production increases were not foreseeable because the incremental amount of induced gas production depends on market factors that are difficult to predict. Locations were not reasonably foreseeable because extensive gas transportation infrastructure in the U.S. makes it possible

for the Freeport facility to receive gas from virtually any production field in the country. Accordingly, the environmental effects, which were local, were also unforeseeable. DOE declined to examine these effects on a regional, shale play basis for similar reasons.

The D.C. Circuit found DOE's conclusions regarding foreseeability to be reasonable, explaining that because DOE "could not estimate the locale of production, it was in no position to conduct an environmental analysis of corresponding local-level impacts, which inevitably would be more misleading than informative." *Sierra Club*, slip op. at 16-17 (internal quotation marks omitted). The D.C. Circuit further noted that DOE's "obligation to drill down into increasingly speculative projections about regional environmental impacts is also limited by the fact that it lacks any authority to control the locale or amount of export-induced gas production, much less any of its harmful effects." *Id.* at 18. The D.C. Circuit thus indicated that DOE's lack of authority over production activities limited DOE's duty to consider those impacts. In terms of cumulative impacts, the D.C. Circuit similarly found that cumulative effects of export activities upon a region could not be meaningfully considered, because DOE could not identify where the production would occur.

### ***Effects Related to Increased Coal Use***

In response to arguments that DOE did not amply consider the indirect effects of exports on coal use, the D.C. Circuit deferred to DOE's finding that the effects were more attenuated than those due to induced production and were not reasonably foreseeable or useful to consider.

### ***Effects Related to GHG Emissions***

Although one of DOE's supplemental reports evaluated the life cycle of GHG emissions associated with exports, Sierra Club contended that DOE's evaluation of both upstream and downstream emissions was inadequate. With respect to upstream emissions, the D.C. Circuit noted that Sierra Club had itself essentially acknowledged that the information it sought was contained in DOE's analysis. With respect to downstream emissions, DOE had evaluated the amount of GHG emissions that would result from electricity generated using U.S. LNG in markets in Europe and Asia vis-à-vis electricity generated from other fossil fuel sources in those markets. Sierra Club also wanted DOE to consider the use of renewable electricity. Once again, the D.C. Circuit deferred to DOE's finding that such analysis was too speculative, emphasizing that foreseeability limitations and practical considerations can limit the scope of NEPA review.

### ***NGA Public Interest Standard***

The D.C. Circuit also rejected Sierra Club's argument that DOE's decision violated the NGA's public interest standard, reaffirming the NGA's presumption in favor of authorizing exports. Importantly, the D.C. Circuit noted that even if DOE had determined that environmental impacts were significant, it could find that the overall public interest weighed in favor of exports.

## Implications

The D.C. Circuit's decision provides additional certainty for LNG developers, as it affirmed the DOE's more generalized evaluation of certain indirect and cumulative effects and declined to require DOE to consider these effects in a significantly more detailed and localized manner. The decision is also likely to set precedent for future challenges to DOE export decisions. Indeed, several additional cases are pending before the D.C. Circuit that challenge DOE export authorizations associated with LNG terminals in Corpus Christi, TX, Sabine Pass, LA, and Cove Point, MD, which are set for oral argument on October 18, 2017. The D.C. Circuit's decisions in these cases are likely to further define the bounds for what is required in DOE's NEPA analyses for export authorizations.

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