ORAL ARGUMENT NOT YET SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 14-1275

SIERRA CLUB AND GALVESTON BAYKEEPER,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

Karin L. Larson
Attorney

For Respondent
Federal Energy Regulatory
Commission
Washington, D.C. 20426

FINAL BRIEF: July 17, 2015

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties: All parties and intervenors appearing before this Court are identified in Petitioners' brief.

B. Rulings Under Review:

1. Order Granting Authorizations Under Section 3 Of The Natural Gas Act, *Freeport LNG Development, L.P.*, 148 FERC ¶ 61,076 (July 30, 2014) ("Authorization Order"), R. 598, JA 1189; and

2. Order Denying Rehearing And Clarification, *Freeport LNG Development, L.P.*, 149 FERC ¶ 61,119 (November 13, 2014) ("Rehearing Order"), R. 632, JA 1264.

C. Related Cases: This case has not previously been before this Court or any other court. There is one related case pending before the Court, *Sierra Club v. FERC*, D.C. Cir. No. 14-1249, which the Court has stated that it will schedule for argument on the same date and before the same panel as this case.

In addition, a related administrative proceeding, in which petitioner Sierra Club is an active party, is pending at the Department of Energy, Office of Fossil Energy: *Freeport LNG Expansion, L.P. et al.*, DOE Docket No. 11-161-LNG (proceeding on application under section 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a), for authorization to export liquefied natural gas using the facilities that are the subject of the Federal Energy Regulatory Commission's review in the challenged proceeding).

/s/ Karin L. Larson
Karin L. Larson

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Authorization Order	*Freeport LNG Development, L.P.*, 148 FERC ¶ 61,076 (July 30, 2014), R. 598, JA 1189
Br.	Petitioners' opening brief
Commission or FERC	Federal Energy Regulatory Commission
Department or DOE	Department of Energy
EIS	Final Environmental Impact Statement for the Freeport LNG Liquefaction Project and Phase II Modification Project (June 2014), R. 561, JA 655
Environmental Addendum	*Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States*, published by the Department of Energy on Aug. 15, 2014
Freeport	The Freeport Project sponsors: Freeport LNG Development, L.P., FLNG Liquefaction, LLC, FLNG Liquefaction 2, LLC, and FLNG Liquefaction 3, LLC
Freeport Facility	The existing LNG facility, including the LNG terminal located on Quintana Island near the city of Freeport, in Brazoria County, Texas
Greenhouse Gas Report	*Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States*, published by the Department of Energy on June 4, 2014
JA	Joint Appendix
Liquefaction Project	Freeport LNG Development, L.P.'s, FLNG Liquefaction, LLC's, FLNG Liquefaction 2, LLC's, and FLNG Liquefaction 3, LLC's proposed project in FERC Docket No. CP12-509-000, to add gas pretreatment and liquefaction facilities and interconnecting pipelines to the Freeport Facility

LNG	Liquefied natural gas
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*
NGA	Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*
November 2014 Export Order	*Freeport LNG Expansion L.P.*, Final Opinion And Order Granting Long-Term Multi-Contract Authorization To Export Liquefied Natural Gas By Vessel From The Freeport LNG Terminal On Quintana Island, Texas, To Non-Free Trade Agreement Nations, Order No. 3357-B, DOE Docket No. 11-161-LNG (Nov. 14, 2014), JA 1392
P	The internal paragraph number within a FERC order
Phase II Modification Project	Freeport LNG Development, L.P.'s proposed project in FERC Docket No. CP12-29-000 for authorization to modify previously approved LNG facilities to facilitate export of LNG at the Freeport Facility
Project	Freeport's Phase II Modification Project and Liquefaction Project together
R.	Record item
Rehearing Order	*Freeport LNG Development, L.P.*, 149 FERC ¶ 61,119 (Nov. 13, 2014), R. 632, JA 1264
Sierra Club	Petitioners, Sierra Club and Galveston Baykeeper

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

The Federal Energy Regulatory Commission ("Commission" or "FERC") conditionally authorized an application to construct and operate liquefied natural gas ("LNG") facilities. The question presented on appeal is:

Assuming jurisdiction, whether the Commission's environmental review, which spanned 42 months, resulting in an environmental impact statement, totaling 978 pages, that considered all direct, indirect, and cumulative impacts in a 1,597 square mile area, and imposed 83 environmental conditions to be met prior to

construction and operation, satisfied the Commission's obligations under the National Environmental Policy Act ("NEPA").

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum.

COUNTER-STATEMENT OF JURISDICTION

Each of Petitioners' three claims (regarding indirect, cumulative, and air emissions impacts) suffers a fatal jurisdictional flaw. Generally, Petitioners make no effort to establish standing, other than attaching, without explanation, the declarations of three Sierra Club members. *See* D.C. Cir. Rule 28(a)(7) (requiring appellant's opening brief to include "the basis of the claim for standing"); *see also, e.g.*, *Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 106 n.4 (D.C. Cir. 2014) (emphasizing that standing arguments must be included in the appellant's opening brief to avoid "wreak[ing] havoc on the procedural controls governing appeals").

More specifically, with respect to Petitioners' first two arguments (indirect and cumulative impacts claims), the alleged injuries set forth in declarations attached to the opening brief do not satisfy minimum constitutional standing requirements. *See infra* Part II.A of the Argument. In addition, Petitioners' indirect and cumulative impacts claims are moot, as the Department of Energy

("Department" or "DOE") has already provided the relief sought by Petitioners. *See infra* Part II.B of the Argument.

Finally, this Court lacks jurisdiction over Petitioners' third issue (indirect air emissions) under section 19(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717r, for failure to raise this claim before the Commission with specificity. *See infra* Part III of the Argument.

INTRODUCTION

In 2011 and 2012, Freeport LNG Development, L.P., FLNG Liquefaction, LLC, FLNG Liquefaction 2, LLC, and FLNG Liquefaction 3, LLC (collectively, "Freeport") filed multiple applications with the Commission (for the physical facilities) and the Department of Energy (for the commodity). The applications sought the necessary authorizations under section 3 of the Natural Gas Act, 15 U.S.C. § 717b, to export LNG from Freeport's existing LNG import terminal located near Freeport, Texas ("Freeport Facility"). This proceeding involves the Commission's environmental review related to the construction and operation of the facilities needed to convert the Freeport Facility into an export terminal. In the orders on review, the Commission conditionally approved Freeport's applications to modify and expand the Freeport Facility to accommodate exports. *Freeport LNG Development, L.P.*, 148 FERC ¶ 61,076 (July 30, 2014) ("Authorization Order"), R. 598, JA 1189; *Freeport LNG Development, L.P.*, 149 FERC ¶ 61,119

(Nov. 13, 2014) ("Rehearing Order"), R. 632, JA 1264.[1] The Commission's approval was expressly conditioned upon the fulfillment of numerous conditions, including receipt of all necessary authorizations from relevant state and federal agencies.

Before the Commission, Petitioners Sierra Club and Galveston Baykeeper (together "Sierra Club") raised numerous challenges to FERC's environmental review of the export project. On appeal, Sierra Club's challenges are reduced to three claims. Specifically, Sierra Club argues that FERC: (1) failed to consider the indirect impacts arising from increased natural gas production and increased use of coal in lieu of natural gas (Br. 20-32); (2) did not include in the cumulative impacts analysis other LNG export projects throughout the United States (Br. 33-36); and (3) incorrectly quantified air pollution related to the Project's electricity consumption (Br. 36-38). The Commission addressed and rejected these (and many other) contentions in the challenged orders.

In an ongoing proceeding, the Department of Energy issued orders authorizing Freeport's export of LNG. In that Department proceeding, Sierra Club raised the same environmental challenges that it raised at FERC. The Department addressed Sierra Club's concerns by publishing two reports analyzing the

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order. "Br." refers to Petitioners' opening brief.

environmental impacts associated with the export of LNG and increased production of natural gas. Nonetheless, Sierra Club continues to pursue its arguments at the Department in a pending request for rehearing. Sierra Club has a legal right to appeal, separately, the Department's findings. *See* 15 U.S.C. § 717r(d)(1) (providing for judicial review of orders by the Department issued pursuant to NGA section 3).

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Licensing Of LNG Projects Under The Natural Gas Act

The Natural Gas Act "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988). Section 3 of the Act, 15 U.S.C. § 717b, prohibits the exportation of any natural gas from the United States to a foreign country without "first having secured an order of the Commission authorizing" such exportation. *Id.* § 717b(a). The regulatory functions of NGA section 3 were transferred to the Department of Energy in 1977 pursuant to section 301(d) of the Department of Energy Organization Act. 42 U.S.C. § 7151(b). The Department subsequently delegated to the Commission the authority under NGA section 3(e), 15 U.S.C. § 717b(e), to approve the siting, construction, and operation of import and export facilities. *See* DOE Delegation

Order No. 00-044.00A (effective May 16, 2006), JA 1287 (renewed delegation of authority to the Commission over the construction, operation, maintenance, or connection of import and export facilities). The Department retains, under section 3(a)-(c) of the NGA, exclusive authority over the export of natural gas as a commodity, including the responsibility to consider whether the exportation of natural gas will "not be inconsistent with the public interest." 15 U.S.C. § 717b(a).

FERC's authority, as exercised here, is to license the "siting, construction, expansion, or operation" of LNG terminals. *Id.* § 717b(e)(1). In doing so, the Commission considers the technical and environmental aspects of the LNG facilities themselves. The Commission "shall" authorize a proposed LNG project unless it finds that construction and operation of the proposed facilities "will not be consistent with the public interest." *Id.* § 717b(a).

Natural Gas Act section 3's "public interest" standard is applied differently than the Commission's NGA section 7's "public convenience and necessity" standard for FERC's certification of natural gas transportation facilities. *See W. Va. Pub. Servs. Comm'n v. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982); *see also* 15 U.S.C. § 717f(e) (NGA section 7 "certificate shall be issued" if the proposed natural gas facility "is or will be required by the present or future public convenience and necessity"). Contrary to NGA section 7, NGA section 3 "sets out a general presumption favoring such authorization. . . ." *W. Va. Pub. Servs.*

Comm'n, 681 F.2d at 856. Accordingly, under NGA section 3, the Commission must authorize an LNG project unless it makes a negative finding that the proposed project is not consistent with the public interest. *Id.* (quoting *Cia Mexicana de Gas v. FPC*, 167 F.2d 804, 806 (5th Cir. 1948)).

B. National Environmental Policy Act

The Commission's consideration of an application for authorization to site, construct, or operate LNG facilities triggers an environmental review mandated by the National Environmental Policy Act. *See* 42 U.S.C. §§ 4321, *et seq.* NEPA sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (same). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Public Citizen*, 541 U.S. at 756-57 (quoting *Robertson*, 490 U.S. at 349-50); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (NEPA ensures a "fully informed and well-considered decision, not necessarily the best decision"). Accordingly, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

Regulations implementing NEPA require agencies to consider the environmental effects of a proposed action by preparing either an environmental assessment, if supported by a finding of no significant impact, or a more comprehensive environmental impact statement. *See* 40 C.F.R. § 1501.4 (detailing when to prepare an environmental impact statement versus an environmental assessment).

The Natural Gas Act, as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), designated the Commission as "the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act," including any authorization required under section 3 of the NGA. *See* 15 U.S.C. § 717n(b)(1). With respect to the Freeport Project, the Commission served as the lead federal agency for the preparation of the environmental documents necessary to comply with NEPA. The Department and several other federal agencies served as cooperating agencies. *See Final Environmental Impact Statement for the Freeport LNG Liquefaction Project and Phase II Modification Project* at 1-1, Docket Nos. CP12-509-000, *et al.* (June 2014), R. 561, JA 679 ("EIS"). Cooperating agencies have jurisdiction by law, or special expertise with respect to the environmental resource issues associated with the project at issue, and participate in the environmental analysis. *Id.*

II. THE COMMISSION'S REVIEW OF THE FREEPORT PROJECT

A. The Freeport Project

The existing, Commission-approved Freeport Facility includes facilities to import up to 1.5 billion cubic feet per day of foreign-sourced LNG, and to store and re-vaporize that LNG for delivery to United States markets. *See* EIS at 1-3, JA 681. The Freeport Facility began importing LNG in June 2008. In 2006, the Commission authorized Freeport's proposed Phase II expansion of the facility to provide for an additional 2.5 billion cubic feet per day of import capacity. *See* Authorization Order PP 6-8, JA 1190-91 (detailing history of the Freeport Facility). Because of changes in the natural gas markets in the late 2000s, Phase II was never built.

Instead, in 2011 and 2012, Freeport filed applications with the Commission for the "Phase II Modification Project" and the "Liquefaction Project" (together the "Project") that are the subject of this appeal. The Phase II Modification Project proposed to alter the previously approved (but not constructed) Phase II facilities to enable the export of LNG at the Freeport Facility. *See* EIS at 1-2, JA 680. The Liquefaction Project encompasses the siting, construction, and operation of natural gas pretreatment and liquefaction facilities and several interconnecting pipelines to support liquefaction and export operations at the Freeport Facility. The major components of the Liquefaction Project include the construction of: (1) three

liquefaction trains;[2] (2) a pretreatment plant; and (3) pipelines connecting the terminal, pretreatment plant, and the existing natural gas interstate pipeline system. *See id.* at 1-2 through 1-3, JA 680-81.

B. The Commission's Environmental Review

The Commission initiated its environmental review of the Liquefaction Project in January 2011 using the Commission's "pre-filing" process.[3] When Freeport filed its application for the Phase II Modification Project in December 2011, the Commission determined that the Phase II Modification Project and the Liquefaction Project were interconnected actions requiring a single comprehensive environmental review. EIS at 1-1, JA 679. Several federal agencies, including the Department of Energy, participated in the environmental review as cooperating

[2] An LNG "train" refers to the compressor facility used to convert natural gas into LNG. The three-step process to convert natural gas into LNG includes: gas treatment (to remove impurities and water), gas compression, and refrigeration. After treatment, purified gas goes to the compressor trains to be transformed from gas into liquid by refrigeration to approximately -256°F.

[3] The Commission's "pre-filing" process may be used by builders of interstate natural gas and LNG facilities. *See Guidance: FERC Staff NEPA Pre-Filing Involvement In Natural Gas Projects* (Oct. 23, 2002). The pre-filing process allows project sponsors to engage in early project-development involvement with the public and agencies, as contemplated by the National Environmental Policy Act, typically seven to eight months prior to submitting a formal project application.

agencies.[4] After issuance of the draft environmental impact statement and multiple opportunities for public comments spanning several years, the Commission's environmental review culminated in the 978-page final EIS.

C. The Authorization Order

On July 30, 2014, the Commission issued a conditional order authorizing the proposed Phase II Modification and Liquefaction Projects upon satisfaction of various environmental conditions, including obtaining all applicable authorizations required under federal law. Authorization Order P 3 & App. A, Condition 10, JA 1190 & 1218. The Commission's environmental review of the Project considered the final EIS and all substantive comments on it. *See id.* PP 36-88, JA 1199-1211. The Commission addressed all of Sierra Club's comments, including the issues raised in this appeal: indirect impacts from induced natural gas production (*id.* PP 77-78, JA 1209-10), and increased natural gas prices (*id.* PP 29-32, JA 1196-97); cumulative impacts (*id.* PP 71-76, JA 1208-09); and air emissions (*id.* PP 59-65, JA 1205-06).

Ultimately, the Commission concurred with the final EIS and determined that the construction and operation of the Project would result in some significant impacts to the residents of the Town of Quintana, but that the impacts would be

[4] The Department can adopt and use the final EIS to support its respective export authorization after an independent review of the document, but it must present its own conclusions and recommendations in its own record of decision.

temporary and minimized by the required mitigation measures. *Id.* P 35, JA 1198. The Commission held that, subject to compliance with 83 environmental conditions, the Project is not inconsistent with the public interest. *Id.* Among the conditions, the Authorization Order requires Freeport to obtain all necessary authorizations from relevant state and federal agencies, including the Department of Energy NGA section 3 export authorization. *Id.* at App. A, Condition 10, JA 1218.

D. The Rehearing Order

Sierra Club was the only party to seek rehearing of the Commission's Authorization Order. *See Freeport LNG Development, LP*, Request for Rehearing, Docket Nos. CP12-29 and CP12-509 (Aug. 29, 2014) ("Rehearing Request"), R. 609, JA 1239. On rehearing, the Commission rejected all of Sierra Club's challenges regarding FERC's compliance with NEPA. *See* Rehearing Order P 1, JA 1264. As relevant to this appeal, the Commission affirmed its determination in the Authorization Order that environmental effects associated with induced natural gas production are neither causally related to the Freeport Project nor reasonably foreseeable. *Id.* P 17, JA 1270; *see also id.* PP 13-31, JA 1268-73. The Commission also rejected Sierra Club's contentions that FERC was required to analyze the cumulative impacts of LNG export projects outside of the Freeport Project's geographic study area (*id.* PP 32-36, JA 1273-74) and that NEPA

requires an analysis of the indirect effects related to increased use of coal for domestic electricity production (*id.* PP 52-54, JA 1279-80). Last, the Commission rejected Sierra Club's rehearing argument that FERC was required to compare the indirect air emission impacts related to the generation of electricity consumed by the Freeport Project against the "no-action alternative." *Id.* PP 60-61, JA 1282-83.

III. THE DEPARTMENT OF ENERGY'S REVIEW

Concurrent with the Commission's review of the Project, the Department reviewed, in DOE Docket Nos. 10-161-LNG and 11-161-LNG, Freeport's two applications for authority to export LNG to countries with which the United States does not have a free-trade agreement.[5] In DOE Docket No. 10-161-LNG, Freeport sought authorization to export 1.4 billion cubic feet per day of natural gas per day for a 20-year period. In a second, separate application in DOE Docket No. 11-161-LNG, Freeport requested an additional authorization to export 1.4 billion cubic feet per day for a 25-year period. *See* EIS 1-8, JA 686 (summarizing the Department's role and the export proceedings).

Sierra Club intervened in DOE Docket No. 11-161-LNG, raising identical challenges regarding the induced natural gas production that it raised in the FERC

[5] Freeport also separately filed, and the Department approved, two applications to export LNG to countries with which the United States has free-trade agreements. *See* EIS at 1-8, JA 686 (summarizing Freeport's export applications filed with the Department).

proceeding. Specifically, Sierra Club argued that an "indirect effect" of the Department's export authorization is the inducement of additional natural gas production in the United States and that the environmental impacts of such additional production should have been considered in the EIS. *See Freeport LNG Expansion L.P. et al.*, Final Opinion And Order Granting Long-Term Multi-Contract Authorization To Export LNG From The Freeport LNG Terminal To Non-Free-Trade Agreement Nations, Order No. 3357-B at 37-44, DOE Docket No. 11-161-LNG (Nov. 14, 2014), JA 1432-39 ("November 2014 Export Order") (summarizing Sierra Club's protest and comments). Sierra Club also challenged the adequacy of the cumulative impacts analysis on the same grounds it asserted in the FERC proceeding. *Id.*

In 2013, in DOE Docket No. 11-161-LNG, the Department issued to Freeport conditional authorization to export LNG to non-free-trade countries contingent on FERC's siting approval and completion of the Department's environmental review of the proposed export of LNG. *See Freeport LNG Expansion L.P.*, Order Conditionally Granting Long-Term Multi-Contract Authorization To Export LNG From The Freeport LNG Terminal To Non-Free Trade Agreement Nations, Order No. 3357 at 163-165, DOE Docket No. 11-161-LNG (Nov. 15, 2013), JA 1390-91. In this conditional order the Department explained that with respect to its environmental review of Freeport's export

application, it was participating "as a cooperating agency in the FERC proceeding . . . to avoid duplication of effort . . . ." *Id.* at 164, JA 1391. The Department noted that if a "participant in the FERC proceeding actively raises concerns over the scope or substance of environmental review but is unsuccessful in securing that agency's consideration of its stated interests, DOE[] reserves the right to address the stated interests within this proceeding." *Id.*

On November 14, 2014, the Department issued a final order in DOE Docket No. 11-161-LNG granting Freeport approval to export LNG to non-free-trade countries. *See* November 2014 Export Order, JA 1392. In its final order, the Department noted that it had conducted an "independent review of the EIS," and determined that "FERC's environmental review covered all reasonably foreseeable environmental impacts of the Liquefaction Project. . . ." *Id.* at 5, 84, JA 1400, 1479 (citing U.S. Envtl. Prot. Agency, *Environmental Impact Statements; Notice of Availability*, 79 Fed. Reg. 61,303, 61,304 (Oct. 10, 2014) (providing notice that DOE adopted FERC's final EIS for the Freeport Project)). The Department further determined that given the "fundamental uncertainties that constrain [its] ability to foresee and analyze with any particularity the incremental natural gas production that may be induced by" LNG exports, "NEPA does not require [its] review to include induced upstream natural gas production." *Id.* at 84, JA 1479. The

Department formally adopted the final EIS and the 83 environmental conditions recommended in it. *Id.* at 83, JA 1478.

The Department also incorporated into its decisional record two additional environmental reports that the Department published in mid-2014: (1) the *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States* ("Environmental Addendum");[6] and (2) the *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States* ("Greenhouse Gas Report").[7] *See* November 2014 Export Order at 6-7, JA 1401-02 (noting that these reports were developed in connection with the pending export applications for Freeport LNG and other LNG operators).

The Environmental Addendum evaluated potential environmental impacts of unconventional natural gas exploration and production activities in the nation as a whole. *Id.* at 6, 46-55, JA 1401, 1441-50 (describing the Environmental Addendum). However, the Environmental Addendum did "not attempt to identify

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[6] Notice of Availability of *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States*, 79 Fed. Reg. 48,132 (Aug. 15, 2014) (attached). The Environmental Addendum is available on line at: http://www.energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf.

[7] Notice of Availability of *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States*, 79 Fed. Reg. 32,260 (June 4, 2014) (attached). The Greenhouse Gas Report is available on line at: http://energy.gov/sites/prod/files/2014/05/f16/Life%20Cycle%20GHG%20Perspective%20Report.pdf.

or characterize the incremental environmental impacts that would result from LNG exports to non-[free-trade] nations" because "[s]uch impacts are not reasonably foreseeable and cannot be analyzed with any particularity." *Id.* at 84, JA 1479 (noting that "fundamental uncertainties" constrain the Department's ability to predict what, if any, domestic natural gas production may be induced by authorizing exports of LNG). The Environmental Addendum addressed air quality, water resources, greenhouse gas emissions, induced seismicity, and land use impacts from natural gas production. *Id.*

In addition to the Environmental Addendum, the Department commissioned the National Energy Technology Laboratory to conduct an analysis of life-cycle greenhouse gas emissions from LNG exported from the United States. *Id.* at 6, 55-82, JA 1401, 1450-77 (detailing the Greenhouse Gas Report). This report analyzes: (i) how domestically produced LNG exported from the United States compares with regional coal (or other LNG sources) for electric power generation in Europe and Asia from a life-cycle greenhouse gas perspective; and (ii) how those results compare with natural gas sourced from Russia and delivered to the same markets via pipeline. *Id.* at 6, JA 1401.

The Department published a formal notice for each report in the Freeport export proceeding and other pending LNG export proceedings and invited public comment on the reports. *See supra* nn.6 & 7 (citing Federal Register notices for

each report). Sierra Club submitted comments on both reports. *See* Environmental Addendum at 151. Sierra Club's comments were taken into consideration by the Department in the final Environmental Addendum, and in the Freeport export proceeding. *See, e.g.*, *id.* at 131-132 (summary of Sierra Club's comments on draft Environmental Addendum); November 2014 Export Order at 69-70, 77, JA 1464-65, 1472 (discussing Sierra Club's comments on Greenhouse Gas Report).

With respect to greenhouse gas impacts associated with LNG exports, based on the record before it, which included the Greenhouse Gas Report, the Department rejected Sierra Club's argument that the export of LNG would likely cause a significant increase in U.S. greenhouse gas emissions through their effect on natural gas prices and the use of coal for electricity. *Id.* at 90, JA 1485 (addressing conclusions from the Department-commissioned 2012 Energy Information Administration study: *Effect of Increased Natural Gas Exports on Domestic Energy Markets*).[8]

On December 15, 2014, Sierra Club requested rehearing of the Department's November 2014 Export Order, arguing, in part, that the Department ignored its independent obligation to assess the environmental impacts of the export application. In Sierra Club's opinion, the Department violated NEPA by failing to

[8] The Energy Information Administration's 2012 Export Study is available online at: http://energy.gov/sites/prod/files/2013/04/f0/fe_eia_lng.pdf.

consider the indirect and cumulative environmental effects of LNG exports. *See Freeport LNG Expansion, L.P.*, Request for Rehearing of Sierra Club, DOE Docket No. 11-161-LNG (Dec. 15, 2014), JA 1509-12. Sierra Club's rehearing request is pending before the Department.

SUMMARY OF ARGUMENT

The Commission's comprehensive environmental review, culminating with the 978-page environmental impact statement, of the construction and operation of the Freeport LNG facility satisfied its statutory responsibilities under the National Environmental Policy Act to take a "hard look" at the Project's environmental consequences and to inform the public of its impacts. NEPA does not require the Commission to consider the universe of potential impacts no matter how attenuated or speculative. Accordingly, the Commission reasonably declined to discuss indirect impacts from future, unidentified gas development activities that, in the agency's informed judgment, are not "caused by" the Project or foreseeable, and would not improve its environmental review. The Commission similarly declined to guess whether and to what extent the export of LNG could impact the use of coal as a fuel source for electric generation in lieu of natural gas.

With respect to Sierra Club's demand that the EIS analyze cumulative impacts from every LNG project, the Commission made an informed and reasoned decision that an even more detailed programmatic environmental impact statement,

covering the cumulative impacts of all present and future LNG projects scattered throughout the United States, is unnecessary. FERC's decision is entirely consistent with case law, which limits the scope of an agency's cumulative impact analysis to other projects in the same area impacted by the Freeport Project.

Moreover, Sierra Club ignores the comprehensive studies the Department undertook to analyze impacts associated with natural gas production activities, including hydraulic fracturing throughout the United States. The Department's two reports – the Environmental Addendum and the Greenhouse Gas Report – provided Sierra Club and the public the best available information on the environmental impacts of natural gas production. For this reason, the relief Sierra Club seeks with respect to its primary claims – indirect impacts (Br. 20-33) and cumulative impacts (Br. 33-36) – would serve no purpose other than to generate unnecessary paperwork.

Sierra Club's last argument regarding indirect air emissions is no more persuasive. The EIS reflects the Commission's detailed modelling of potential air emission impacts from the Project's construction and operation, and states the amount of indirect air emissions related to the electricity used to power the Project's refrigeration compressors. Where, as here, all the relevant information was provided and analyzed in the EIS, the Commission fully satisfied its obligations under NEPA.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews the substance of Commission actions under the Administrative Procedure Act, overturning disputed orders only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Administrative Procedure Act's arbitrary and capricious standard applies to challenges under the National Environmental Policy Act. *See Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). When the Court reviews Commission action taken "under NEPA, the court's role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (denying appeal of FERC pipeline certificate decision) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98); *see also, e.g., Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (noting that FERC's NEPA obligations are "essentially procedural") (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978)). The Commission's findings of fact, if supported by substantial evidence, are conclusive. *See Nat'l Comm. for the New River*, 373 F.3d at 1327.

Agency action taken pursuant to NEPA is entitled to a high degree of deference. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78 (1989). This Court evaluates agency compliance with NEPA under a "rule of reason" standard. *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) (citing *Nevada*, 457 F.3d at 93); *see also Myersville*, 783 F.3d at 1322 (same). This Court consistently declines to "flyspeck" an agency's environmental analysis, looking for "any deficiency no matter how minor." *Myersville*, 783 F.3d at 1322-23 (quoting *Nevada*, 457 F.3d at 93; and citing *Minisink*, 762 F.3d at 112). Thus, "[a]s long as the agency's decision is 'fully informed' and 'well-considered,' it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (quoting *N. Slope Borough v. Andrus*, 642 F.2d 589, 599 (D.C. Cir. 1980)). *See also Robertson*, 490 U.S. at 350-51 (NEPA merely prohibits uninformed – rather than unwise – agency action).

II. THE COMMISSION'S INDIRECT AND CUMULATIVE IMPACTS ANALYSES FULLY COMPLIED WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

Consistent with NEPA, the Commission prepared an environmental impact statement for the Freeport Project, addressing the wide range of direct, indirect, and cumulative impacts associated with the construction and operation of the Project. Nevertheless, Sierra Club argues that the Commission erred in excluding

from its analysis: (i) indirect impacts from induced increases in domestic natural gas production and the further removed hypothetical increase of coal consumption associated with LNG exports' impact on the price and availability of natural gas (Br. 20-33); and (ii) "cumulative effects of the increases in gas production and coal use that would result from" other proposed LNG export projects (Br. 18-19, 33-36).[9]

As discussed below, the Court does not have jurisdiction over either of these NEPA claims, as Sierra Club did not demonstrate constitutional standing (*infra* Part II.A) and, further, the claims are moot (*infra* Part II.B). If the Court has jurisdiction to hear these claims, as explained below (*infra* Parts II.C and II.D), they should be rejected as inconsistent with NEPA regulations and applicable precedent.

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[9] Sierra Club's cumulative impacts argument is vague as to the precise nature of its claim. *See* Br. 30-33. However, its summary of argument specifies that FERC violated NEPA by failing "to consider the cumulative effects of the increases in gas production and coal use that would result from [other proposed LNG export projects]." Br. 18-19. This statement is consistent with how Sierra Club presented the issue to FERC in its request for rehearing. *See* Rehearing Request at 4-5, JA 1242-43 ("the increases in [gas] production that would result from this and other projects must also be considered in the cumulative effects analysis"); *see also id.* at 12-13, JA 1250-51 ("it is clear that cumulative effect of the many proposed export projects will be an increase in production;" thus, "the cumulative effects of this production must be discussed"). Accordingly, the Commission interprets Sierra Club's brief as claiming that FERC violated NEPA by failing to consider in its cumulative impacts analysis the impacts of gas production allegedly induced by other LNG export projects throughout the United States.

A. Sierra Club Has Not Established Standing To Assert Claims Regarding Indirect And Cumulative Impacts

Sierra Club does not satisfy minimum constitutional standing requirements to pursue its claims regarding induced increases in natural gas production and coal consumption. While not every member of Sierra Club needs standing, at least one of its members must demonstrate constitutional and prudential standing for each claim. *See Del. Dep't of Natural Res. and Envtl. Control v. EPA*, 785 F.3d 1, 10 (D.C. Cir. 2015) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

To establish Article III standing, an association's member must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the agency's challenged action; and redressable by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (explaining associational standing). Any future "threatened injury must be certainly impending to constitute injury in fact[;] allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013) (quotations omitted).

None of the declarations attached to Sierra Club's brief shows a concrete and imminent injury related to increased natural gas production that was caused by the challenged FERC orders. *See Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 833 (D.C. Cir. 2005) ("To have standing to challenge [pipeline]

route alignments, [petitioner] must demonstrate that its members have suffered, or will suffer, specific environmental and aesthetic harms as a result of the route realignments themselves."). This is particularly true here, where the Natural Gas Act differentiates between review of LNG export decisions (the Department's responsibility) and the specific LNG facilities (for FERC to review). *See supra* pp. 5-6 (discussing division of statutory responsibilities).

The clearest expression of an injury, related to the export of LNG and induced gas production and coal consumption, are the following statements made by declarant Michael Hershey:[10]

> ● I am aware that there are a number of [LNG] export terminals that are proposed across the country. LNG exports will increase demand for natural gas to be supplied via expanded fracking, which is known to pollute the air and water, and disrupt landscapes.
>
> ● I am concerned that, with an increase in gas production in response to LNG exports, the water I rely on so heavily for farming could become contaminated due to leaks and spills associated with the [Gulf South Coastal Bend Header Project] pipeline. The water I use for farming now comes from wells, rather than the Colorado River . . . . I am worried that the expanded gas development spurred by exports will make obtaining water from the Colorado River more remote that [sic] it would otherwise be. I am concerned because both my property and livelihood are at risk with an increase in natural gas drilling.

[10] Neither of the other two declarants, Teresa Cornelison (who focuses on noise) and Melanie Oldham (who focuses on air pollution in Brazoria County, Texas from operation of the Freeport Facility), asserts any injury related to indirect or cumulative impacts arising from induced natural gas production or increased use of coal in lieu of natural gas as a fuel.

Decl. of Michael Hershey at 1-2 (8th and 9th bullets).

Sierra Club has made no showing that Mr. Hershey's alleged injuries (contaminated water from a leak on a yet-to-be-built pipeline, generalized harm to property from unspecified drilling activities, and potential difficulty in obtaining water from a source that declarant does not use) are concrete or imminent. *See, e.g., Del. Dep't of Natural Res.*, 785 F.3d at 10 (Delaware lacked standing to challenge exemption from agency's emissions regulations for certain generators located in remote areas where Delaware offered no evidence that the exempt generators were located near enough to Delaware to pose a threat to the state's air quality); *NO Gas Pipeline v. FERC*, 756 F.3d 764, 768 (D.C. Cir. 2014) (alleged injury – harm from higher radon levels from gas that may be transported over the FERC-approved pipeline – too speculative to support standing); *Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1026 (D.C. Cir. 2012) (petitioner's fear of a possible future rate increase not enough to show the requisite injury). The alleged injuries are speculative at best. Moreover, Sierra Club's injuries do not directly flow from the Commission's action in the challenged orders.

Sierra Club's declarations do not carry their burden with respect to the second element of standing – causation. Indeed Mr. Hershey's injuries mostly relate to Gulf South Pipeline's proposed pipeline project, for which no formal certificate application has been filed with FERC and which is not the subject of the

Freeport Project proceeding. *See Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 736 (D.C. Cir. 2008) (no standing where petitioner failed to show that the injury – increased retail rates – would be redressed by a favorable ruling, where the Court found that the state, not FERC, has independent authority to fix retail utility rates).

Further, the claimed injuries arising from induced increases in gas production (from either the Freeport Project or other LNG export projects) require independent acts of multiple third parties to occur. *See N. Laramie Range Alliance v. FERC*, 733 F.3d 1030 (10th Cir. 2013) (no standing where injury depends on the choices made by independent actors). It is the export of LNG that Sierra Club argues will induce additional natural gas production. The authority to permit LNG export from the Freeport Facility lies solely with the Department in a pending proceeding. Thus the export of LNG from Freeport or other proposed LNG facilities, which may or may not give rise to additional gas production, is not guaranteed. Furthermore, the alleged injuries will only occur if other third parties, private gas exploration and development companies, decide that market economics and regulatory environments are such that they will pursue incremental gas development activities. *See, e.g.*, EIS at 4-241, JA 979 ("[S]hale gas production has occurred for reasons unrelated to the Project and over which the Commission has no control, such as state permitting for additional gas wells."). In sum, there is

no showing that any injury is actual or imminent or that it could occur without the intervening acts of multiple third parties.

B. Challenges Are Moot; Requested Relief Redundant

Mootness is a threshold jurisdictional issue stemming from the case or controversy requirement of Article III of the Constitution. *See S. Co. Servs. v. FERC*, 416 F.3d 39, 43 (D.C. Cir. 2005). Courts may not "give opinions upon moot questions or abstract propositions or . . . declare principles or rules of law which cannot affect the matter in issue in the case before it." *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 950 (D.C. Cir. 2005) (citations omitted); *accord, e.g., McBryde v. Comm. to Review,* 264 F.3d 52, 55 (D.C. Cir. 2001) ("If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot.").

Sierra Club's demand for additional environmental review of both the indirect and cumulative impacts of increased gas production and coal use ignores the two environmental reports published by the Department of Energy that addressed Sierra Club's concerns. In two public proceedings, which followed NEPA's notice and comment procedures, the Department issued two reports that evaluated specific environmental aspects of the LNG production and export chain: the Environmental Addendum and the Greenhouse Gas Report. *See supra* pp. 16-18 (discussing reports and proceedings). These reports were developed in response

to challenges raised by Sierra Club and other commenters in the Freeport LNG export proceeding and other export proceedings pending at the Department of Energy.

Sierra Club has obtained its requested relief.[11] Accordingly, there is no live controversy and this appeal is moot as to these issues. *See Pub. Serv. Elec. & Gas Co. v. FERC*, 783 F.3d 1270, 1274 (D.C. Cir. 2015) (case moot where no live controversy between parties); *see also Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1245 (D.C. Cir. 2004) (no ongoing case or controversy where contracts addressed in challenged orders were cancelled).

Even if the Court finds a "live controversy," Sierra Club's requested relief would be unnecessarily redundant. Sierra Club seeks "additional environmental review" of impacts arising from "connecting the United States' supply of natural gas to global gas demand." Br. 1. Yet, the Department already conducted this review. The Department of Energy went above and beyond what NEPA requires

[11] As Sierra Club notes (Br. 27 n.15), in its comments on the draft EIS it asked that the Greenhouse Gas Report be considered as part of the record for decision-making for Freeport. Sierra Club was heard. The Department, as the federal agency with the authority over the export of LNG, incorporated the Greenhouse Gas Report (as well as the Environmental Addendum) into its record in the Freeport export proceeding and evaluated these two Reports as part of its "public interest review." *See* November 2014 Export Order at 7, 55-82, 88-94, JA 1402, 1450-77, 1483-89 (concluding, based upon its consideration of the Greenhouse Gas Report, that U.S. LNG exports will not significantly exacerbate global greenhouse gas emissions).

by developing the Environmental Addendum and the Greenhouse Gas Report. *See* November 2014 Export Order at 7, 46, 55-56, JA 1402, 1441, 1450-51 (Environmental Addendum and Greenhouse Gas Report not required by NEPA; intended to provide best available information on issues raised by commenters – including Sierra Club – in the Freeport and other LNG export proceedings at the Department). Together, the Environmental Addendum and the Greenhouse Gas Report evaluated, to the extent possible, potential environmental impacts on resources, including air quality and climate change, arising from future natural gas production.

To require the Commission, at this juncture, to independently produce the same report the Department already did, would be unnecessarily duplicative of the Department's efforts. "NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action." 40 C.F.R. § 1500.1(c). As several circuit courts have noted, common sense and executive policy suggests that, with respect to NEPA requirements, duplication should be avoided. *See Town of Barnstable v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014) (holding NEPA's "rule of reason" does not require FAA to duplicate Interior Department's NEPA analysis when it would serve no purpose); *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1215 (11th Cir. 2002) ("Agencies are not required to duplicate the work done by another federal agency which also has jurisdiction over a project."); *Sierra*

Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011, 1039 (2d Cir. 1983) (citing 40 C.F.R. § 1500.4 (CEQ regulation directing agencies to reduce paperwork in implementing NEPA)) (declining to order federal permitting agency to develop its own EIS to remedy violation because it would be a wasteful duplication of effort); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196 (4th Cir. 2009) ("NEPA plainly is not intended to require duplication of work").

"Congress did not enact the National Environmental Policy Act to generate paperwork or impose rigid documentary specifications." *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1172-73 (10th Cir. 1999). In *Dombeck*, the court held that the agency's failure to formally disclose in the environmental impact statement that its lynx population data was incomplete was not actionable under NEPA because the participants in the environmental review process were well aware of the available lynx population data, thus requiring a formal statement in the EIS would serve no useful purpose. *See Dombeck*, 185 F.3d at 1172-73. Similarly, here, the Court should reject Sierra Club's demand that the Commission generate more paperwork to further justify an action – the Freeport Project – that it already analyzed and approved in full compliance with NEPA.

C. Potential Impacts From Increases In Natural Gas Production And Coal Consumption Are Not Indirect Impacts, Under NEPA, Of The Freeport Project

Notwithstanding Sierra Club's arguments to the contrary (Br. 20-33), the

Commission's conclusion that increases, if any, in natural gas production and coal consumption are not indirect impacts of the Commission's approval of the Freeport Project is consistent with NEPA regulations and precedent. *See* Rehearing Order P 30, JA 1273. Indirect impacts "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). While indirect impacts "may include growth inducing effects," *id.*, here, Sierra Club's claimed induced increases in gas production and coal use are neither sufficiently causally related to the Freeport Project nor reasonably foreseeable to warrant analysis. *See* Authorization Order PP 77-78, JA 1209-10; Rehearing Order P 7, JA 1266.

1. There Is No Causal Link Between Increased Gas Production And The Freeport LNG Project

Sierra Club seeks review of impacts that are not "caused by" the siting, construction, and operation of the Project. *See* Rehearing Order PP 16-21, JA 1269-70 (link between induced natural gas production and the Commission's authorization of the Freeport Project is "attenuated"); *see also* Authorization Order P 33, JA 1198 (finding no connection between the Project and any specific, quantifiable induced production).

As stated in the governing regulation, 40 C.F.R. § 1508.8(b), an indirect impact must be "caused by" the proposed action. Although the term "caused by" is not defined in NEPA or the implementing regulations, courts have provided ample

guidance for determining whether an indirect impact is "caused by" a proposed action. *See, e.g.*, *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989) (upholding agency conclusion that the indirect impacts of a golf course did not include other planned resort facilities because "each could exist without the other, although each would benefit from the other's presence"). The test to determine whether a particular effect is caused by the federal action is not a "but for" inquiry, but rather whether the federal action was the "legally relevant cause" of the effect. *See Public Citizen,* 541 U.S. at 769. In *Public Citizen*, the Supreme Court upheld the agency's decision not to consider, in its environmental analysis for new safety regulations governing Mexican motor carriers, the potential environmental impacts of an increased number of Mexican trucks on U.S. roads, based on the agency's finding that there was not a reasonably close causal relationship between the increased number of trucks and the safety regulations. *See id.* at 767-69.

Similarly, here the Commission explained that there is no record evidence that any increase in natural gas production is directly associated with the Freeport Project. *See* Rehearing Order P 21, JA 1270 (no meaningful information on whether Freeport Project will use gas derived from new production or existing production). Notwithstanding Sierra Club's insinuation to the contrary (Br. 24), the "purpose of the Project[] is not to facilitate additional shale production."

Authorization Order P 77, JA 1209 (citing *Coal. for Responsible Growth and Res. Conservation v. FERC*, 485 Fed. App'x. 472 (2d Cir. June 12, 2012) (unpublished opinion) (upholding FERC's conclusion that future Pennsylvania shale gas production was not sufficiently causally-related to a proposed pipeline that would transport the shale gas to market to warrant an in-depth impacts analysis)).

The Freeport Project's purpose is to "allow for exportation of domestic natural gas to the global market and meet [Freeport's] contractual obligations." EIS at 1-3, JA 681. Sierra Club makes much of the fact that Freeport noted that an economic benefit of the Project is the "indirect creation of . . . jobs associated with increased natural gas exploration and production." Br. 24 (citing *Freeport LNG Development, L.P.*, Application for Authorization at 14, Docket No. CP12-509-000 (Aug. 31, 2012), R. 272, JA 143). But this potential economic benefit was not the catalyst for the Project. The record evidence shows that the Project was driven by "the ample availability of natural gas." Application at 13, JA 142. Freeport supported this claim, in part, by citing the Energy Information Administration's Annual Energy Outlooks for 2011 and 2012, which predicted that shale gas production would increase significantly in 2015. *See id.* at 13-14, JA 142-43. It was this predicted increase in the supply of natural gas that created the market demand for the Freeport Project, not the other way around.

The Commission concluded that the "Project does not depend on additional shale production" and that "shale gas production has occurred for reasons unrelated to the Project." EIS at 4-241, JA 979. The Commission highlighted the "longtime, extensive natural gas development that has already occurred in Texas, including in its shale areas," and found that there is no evidence that gas ultimately processed by the Freeport Project will come from future, induced natural gas production as opposed to existing production. Rehearing Order P 19, JA 1270. Accordingly, like the federal action at issue in *Public Citizen*, the construction and operation of the Freeport Project is not the legally relevant cause of any potential future incremental or "induced" increases in natural gas production.

Put another way, the Project simply is not a link in the same causal chain as natural gas production. *See id.* P 16, JA 1269 (citing *Sylvester*, 884 F.2d 394). In *Sylvester*, the Ninth Circuit explained:

> Environmental impacts are in some respects like ripples following the casting of a stone in a pool. The simile is beguiling but useless as a standard. So employed it suggests that the entire pool must be considered each time a substance heavier than a hair lands upon its surface. This is not a practical guide. A better image is that of scattered bits of a broken chain, some segments of which contain numerous links, while others have only one or two. Each segment stands alone, but each link within each segment does not.

Sylvester, 884 F.2d at 400. Sierra Club views the Project as part of the pool of nation-wide natural gas activities and demands an examination of this entire pool. Instead, the Commission reasonably concluded that a single LNG export project in

Freeport, Texas and future natural gas production activities are not links in the same chain. *See* Rehearing Order P 16, JA 1269; *see also Myersville*, 783 F.3d at 1326-27 (upholding FERC determination that although a pipeline project's excess capacity may be used to move gas to an LNG export project, the projects are "unrelated" for purposes of NEPA).

Sierra Club's claim that it is "self-evident" that construction of the Project will result in an increase in both gas production and coal consumption is unsupported by its cited cases. *See* Br. 20-21 (citing *Airlines for Am. v. Transp. Security Admin.*, 780 F.3d 409 (D.C. Cir. 2015), and *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002)). Both cases are inapposite as their holding, that an "injury is inferable from generally applicable economic principles," relates only to the Court's standing analysis. *See Airlines for Am.*, 780 F.3d at 411 (quoting *Sierra Club v. EPA*, 292 F.3d at 900). Nothing in these cases suggests that the Court's holding should be extended to determine compliance with NEPA.

Sierra Club also cites (Br. 24) to *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975), but to little effect. In that case, the Court found evidence that the federal action – a highway interchange – was being built "to stimulate and serve future industrial development" and was an "indispensable prerequisite to rapid development" of the immediate area. *Id.* at 667, 674. In contrast, the Freeport Project is being built to take advantage of existing supplies of natural gas and

planned production. *See supra* p. 34. In fact, it is unknown whether market conditions will continue to favor export once the Project is in operation. The Commission explained that studies "indicate that LNG exports are self-limiting, in that little or no natural gas will be exported if the price of natural gas in the U.S. increases much above current expectations." Rehearing Order P 52, JA 1279 (citing EIS, Appendix L at 216, JA 1182).[12]

Sierra Club relies on the Energy Information Administration's 2012 Export Study to support its contention that LNG exports will "increase gas production and coal use." *See* Br. 23-25, 30-31. But, as the Commission explained, the study's usefulness is limited. *See* Rehearing Order P 20, JA 1270. The Energy Information Administration's 2012 Export Study predicted, based on set assumptions, that increased exports of domestic LNG will lead to increased domestic gas production. The study's conclusion is tempered by its own caveat that projections involving energy markets are "highly uncertain and subject to many events that cannot be foreseen, such as supply disruptions, policy changes, and technological breakthroughs." *Id.* (quoting the 2012 EIA Export Study at 3).

Further, as Sierra Club notes (Br. 23), the Department considered the Energy Information Administration's 2012 Export Study in its orders and, like FERC, the

[12] The citation to the EIS in footnotes 66-67 of the Rehearing Order, inadvertently referenced EIS "Volume I" instead of EIS "Appendix L." The correct citation is "June 2014 EIS Appendix L at 216."

Department acknowledged the study's limitations, particularly with respect to the estimated increase in coal consumption. *See* November 2014 Export Order at 89-90, JA 1484-85. The Department flagged the Study's statement that "[t]he degree to which coal might be used in lieu of natural gas depends on what regulations are in place that might restrict coal use." *Id.* at 89 n.209, JA 1484 (quoting 2012 EIA Export Study at 12 n.7). The Department then identified four proposed Environmental Protection Agency rules that were developed after the Export Study's publication that would "likely reduce the extent to which increased use of coal would compensate for reduced use of natural gas." *Id.* at 90, JA 1485. The Export Study provides a snapshot. It does not inform the Commission whether the gas processed by the Freeport LNG facility will come from induced gas production or existing production. *See* Rehearing Order P 21, JA 1270.

Moreover, even if the Project might "facilitate" additional gas production, that is insufficient to constitute a "growth-inducing impact under 40 C.F.R. §1508.8(b)." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir. 1998) (environmental analysis need not discuss growth-inducing impact – increased air traffic – of an airport improvement project where project was implemented to deal with existing problems); *see also Ctr. for Envtl. Law and Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1011 (9th Cir. 2011)

("Agencies need not account for potential growth effects that might be caused by a project if the project is exclusively intended to serve a much more limited need.").

At issue in *Center for Environmental Law* was a lake drawdown project, one component of which was the expansion of a siphon (a pipe that uses atmospheric pressure to force water from a reservoir). *See* 655 F.3d at 1011. The siphon expansion would increase the drawdown capacity by 1,950 cubic feet per second, but the specific project planned to use less than ten percent of that capacity. *Id.* The Court rejected the petitioner's argument that the agency was required to consider the indirect effects of diverting the additional capacity that the expanded siphons could handle. *Id.* The Court found that because the incremental siphon capacity could not occur unless other events took place, e.g., a decision by the agency to utilize the expanded capacity and expansion of other canals in the area, the causal tie between the project and growth is too attenuated to require consideration of the additional water diversions as an indirect effect of the proposed drawdown project. *Id.* at 1011-12. Consistent with applicable case law, the Commission reasonably concluded that future unidentified natural gas development activities throughout the United States are not sufficiently causally-related to the Freeport Project to warrant consideration of the potential impacts stemming from such gas production.

2. There Are No Reasonably Foreseeable Induced Gas Production Activities Tied To The Freeport Project

Even if it were clear that the Freeport Project would induce additional gas production, impacts from any such future gas development are not reasonably foreseeable. "An impact is reasonably foreseeable if it is 'sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.'" Rehearing Order P 22, JA 1271 (citing *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)). With respect to the Freeport Project: (1) it is unknown how much gas might ultimately be exported as well as how much additional upstream production might occur to support its exports; and (2) it is speculative as to where the gas processed by the Project will originate, as well as where the wells, gathering line locations and the potential associated environmental impacts will occur. *See* Authorization Order P 78, JA 1209; Rehearing Order P 21, JA 1270. Without knowing where, in what quantity, and under what circumstances additional gas production will arise, the environmental impacts resulting from such production activity are not "reasonably foreseeable" within the meaning of the NEPA regulations. Rehearing Order P 21, JA 1270.

Sierra Club's reliance upon *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003) (Br. 21-22), is misplaced. In *Mid States*, the agency acknowledged that a particular outcome (construction of new coal burning plants resulting from the availability of cheaper coal after the new rail lines were

built) was reasonably foreseeable but then failed to consider its impact. *See Mid States*, 345 F.3d at 549-550 (holding that "when the *nature* of the effect is reasonably foreseeable but its *extent* is not, agency may not simply ignore the effect"). Here, the Commission found neither the nature nor the extent is reasonably foreseeable. Based on the record before it, the Commission could not determine that the Project would induce incremental production of natural gas and, even if additional gas is induced, the amount, timing and location of such development activity is "unknowable." Rehearing Order P 21, JA 1270; *see also id.* at P 26, JA 1272 (record contains no detailed or quantified information with respect to additional production that might be produced); *see also Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 90 (2d Cir. 1975) (holding that an agency need not "consider other projects so far removed in time or distance from its own that the interrelationship, if any, between them is unknown or speculative"). Moreover, unlike the agency in *Mid States*, the Commission did not "simply ignore" (*Mid States*, 345 F.3d at 549) the impacts of future gas development, as it considered the cumulative impacts of foreseeable future shale gas and other gas production development within Brazoria County, Texas. *See* Authorization Order P 33, JA 1198; EIS at 4-253, JA 991.

The boundless analysis sought by Sierra Club would require the Commission "to engage in speculative analysis" that would not meaningfully

inform FERC's decision regarding construction of the Freeport Project. Authorization Order P 78, JA 1210 (citing *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897 (7th Cir. 2010) (impacts that cannot be described with sufficient specificity to make its consideration useful need not be included in EIS)). Sierra Club is correct that NEPA requires "reasonable forecasting." Br. 6, 24 (quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)). However, NEPA does not require an agency to "engage in speculative analysis" or "to do the impractical, if not enough information is available to permit meaningful consideration." *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011); *see also Fund for Animals v. Kempthorne*, 538 F.3d 124, 137 (2d Cir. 2008) (speculation in an EIS is not precluded, but the agency is not obliged to engage in endless hypothesizing as to remote possibilities).

Sierra Club's reliance on *Scientists' Institute* is also misplaced. There, this Court faulted the Atomic Energy Commission for failing to prepare *any* NEPA analysis for a proposed reactor program. *See* Rehearing Order P 25, JA 1271 (distinguishing *Scientists' Institute*); *see also Nat'l Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1478 (D.C. Cir. 1990) (calling into doubt whether "the relevant reasoning in *Scientists' Institute* survives the Supreme Court's *Kleppe* decision") (citing *Kleppe v. Sierra Club*, 427 U.S. 390 (1976)). The Court noted that where

the Atomic Energy Commission was able to prepare a complex cost/benefit analysis to support the reactor program, it could not claim that discussion of future environmental effects would be a "crystal ball inquiry" to justify not considering the environmental costs of the program in a NEPA document. *Scientists' Institute*, 481 F.2d at 1091-92. In contrast, here the Commission prepared a comprehensive EIS for the Freeport Project, taking a hard look at every impacted resource.

Sierra Club's claim (Br. 25-26, 28-29) that the Energy Information Administration's 2012 Export Study and other Administration "tools" could be used to predict where induced production will occur is similarly unhelpful. The referenced studies set forth general projections that do not assist the Commission with "estimating how much of Freeport LNG's export volumes will come from . . . future natural gas production." Rehearing Order P 24, JA 1271. The Commission requires specific information to prepare a meaningful analysis of when, where and how future gas production will ultimately occur – and that information is "unknowable" at this time. *See id.* P 21, JA 1270. The Commission's judgment is based upon its expertise and entitled to deference from this Court. *See Balt. Gas & Elec. Co.*, 462 U.S. at 103.

3. Impacts From Potential Increased Coal Consumption Are Even Farther Removed And Attenuated Than Increased Gas Production And Need Not Be Considered

For all the reasons stated above, Sierra Club's secondary argument (Br. 30-33), related to alleged increases in domestic coal consumption stemming from the impact LNG exports may have on domestic gas prices, also fails. *See* Rehearing Order PP 52-54, JA 1279-80 (any change in the use of coal for electric generation is too "far removed and attenuated" from the Project) (citing *Sierra Club v. Froehlke*, 486 F.2d 946, 951 (7th Cir. 1973) (NEPA does not require that "each problem be documented from every angle")). Sierra Club's demand that FERC analyze potential impacts from a hypothetical increase in coal use would require FERC to engage in speculation upon speculation that is not required by NEPA. *See* Rehearing Order P 54, JA 1280 (listing the multiple assumptions required to consider issue).

D. The Commission Reasonably Limited Its Cumulative Impacts Analysis To Actions In The Same Geographic Area As The Freeport Project

Sierra Club argues that the Commission violated NEPA by failing to include in the cumulative impacts analysis, without any geographic or other limiting principle, all other LNG export projects. Br. 33-36. But NEPA does not require this. The regulations implementing NEPA define "cumulative impact" as "the impact on the environment which results from the incremental impact of the action

when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. This Court defines cumulative impacts as the "measurement of the effect of the current project along with any other past, present, or likely future actions *in the same geographic area*." *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006) (emphasis added) (citing 40 C.F.R. § 1508.7); *see also* Rehearing Order P 33, JA 1273 (cumulative impacts analysis limited to other actions occurring in the "project area") (citing CEQ Guidance, Considering Cumulative Effects Under the National Environmental Policy Act (January 1997)).

There is a geographic limit to the scope of a cumulative impacts analysis. This Court has held that a meaningful cumulative impacts analysis must identify five things: "(1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected *in that area* from the proposed project; (3) other actions – past, present, and proposed, and reasonably foreseeable – that have had or are expected to have impacts *in the same area*; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate." *TOMAC*, 433 F.3d at 864 (emphasis added) (quoting *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002)).

Consistent with the regulation and case law governing cumulative impacts, the Commission identified Brazoria County, the 1,597 square mile county located on Texas' "coastal bend" area, as the Project's geographic study area. *See* EIS at 4-240, JA 978 (noting that "the predominance of [the Project's] environmental impacts occur" in Brazoria County); Rehearing Order P 34, JA 1274; *see also Kleppe v. Sierra Club,* 427 U.S. at 413-14 ("identification of the geographic area within which [cumulative environmental impacts] may occur is a task assigned to the special competency of the appropriate agencies"). The Commission analyzed 109 recent or proposed projects in Brazoria County, including some up to 46 miles away from the Freeport Facility. *See* EIS at 4-254 and Appendix G, JA 984, 1046-62. FERC included oil and gas production field developments in the Project area. *See* EIS at 4-253, JA 991 (analyzing proposed drilling activity in several existing production areas, applications for wells, and drilling activity as far as 22 miles away from the Freeport Facility). The scope of the Commission's cumulative impacts analysis is sufficient. *See Marsh*, 490 U.S. at 376-77 (agencies retain substantial discretion as to the extent of the inquiry for a cumulative impacts analysis); *see also N. Slope Borough*, 642 F.2d at 601 (Court applies rule of reason to determine adequacy of cumulative impacts study).

As the Commission noted, Sierra Club's argument would have the absurd result of defining the project area for the Freeport Project as not where the facilities

are located (Brazoria County, Texas), but rather the entire United States. *See* Rehearing Order P 34, JA 1274 (other LNG export projects cover a vast geographic scope consisting of tens of thousands of square miles). Sierra Club presents no evidence that other LNG projects – as far flung as Oregon (Jordon Cove Energy Project) and Maryland (Dominion Cove Point LNG) – will impact the same resources as the Freeport Project. As the Commission explained, it is not required to analyze the "cumulative effects of an action on the universe." *Id.* P 33, JA 1273 (citing 1997 CEQ Guidance).

Even in the sole case Sierra Club relies on (Br. 34), *Kleppe*, 427 U.S. 390, the environmental analysis was geographically limited to a particular locale. *See id.* at 413-14 (holding that where there is no proposal for region-wide action, NEPA does not require a regional impact statement); *see also Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d at 90 (EIS for dredging and dumping project near New London, Conn. needed only to consider the effects of other projects at or near New London – not the "whole Long Island Sound"); *Inland Empire Pub. Lands v. U.S. Forest Serv.*, 88 F.3d 754, 763-64 (9th Cir. 1996) (rejecting assertion that impacts in areas outside the project area must be analyzed).

Sierra Club essentially seeks a programmatic impact statement covering all LNG export activities as "connected actions." *See* Authorization Order P 75, JA 1208 (rejecting Sierra Club's call for a programmatic EIS covering all U.S.

export terminals, where such a national program is not proposed); Rehearing Order PP 35-36, JA 1274 (LNG export projects not connected actions). As the Court recently noted, actions are "connected," such as to require a comprehensive environmental analysis, where there is a "clear physical, functional, and temporal nexus between the projects." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1308-09 (D.C. Cir. 2014) (FERC improperly segmented and failed to consider the cumulative impacts of four "connected, contemporaneous, closely related, and interdependent" upgrade projects that together resulted in a single linear pipeline with no physical offshoots); *see also Minisink*, 762 F.3d at 113 & n.11 (upholding FERC's cumulative impacts analysis, which declined to consider a future compressor project likely to be located 70 miles from compressor project under review); *Myersville*, 783 F.3d at 1326-27 (rejecting argument that the Cove Point LNG export project is "connected" to proposed pipeline project that may ultimately transport gas that reaches Cove Point). Here Sierra Club fails to point to any "connection" between the Freeport Project and any other LNG export project. *See* Br. 33-36. *See also* 40 C.F.R. § 1508.25(a)(1) (defining "connected actions" as actions so "closely related" that the one action: (i) automatically triggers another action; (ii) cannot proceed without the other action; or (iii) depends on the other, larger action for its justification); *Nat'l Wildlife Fed'n v. Appalachian Reg'l*

Comm'n, 677 F.2d 883, 891 (D.C. Cir. 1981) (deferential arbitrary and capricious standard applies to segmentation of environmental review).

III. THE COMMISSION REASONABLY ANALYZED POTENTIAL INDIRECT AIR EMISSIONS

Sierra Club's air emissions claims (Br. 36-38) have been a moving target throughout the Commission proceeding. Now, for the first time on appeal, Sierra Club contends that the final EIS understates the Project's total annual air emissions because the EIS expresses the indirect emissions associated with the power required for the Project in a different format than the direct emissions. *See* Br. 36-38. Sierra Club waived this argument by failing to raise it during the Commission's environmental review or with specificity on rehearing. *See Myersville*, 783 F.3d at 1310 (rejecting argument that petitioner failed to adequately raise in its rehearing request).

Sierra Club's comments on the draft EIS simply complained that the document was "completely silent as to the[] impacts" of power generation for the Project. Sierra Club Comments on Draft EIS at 18, Docket Nos. CP12-509 and CP12-29 (May 5, 2014), R. 516, JA 432; *see also id.* at 17-19, JA 431-33 (entire discussion regarding indirect emissions from electricity consumption). Sierra Club cannot now argue that the manner in which FERC quantified the indirect emissions is problematic. *See Public Citizen,* 541 U.S. at 764 (challenges to agency's compliance with NEPA must "alert[] the agency to the [parties'] position and

contentions") (quoting *Vt. Yankee*, 435 U.S. at 553); *see also Nevada v. Dep't of Energy*, 457 F.3d at 88 (holding that state waived argument where state's NEPA comments nowhere alerted the agency to its contention). *See generally Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1171 (D.C. Cir. 2007) ("the Commission cannot be asked to make silk purse responses to sow's ear arguments") (quoting *City of Vernon v. FERC*, 845 F.2d 1042, 1047 (D.C. Cir. 1988)).

Moreover, Sierra Club again failed to state this argument with specificity in its rehearing request before the Commission. *See* Rehearing Request at 3, 15-16 (arguing only that FERC failed to indicate the amount of indirect emissions that would be avoided by the no-action alternative), JA 1241, 1253-54. The Commission was only able to respond to the argument Sierra Club asserted. *See* Rehearing Order PP 60-61, JA 1282-83 (addressing rehearing argument regarding the indirect air emissions and the "no-action alternative"). Section 19 of the Natural Gas Act prohibits the court from considering an objection to a Commission order unless the objection was "urged before the Commission in [an] application for rehearing" and was specifically set forth in the rehearing request. 15 U.S.C. § 717r(a) and (b); *see Myersville*, 783 F.3d at 1310 (argument raised in footnote insufficient to establish jurisdiction). *See also Columbia Gas Transmission Corp.*

v. FERC, 477 F.3d 739, 741 (D.C. Cir. 2007) (Court strictly applies the NGA jurisdictional provisions).

Assuming jurisdiction, the Court should reject Sierra Club's invitation to flyspeck the final EIS. *See Myersville*, 783 F.3d at 1324 (rejecting petitioners' assertion that FERC overestimated the amount of land impacted by an alternative as "flyspecking"); *see also Minisink*, 762 F.3d at 112 (finding petitioners' NEPA claims (e.g., failure to undertake cost-benefit analysis or examine project's impact on property values) fall into the "flyspecking" camp) (citations omitted).

Sierra Club does not challenge the Commission's detailed modelling of potential air emission impacts from the Project's operation. *See* Br. 36-38. Rather, Sierra Club quibbles with how the indirect emissions are quantified. *See* Br. 37 (complaining that indirect emissions are expressed in terms of pounds per megawatt rather than tons per year). The EIS quantifies, on a pounds of pollutant per energy-output basis, the indirect emissions associated with the electric motors used to drive the liquefaction equipment. *See* EIS at Appendix F, F-7, JA 1045. The EIS details these indirect emissions in a table broken down by generation and transmission, as well as the combined total for the six types of emissions of concern. *Id.* (Table F-4). Nothing more is required. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991) (agency's EIS not

capricious where agency takes a body of data, dissects it, and displays it in a comprehensible form).

NEPA does not require an agency "to accept every possible method of collecting and analyzing data." *Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120, 129 (D.C. Cir. 1985) (upholding FAA's method of considering noise level impacts over Sierra Club's estimates). The agency is entrusted with considering the various modes of scientific evaluation and "choosing the one appropriate for the given circumstances." *Id.*; *see also Myersville*, 783 F.3d at 1308 (FERC's evaluation of scientific data is afforded "an extreme degree of deference"). Moreover, that the indirect air emissions are set forth in a separate table in the EIS is irrelevant. An EIS is an integrated document and its "informational impact . . . is . . . cumulative." *N. Slope Borough*, 642 F.2d at 601 (rejecting argument that cumulative impacts analysis deficient because it references other sections of the EIS); *see also Ctr. for Envtl. Law*, 655 F.3d at 1009 (declining to require agency to consolidate various analyses placed throughout environmental document under the cumulative effects section as an impermissible "elevation of form over substance").

Here, the Commission found that it had before it all the data necessary to make an informed decision that there would be "no regionally significant impacts on air quality." EIS at 4-224, JA 962; *see also* Authorization Order P 65, JA 1206;

Rehearing Order P 61, JA 1283. In sum, the purported shortcomings in the Commission's environmental review simply do not exist. The Commission took the requisite hard look at environmental impacts and, through its mitigating conditions, took all of the steps necessary to discharge its responsibilities under NEPA.

CONCLUSION

For the foregoing reasons, the petition for review, to the extent not dismissed for lack of jurisdiction, should be denied and the Commission's orders should be affirmed.

Respectfully submitted,

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

/s/ Karin L. Larson
Karin L. Larson
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-8236
Fax: (202) 273-0901

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission contains 12,093 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

/s/ Karin L. Larson
Karin L. Larson
Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-8236
Fax: 202-273-0901
E-mail: karin.larson@ferc.gov

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