

THE WEAKEST LINK: THE CONSISTENT REFUSAL TO CONSIDER FAR-REMOVED INDIRECT EFFECTS OF THE EXPANSION OF LNG TERMINALS

Synopsis: The D.C. Circuit has recently ruled on numerous cases challenging the Federal Energy Regulatory Commission’s (FERC) approval of the expansion of liquefied natural gas (LNG) terminals to allow both export and import activity. Much of its analysis has focused on the delegation of authority between the Department of Energy (DOE) and FERC under the Natural Gas Act (NGA). Environmental groups raised challenges to the Environmental Assessment (EA) completed by FERC in each case, arguing that FERC failed to adequately consider direct and indirect effects of the expansion. The indirect effects would arise via a chain of events ultimately depending on the increased production and consumption of LNG. In each case, the Court has pointed out that FERC only has authority to regulate the expansion of the facilities themselves. Without approval by the DOE to allow the additional import or export at the individual terminal at issue, FERC’s approval can cause no indirect effects. Moreover, the Court has reiterated multiple times that since FERC’s approval does not cause these indirect effects, but the DOE’s approval does, these suits should have been brought against the DOE. In this note, I discuss one of these cases, *EarthReports v. FERC*, at length, as well as incorporate portions of other similar cases to come to an understanding regarding what steps potential challengers to similar approvals should take. If challengers hope to convince a court, particularly the D.C. Circuit, they should ensure that they both (1) shorten the chain of causation for indirect effects to make the relationship between the particular agency and the indirect effect closer, and (2) sue the agency that has the statutory authority to substantially impact that indirect effect through the chain of causation.

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I. INTRODUCTION

When someone turns on her television to watch Monday Night Football, she expects to watch two teams competing for victory.¹ What viewers got instead on Monday, November 2, 2015, was a real-life fight between Maryland residents, environmentalists, and corporate interests over the impending export of liquefied natural gas (LNG).² Sixty miles from the heart of Washington, D.C., the Dominion Cove Point LNG facility is currently expanding its capabilities to allow it to export as well as import LNG, causing controversy in the surrounding community as well as among environmental interest groups.³ During the “game between the Carolina Panthers and the Indianapolis Colts,” four protesters “rappelled [down] from the upper deck of [the] Bank of America Stadium” and unfurled a banner reading, “BoA: Dump Dominion.”⁴ The protestors were arrested that night, but environmental groups and local residents in and around Lusby, Maryland, are still pressing those same complaints.⁵

In this note, I examine the potential risks cited by petitioner EarthReports in its appeal “of the Federal Energy Regulatory Commission’s [(FERC or the Commission)] conditional authorization of the [expansion] of the [Dominion] Cove Point [liquefied natural gas (LNG)] facility” to allow export as well as import.⁶ Those risks include impacts on water quality off of the shores of Maryland, the North Atlantic right whale; and the public safety of residents living in and around Lusby.⁷ I also discuss the procedural law that FERC was obligated to follow under both the Natural Gas Act (NGA) and the National Environmental Protection Act

1. See generally Colin Campbell, *‘Monday Night Football’ Protest Aimed at Stopping Maryland Natural Gas Project*, BALT. SUN (Nov. 3, 2015, 6:55 PM), <http://www.baltimoresun.com/news/maryland/bs-md-mnf-dominion-protest-20151103-story.html>.

2. *Id.*

3. Driving Directions from Wash., D.C. to Dominion Cove Point LNG, GOOGLE MAPS, <http://maps.google.com> (follow “Directions” hyperlink; then search starting point field for “Washington, D.C.” and search destination field for “Dominion Cove Point LNG”); see generally Peter Galuszka, *An Energy Dilemma at Maryland’s Cove Point*, WASH. POST (June 14, 2013), https://www.washingtonpost.com/opinions/an-energy-dilemma-at-mds-cove-point/2013/06/14/f9bb06c2-d3a1-11e2-a73e-826d299ff459_story.html?utm_term=.4a7cb0e80f12; see also Tim Wheeler, *Cove Point Protesters Arrested in D.C.*, BALT. SUN (July 14, 2014, 5:38 PM), <http://www.baltimoresun.com/features/green/blog/bal-cove-point-protesters-arrested-in-dc-20140714-story.html>.

4. Campbell, *supra* note 1.

5. *Id.*; see, e.g., Wheeler, *supra* note 3.

6. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 951 (D.C. Cir. 2016).

7. *Id.* at 952.

(NEPA).⁸ Through the application of NEPA and the Administrative Procedure Act (APA), the court was required to take a “hard look” at the direct effects of the expansion of the Cove Point facility to allow the export of LNG.⁹ If it took that hard look, and came to a decision after considering alternatives and direct effects, that decision is not arbitrary and capricious under the APA.¹⁰ Lastly, I argue that not only was the Environmental Assessment (EA) completed by FERC more than adequate, and therefore its decision to permit Dominion Cove Point to expand was not arbitrary and capricious, but FERC was also not required to analyze the indirect effects raised by EarthReports at all because those effects would arise from the actual export of LNG, which is within the purview of the Department of Energy (DOE).¹¹ The FERC only had authority over the expansion of the facility, not the proposed export of LNG.¹² Since FERC had no authority to license, and thus enable, Dominion to use its expanded facility to begin exports, it was not required to examine any effects arising from those increased exports.¹³

II. A BRIEF HISTORY OF THE USE OF NATURAL GAS IN THE UNITED STATES

Natural gas embodies a prominent role in the United States’ pursuit of energy independence.¹⁴ The DOE calls it “the ideal fossil fuel,” and expects “[n]atural gas consumption in the United States” to increase by 2.3 trillion cubic feet (Tcf) by 2035.¹⁵ It has helped decrease the nation’s reliance on foreign oil as an energy resource, and is not expected to slow anytime soon.¹⁶ Additionally, natural gas is displacing coal as a resource.¹⁷ According to the Edison Energy Institute, natural gas was the source of 33.8% of the United States’ electricity in 2016, while coal only provided 30.4%.¹⁸

Natural gas has been utilized since before the first century.¹⁹ However, it was not produced or used commercially in the United States on a mass scale until the nineteenth century.²⁰ In 1816, it was first used to provide light to the streets of

8. *Id.* at 952-53.

9. *Id.*; National Environmental Protection Act of 1969 (NEPA), 42 U.S.C. § 4332(C) (1970).

10. Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (1966).

11. *See generally EarthReports*, 828 F.3d at 952.

12. *Id.*

13. *Id.* at 955-56.

14. LIQUEFIED NATURAL GAS, <http://energy.gov/fe/science-innovation/oil-gas/liquefied-natural-gas> (last visited Feb. 26, 2017).

15. NATURAL GAS: FUELING THE BLUE FLAME: GETTING GAS FROM THE GROUND . . . AND THE SEA, http://www.fossil.energy.gov/education/energylessons/gas/gas_production.html (last visited Feb. 26, 2017). In 2011, the United States consumed 24.3 trillion cubic feet (Tcf) of natural gas, and the DOE expects annual consumption to increase to 26.6 Tcf by 2035. LIQUEFIED NATURAL GAS, *supra* note 14.

16. *See generally* LIQUEFIED NATURAL GAS, *supra* note 14.

17. *See generally* FUEL DIVERSITY, <http://www.eei.org/issuesandpolicy/generation/fueldiversity/Pages/default.aspx> (last visited Aug. 20, 2017).

18. *Id.*

19. A BRIEF HISTORY OF NATURAL GAS, <http://www.apga.org/apgamainsite/aboutus/facts/history-of-natural-gas> (last visited Feb. 26, 2017).

20. *Id.*

Baltimore, Maryland.²¹ Robert Bunsen created the Bunsen burner in 1855, which used a combination of natural gas and air to provide heat indoors.²² The markets for natural gas remained limited until 1891, when the first pipeline was constructed in order to move the gas from Indiana to Chicago.²³ After that, due to U.S. participation in World Wars I and II, the market for natural gas in the United States remained stagnant.²⁴ The popularity and use of natural gas increased massively after the two wars.²⁵ Today, natural gas is used for multiple purposes, from heating ovens to providing reading light.²⁶

A. *The Production of LNG*

Natural gas is often found with oil in underground pools.²⁷ To access those pools, drillers use “a technique called ‘hydraulic fracturing’” (fracking) to push natural gas out of a rock formation, then fill the leftover voids in the formation with a substitute fluid.²⁸ The usual fluid of choice is water mixed with a “propping agent,” which is intended to keep the fractures open when the high pressure ceases, fluids stop flowing through the rock formation, and are allowed to settle.²⁹

Without being able to transport natural gas efficiently, only the markets surrounding those pools would be able to utilize this alternative form of energy.³⁰ Liquefying natural gas enables companies to condense and ship the natural gas to locations worldwide.³¹ To produce LNG, a company starts with natural gas, removes any impurities (like oil) that may contaminate the gas, then liquefies it by reducing its temperature to -260 degrees Fahrenheit, which reduces it to 1/600th of its original volume.³² Once it has been liquefied, “[t]he LNG is loaded onto double-hulled ships” (to maintain the low temperature necessary to ensure that minimal gas evaporates) and shipped all over the world.³³ When it arrives “at the receiving port,” the LNG is heated until it converts back into gas form, then is distributed to the local market through pipelines.³⁴ The majority of the natural gas

21. *Id.*

22. *Id.*

23. THE HISTORY OF NATURAL GAS, http://www.fe.doe.gov/education/energylessons/gas/gas_history.html (last accessed Oct. 14, 2016).

24. *Id.*

25. *Id.*

26. See A BRIEF HISTORY OF NATURAL GAS, *supra* note 19.

27. NATURAL GAS: FUELING THE BLUE FLAME: GETTING GAS FROM THE GROUND . . . AND THE SEA, *supra* note 15.

28. *Id.*

29. *Id.* Propping agents, made mostly of salt water, are injected into the earth to thin out oil and natural gas deposits underground. They create enough pressure to push the thinned oil and natural gas to the surface, and are intended to “prop” the resulting empty space in the ground open. The propping agents usually include brine, water, steam, or carbon dioxide. CLASS II OIL AND GAS RELATED INJECTION WELLS, <https://www.epa.gov/uic/class-ii-oil-and-gas-related-injection-wells> (last visited Feb. 26, 2017).

30. LIQUEFIED NATURAL GAS, *supra* note 14.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

consumed in the United States is produced domestically, as well as in conjunction with Canadian imports.³⁵

B. Dominion's Ownership of Cove Point

The United States also exports much of its natural gas.³⁶ “There are . . . twelve LNG . . . terminals” along the eastern seaboard, nine of which are located directly on the mainland.³⁷ Cove Point is one of these terminals, and was one of the first four marine LNG terminals built in the United States.³⁸ Originally, it was built as an import facility, enabling it to receive foreign (mainly Algerian) shipments of LNG.³⁹ It was equipped with the machinery necessary to convert LNG back to its gaseous form and deposit it into a pipeline for distribution.⁴⁰ The plant opened in 1978, but closed within two years due to a reduced demand for LNG.⁴¹ In 2003, as the demand grew once again, Cove Point reopened.⁴² However, this time it primarily handled domestic natural gas, “liquefy[ing], stor[ing], and distribut[ing]” that gas in the Mid-Atlantic region.⁴³ Dominion acquired the facility in 2002, and received its first shipment in 2003.⁴⁴ Natural gas received at the Cove Point terminal is distributed along the Northeast and Mid-Atlantic states.⁴⁵

At present, Dominion plans to build the additional facilities necessary for the export of LNG on the existing footprint of the current facility.⁴⁶ Dominion claims that the expansion will create thousands of construction jobs in the Lusby area, as well as bring in roughly \$40 million in tax revenue for the state.⁴⁷ Natural gas is a valuable resource across the globe because it is easily storable and distributable.⁴⁸ According to the U.S. Energy Information Administration, price drivers for

35. LIQUEFIED NATURAL GAS, *supra* note 14.

36. *Id.* In 2015, natural gas imports decreased to 935 billion cubic feet (Bcf). The United States imported 2,718,094 million cubic feet (Mcf) of natural gas in 2016, 91,511 of which was LNG. For comparison, the United States exported 1,783,512 Mcf of natural gas in 2016, only 28,381 Mcf of which was LNG. U.S. ENERGY INFO. ADMIN., U.S. NATURAL GAS EXPORTS AND RE-EXPORTS BY COUNTRY; U.S. ENERGY INFO. ADMIN., U.S. NATURAL GAS IMPORTS BY COUNTRY; U.S. ENERGY INFO. ADMIN., U.S. NATURAL GAS IMPORTS & EXPORTS 2015.

37. LIQUEFIED NATURAL GAS, *supra* note 14.

38. HISTORY OF LNG, https://www.dom.com/about-us/news-center/natural-gas-projects-and-initiatives/~link.aspx?_id=C8BB16F578464A8E94F26BFDA86BBEB7&_z=z (last visited Feb. 26, 2017).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. HISTORY OF COVE POINT, https://www.dom.com/~link.aspx?_id=4572833999C34F75AAC1B21669804A13&_z=z (last visited Feb. 27, 2017).

44. *Id.*

45. *Id.*

46. Brochure from Mark Reaser, Director of LNG Operations, Dominion, to Calvert County Residents (2013) (accessible at <https://www.dom.com/library/domcom/pdfs/gas-transmission/cove-point/cp-brochure-102313.pdf?la=en>).

47. *Id.*

48. *See generally* U.S. ENERGY INFO. ADMIN., WHAT ARE THE MAJOR FACTORS AFFECTING NATURAL GAS PRICES? (2016), <https://www.eia.gov/tools/faqs/faq.php?id=43&t=8>.

natural gas include “natural gas production, net imports, . . . underground storage levels. . . . [w]eather, . . . economic conditions, and petroleum prices.”⁴⁹

Dominion expects to export LNG from Cove Point to Japan and India.⁵⁰ India is “increasingly dependent on energy imports.”⁵¹ It’s estimated that roughly 240 million people – about 20% of the population – “lacked basic access to electricity in 2013.”⁵² In 2016, India ceased exporting LNG, and the following year, India was among the top three Asian countries contributing to increased demand.⁵³ India is currently responsible for 7.4% of imported LNG globally.⁵⁴ Similarly, Japan has struggled to meet its energy demand; in fact, Japan’s domestic resources only meet less than 10% of demand.⁵⁵ Japan has become even more dependent on imports since March 2011, when an earthquake struck and heavily damaged the Fukushima-Daiichi nuclear reactors.⁵⁶ Thus, the country relies heavily on imports, and imports more LNG than any other country worldwide.⁵⁷

Dominion anticipates using its existing pipeline to accommodate the increased LNG traffic, and expects to see roughly “one ship every four days,” which it says is a minimal increase from the current figure.⁵⁸ All participating ships will be required to comply with existing federal and state regulations.⁵⁹

III. ENVIRONMENTAL CONCERNS REGARDING THE EXPANSION OF COVE POINT

Environmental groups like EarthReports cite concerns such as the effects on water quality, effects on the North Atlantic right whale, and public safety as reasons FERC should not have approved Cove Point’s application to expand its facilities.⁶⁰ They assert that increased ship traffic around Cove Point will result in the introduction of more invasive species to the local ecosystem.⁶¹ Ballast water, which is regulated by both the Environmental Protection Agency (EPA) and the U.S. Coast Guard, is water contained in the bottom of steel-hulled ships to ensure stability of the ship and its cargo.⁶² The water is pumped into the ship from a local supply, used for the duration of the trip, and is released as the ship takes on more cargo.⁶³ The ballast water contains microorganisms from the original location,

49. *Id.*

50. Brochure from Mark Reaser, *supra* note 46.

51. INDIA, <https://www.eia.gov/beta/international/analysis.cfm?iso=IND> (last visited Sept. 1, 2017).

52. *Id.*

53. INT’L GAS UNION, 2017 WORLD LNG REPORT (2017).

54. *Id.*

55. JAPAN, <https://www.eia.gov/beta/international/analysis.cfm?iso=JPN> (last visited Sept. 1, 2017).

56. *Id.*

57. *Id.*

58. Brochure from Mark Reaser, *supra* note 46.

59. *Id.*

60. *See generally* Pet’rs Reply Br., *EarthReports v. FERC*, 2016 WL 739042 (D.C. 2016) (Nos. 15-1127, 15-1205).

61. *Id.* at *19-20.

62. NAT’L OCEANIC & ATMOSPHERIC ADMIN., BALLAST WATER—A PATHWAY FOR AQUATIC INVASIVE SPECIES, http://www.habitat.noaa.gov/pdf/best_management_practices/fact_sheets/Ballast%20Water%20Fact-sheet.pdf.

63. *Id.*

and when the water is released, these organisms are introduced into a new environment, which can have hugely detrimental effects on that ecosystem.⁶⁴ Roughly 200 million tons of ballast water are released into U.S. waters every year, and that water holds the potential to have substantial negative effects.⁶⁵ For example, in 1991, 10,000 people in Peru died from drinking water contaminated with cholera.⁶⁶ That strain of cholera was transported by a ship arriving from South America and was found in ballast water tanks in Mobile, Alabama.⁶⁷ The environmental groups contend that the ships moving LNG in and out of Maryland will introduce similar risks.⁶⁸

The North Atlantic right whale lives along the Atlantic coast of the United States, generally choosing to stay close to the shoreline.⁶⁹ The National Oceanic and Atmospheric Administration (NOAA) has determined that one of the critical areas for the conservation of North Atlantic right whales is located along the coast of the Northeastern United States, reaching from Massachusetts to Maine.⁷⁰ The North Atlantic right whale is classified as an endangered species, and has been since 1973; only between 300 and 350 of these whales are still expected to be alive today.⁷¹ According to the World Wide Fund for Nature, ship collisions, a possible consequence of increased traffic in and around Cove Point, and ecosystem change are two major threats to the survival of this whale.⁷²

Much of the discussion about public safety is based on Cove Point's proximity to the Calvert Cliffs nuclear power plant, located seven miles north of the Cove Point facility.⁷³ Environmental groups contend that even though Dominion claims the project will be constructed within its current footprint, expansion necessitates the addition of a liquefaction train, separate pre-treatment units, electrical generators, storage facilities for hazardous materials, loading stations, and spill basins.⁷⁴ They have expressed concern regarding the health impact on residents living "directly across the street" from the Cove Point facility.⁷⁵ The groups assert that not only could this facility possibly pose a threat to local residents above ground, it could also cause the ground beneath many of the Northeastern states to become unstable due to fracking, as Dominion plans to obtain most of its exported gas

64. *Id.*

65. *Id.*

66. *Id.*

67. NAT'L OCEANIC & ATMOSPHERIC ADMIN., BALLAST WATER—A PATHWAY FOR AQUATIC INVASIVE SPECIES, *supra* note 62.

68. Pet'rs Reply Br., *supra* note 60, at *19.

69. NAT'L OCEANIC & ATMOSPHERIC ADMIN., NORTH ATLANTIC RIGHT WHALES (EUBALAENA GLACIALIS) (2016).

70. NAT'L OCEANIC & ATMOSPHERIC ADMIN., CRITICAL HABITAT (2016).

71. NORTH ATLANTIC RIGHT WHALE, <http://www.worldwildlife.org/species/north-atlantic-right-whale> (last visited Oct. 14, 2016); NORTH ATLANTIC RIGHT WHALES, *supra* note 69.

72. NAT'L OCEANIC & ATMOSPHERIC ADMIN., NORTH ATLANTIC RIGHT WHALE, *supra* note 71.

73. Driving Directions from Cove Point to Calvert Cliffs Nuclear Power Plant, GOOGLE MAPS, <https://maps.google.com> (follow "Directions" hyperlink; then search starting point field for "Dominion Cove Point LNG" and search destination "Calvert Cliffs Nuclear Power Plant").

74. Pet'rs Reply Br., *supra* note 60, at *22.

75. *Id.* at *5, *23.

from the Marcellus formation, which is located between West Virginia and New York.⁷⁶

IV. REGULATING THE PRODUCTION AND USE OF LNG

The manufacture, transport, import, and export of LNG are subject to multiple statutes and regulations.⁷⁷ Two of the most important federal statutes are NEPA and the NGA.⁷⁸

A. *Procedures for Agency Investigation of Environmental Impacts*

NEPA was passed in 1970 with the purpose of “promot[ing] efforts which will prevent or eliminate damage to the environment and . . . stimulate the health and welfare of man[,]” as well as “enrich[ing] the understanding of the . . . natural resources important to the Nation.”⁷⁹ The Congressional intent behind NEPA was to “create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”⁸⁰ NEPA requires agencies to include an environmental impact statement (EIS) with “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”⁸¹ This statement should include a discussion of five factors:

- Environmental impact;
- Unavoidable negative environmental effects;
- Alternatives;
- How actions taken will pan out in the long-term;
- “Irreversible and irretrievable commitments of resources.”⁸²

Under NEPA, if a proposal for the expansion, creation, or operation of a natural gas facility significantly affects the quality of the human environment, the agency must prepare an EIS.⁸³ If such proposal does not significantly affect the quality of the human environment, an Environmental Assessment (EA) is prepared to ensure that an EIS is not actually required.⁸⁴ If a proposal passes through the EA stage and FERC still finds that an EIS is not required – that is, that the proposal poses little to no negative effect on the quality of human life – then the agency “issue[s] a Finding of No Significant Impact (FONSI)” and authorizes the proposal.⁸⁵

76. *Id.* at *7-8; *see generally* ENVTL. PROT. AGENCY, SHALE GAS DEVELOPMENT CHALLENGES—A CLOSER LOOK, https://energy.gov/sites/prod/files/2013/04/f0/shale_gas_challenges_air.pdf.

77. *See generally* NEPA § 4332 (1970); Natural Gas Act (NGA), 15 U.S.C. § 717 (a) (2005).

78. NEPA § 4332; NGA § 717.

79. NEPA § 4321.

80. *Id.* at § 4331 (a).

81. *Id.* at § 4332 (C).

82. *Id.* at § 4332 (C)(v).

83. *Id.*

84. *See generally* NEPA § 4332 (C).

85. *Id.*; *see, e.g.*, ENVTL. PROT. AGENCY, NAT'L ENVTL. POL'Y ACT REVIEW PROCESS, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>.

B. *Delegation of Responsibilities under the NGA*

The NGA was passed in 1938 and delegated power to regulate the interstate transport of natural gas to FERC's predecessor, the Federal Power Commission (FPC).⁸⁶ Under the NGA, both exporters and importers of natural gas must obtain an order from FERC authorizing such transaction.⁸⁷ Any application to expand an LNG terminal, like the one at issue here, triggers a notice-and-comment period, where FERC may issue or deny the order after a hearing.⁸⁸ The statute explicitly enumerates six types of safety considerations FERC will consider at such hearing:

- The kind and use of the facility;
- The existing and projected population and demographic characteristics of the location;
- The existing and proposed land use near the location;
- The natural and physical aspects of the location;
- The emergency response capabilities near the facility location; and
- The need to encourage remote siting.⁸⁹

Administration of the NGA is divided between FERC and the DOE.⁹⁰ In 1977, the DOE delegated authority to approve or deny applications for the creation or alteration of facilities and their capabilities to FERC.⁹¹ The DOE maintained its original authority over the export of natural gas, while FERC has authority over the domestic operation of natural gas pipelines and LNG facilities.⁹²

V. THE HARD LOOK DOCTRINE

The standard of review at issue is found in section 706 of the APA, and is applied to FERC through NEPA.⁹³ Subsection (2)(A) of the APA instructs reviewing courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁹⁴ In *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court identified factors to consider in determining whether such action, finding, or conclusion was arbitrary and capricious.⁹⁵ A reviewing court must determine whether

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation

86. NGA § 717 (c).

87. *Id.* § 717b (a).

88. *Id.* § 717b (a), (e).

89. *Id.* § 717b (1)(b) (internal numbering omitted).

90. LNG, <https://www.ferc.gov/industries/gas/indus-act/lng.asp> (last visited Oct. 14, 2016).

91. A BRIEF HISTORY OF NATURAL GAS, *supra* note 19.

92. *Id.*

93. APA § 706 (2)(A).

94. *Id.*

95. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983).

for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁹⁶

A decision will be upheld if the court can reasonably understand the agency's basis for the decision, even if it is not entirely clear.⁹⁷ Courts routinely examine whether the agency explained its decision or whether it considered relevant alternatives.⁹⁸

The Hard Look Doctrine gets its name from a footnote in *Kleppe v. Sierra Club*.⁹⁹ A subset of the "arbitrary and capricious" standard outlined in the APA, the Hard Look Doctrine requires that a reviewing "court [must] insure that the agency [took] a 'hard look' at [the possible] environmental consequences" of the proposed act in question.¹⁰⁰ This standard is applied to FERC's decision-making process through the APA itself as well as NEPA.¹⁰¹ The Court of Appeals for the D.C. Circuit has noted that since "NEPA does not create a private right of action, we can entertain NEPA-based challenges only under the Administrative Procedure Act and its deferential standard of review."¹⁰² NEPA requires that FERC "take a 'hard look' at [its] proposed action[']s environmental consequences in advance of deciding whether and how to proceed."¹⁰³ A court may not substitute its own judgment for that of the agency, nor may it consider factors which have not been properly and previously raised by the agency or its opponents.¹⁰⁴

The Hard Look Doctrine is relatively easy to satisfy. In *National Committee for the New River v. FERC*, the petitioners raised objections to a draft EIS which, they claimed, failed to address adequate alternatives and "impacts of two proposed generating plants."¹⁰⁵ FERC considered thirteen alternatives in its final EIS, but decided to adhere to its original plan rather than adopt any of the alternatives.¹⁰⁶ The agency conducted extensive analysis and multiple site visits; therefore, it adequately considered alternatives and the Hard Look Doctrine was satisfied.¹⁰⁷

96. *Id.* at 43.

97. *Id.* (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974)).

98. *Id.* at 48-49 (citing *Atchison, T & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 806 (1973)).

99. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citing *NRDC v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

100. *Id.*

101. *Id.* See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) ("The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences" (quoting *Kleppe*, 427 U.S. at 410 n. 21)).

102. *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017) (citing *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010)) [hereinafter *Se. Mkt. Pipelines Project*].

103. *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015).

104. *NRDC*, 458 F.2d at 838.

105. *Nat. Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1325 (D.C. Cir. 2004).

106. *Id.* at 1331.

107. *Id.* at 1332.

A. Prior Case Law

FERC has been faced with this question about enabling former terminals to export LNG multiple times recently, and it has taken a consistent standpoint.¹⁰⁸ Most recently, in *Sierra Club v. FERC (Sabine Pass)*, an LNG terminal in Louisiana applied for authorization to construct and operate export facilities, and FERC granted that authorization over objection from the Sierra Club.¹⁰⁹ The Sierra Club claimed that FERC did not consider the impact that the volume of exported LNG has on the amount of domestic fracking, and that it did not consider possible increases of air pollution caused by coal burning.¹¹⁰ The D.C. Court of Appeals handed down this decision just a few weeks before releasing its ruling on Dominion Cove Point.¹¹¹ In *Sabine Pass*, the court noted that an indirect effect is “caused by the action and . . . later in time or farther removed in distance, but . . . still reasonably foreseeable.”¹¹² It held that an increase in “natural gas production was not a reasonably foreseeable consequence” of permitting the Louisiana facility to increase its production capabilities for export, so this concern did not qualify as an “indirect effect,” and FERC did not have to take it into consideration when granting or denying the authorization.¹¹³ Next, the court addressed the potential increase in tanker traffic related to the facility’s ability to export.¹¹⁴ The court noted that the record showed that even though “the authorized maximum number of tankers remain[ed]” the same, the number of tankers needed to export LNG was directly related to and dependent upon the volume of natural gas prepared for export.¹¹⁵ In other words, as more LNG was prepared for export, more tankers were needed.¹¹⁶ However, the court held that since FERC does not have the power to increase exports – which, under NGA section 3, lies with the DOE – the Sierra Club could not raise that claim against FERC, and FERC did not have to consider it in its approval of the Louisiana facility’s application.¹¹⁷

B. NEPA Requirements for Reviewing Potential Environmental Impacts

The court explained the requirements of NEPA in *Baltimore Gas & Elec. Co. v. NRDC*.¹¹⁸ It held that “[t]he key requirement of NEPA . . . is that the agency consider and disclose the actual environmental effects in a manner that will ensure that the [actual] process . . . brings those effects to bear on decisions to take particular actions that significantly affect the environment.”¹¹⁹ The first requirement

108. See generally *Sierra Club v. FERC (Sabine Pass)*, 827 F.3d 59 (D.C. Cir. 2016); see also *Sierra Club v. FERC (Freeport)*, 827 F.3d 36 (D.C. Cir. 2016).

109. *Sabine Pass*, 827 F.3d at 62.

110. *Id.* at 64.

111. *Id.* at 59.

112. *Id.* at 63 (quoting 40 C.F.R. § 1508.8 (b)) (internal quotes omitted).

113. *Id.* at 68 (citing *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 769-70 (2004)).

114. *Sabine Pass*, 827 F.3d at 66.

115. *Id.* at 67.

116. *Id.*

117. *Id.* at 68.

118. *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87 (1983).

119. *Id.* at 96.

of NEPA is that the agency must “consider every significant aspect” of any potential environmental effects caused by a proposed action or plan.¹²⁰ Next, “the agency [must] inform the public” of what environmental issues it has considered.¹²¹ Lastly, the court noted that a reviewing court, as well as an agency, is only required to consider environmental concerns, not to elevate them over potential benefits of any plan or other adverse effects.¹²²

The court has previously discussed requirements of an EIS, specifically pertaining to the consideration of alternatives.¹²³ Under NEPA section 4332 (2)(e), agencies must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.”¹²⁴ According to the “rule of reason,” the agency is only required to consider reasonable alternatives in its EIS, “as long as the agency’s decision [was] ‘fully-informed’ and ‘well-considered,’ it is entitled to judicial deference.”¹²⁵ Furthermore, the Council on Environmental Quality (CEQ) regulations propose that an EIS “consider together actions that ‘are’” closely interrelated and interdependent, cumulative actions with cumulatively significant impacts, and similar actions.¹²⁶

C. Procedural History

Dominion published notice of its application to expand the facility at Cove Point in the Federal Register on April 19, 2013.¹²⁷ The FERC spent two years compiling a 200 page long EA, which ultimately recommended that the Commission issue a FONSI and authorize the expansion to include export facilities.¹²⁸ There was a period for public comment while the EA was being completed.¹²⁹ Once the EA was fully completed and that recommendation was made, the Commission allowed another period for public comment.¹³⁰ It ultimately adopted the recommendations in the EA and authorized the expansion.¹³¹ The DOE had already permitted Dominion to export LNG to both free trade and non-free trade countries, but specifically authorized LNG exports to be processed at and leave from the Cove Point facility in 2015.¹³²

On July 15, 2016, the U.S. Court of Appeals for the D.C. Circuit ruled on challenges to the expansion of the Cove Point LNG facility in Lusby.¹³³

120. *Id.* at 97 (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978)).

121. *Id.* (citing *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 143 (1981)).

122. *Id.* (citing *Stryckers’ Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980)).

123. *NRDC v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988).

124. *Id.* (quoting 42 U.S.C. § 4332 (2)(E)) (internal quotes omitted).

125. *Id.* at 294 (citing *North Slope Borough v. Andrus*, 642 F.2d 589, 599 (D.C. Cir. 1980)).

126. *Id.* at 298 (quoting 40 C.F.R. § 1508.25 (a)).

127. *EarthReports*, 828 F.3d at 952; see generally Notice of Application, Dominion Cove Point LNG, LP, 78 Fed. Reg. 23,552 (Apr. 19, 2013).

128. *EarthReports*, 828 F.3d at 953.

129. *Id.*

130. *Id.* at 954.

131. *Id.*

132. *Id.*

133. *EarthReports*, 828 F.3d at 959.

EarthReports, the named petitioner in this appeal, raised two separate categories of environmental challenges: (1) indirect effects of increased natural gas exports, and (2) direct effects of the expansion on water quality, the North Atlantic right whale population, and public safety.¹³⁴

Direct effects under NEPA are those that are “caused by the [agency’s] action and occur at the same time and place.”¹³⁵ On the other hand, indirect effects are also caused by the agency’s action, but are “later in time or farther removed in distance, but are still reasonably foreseeable.”¹³⁶ The Court of Appeals for the D.C. Circuit held that the key element of an indirect effect is that it is reasonably foreseeable, meaning that it is “sufficiently likely to occur that a person of ordinary prudence would take [it] into account in reaching a decision.”¹³⁷ To determine what effects are reasonably foreseeable, agencies must forecast and speculate on whether they may actually come to pass.¹³⁸ Moreover, there must exist a “reasonably close causal relationship between the environmental effect and the alleged cause,” analogous . . . to tort law.”¹³⁹

The court held that FERC was only required to consider the direct effects of the exports.¹⁴⁰ It also held that the Commission did not act arbitrarily and capriciously in authorizing the expansion because it took a “hard look” at the direct effects the expansion may cause.¹⁴¹ This holding helps explain how future challengers of FERC orders must put forth their complaints, and what categories of effects will be considered by a reviewing court under the Hard Look Doctrine.¹⁴²

VI. HOLDING & REASONING

In *EarthReports*, the Court of Appeals for the D.C. Circuit held that FERC was not required “to consider indirect effects of increased natural gas exports through the Cove Point facility.”¹⁴³ It also held that FERC did adequately consider the direct effects of expansion of the facility on water quality off the shores of Maryland, the health and population of the North Atlantic right whale, and the safety of residents living in and around Lusby.¹⁴⁴

These effects should have been properly brought in an appeal of the DOE’s separate environmental review because the DOE regulates LNG exports.¹⁴⁵ FERC

134. *Id.* at 954.

135. *Sierra Club v. Dep’t of Energy*, 867 F.3d 189, 193 (D.C. Cir. 2017) (quoting 40 C.F.R. § 1502.16 (b); *Freeport*, 827 F.3d at 41) (internal quotes omitted) [hereinafter *Freeport II*].

136. *Se. Mkt. Pipelines Project*, 867 F.3d at 1371 (quoting 40 C.F.R. § 1508.8 (b)).

137. *Id.* (quoting *EarthReports*, 828 F.3d at 955).

138. *Se. Mkt. Pipelines Project*, 867 F.3d at 1374 (quoting *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).

139. *Id.* (quoting *Freeport*, 827 F.3d at 47).

140. *EarthReports*, 828 F.3d at 952.

141. *Id.* at 954.

142. *See generally id.*

143. *Id.* at 952.

144. *Id.*

145. *See generally* LNG, *supra* note 90.

handles the environmental review under NEPA, while the DOE issues authorizations to export LNG.¹⁴⁶ In a similar case, the Court noted that “the export of LNG . . . requires separate approval from the [DOE],” while FERC “is . . . responsible for approving the siting and construction of . . . facilities [to be used for export].”¹⁴⁷

The approach of the D.C. Circuit is consistent among similar cases, all of which have been recently decided by that court.¹⁴⁸ For example, one week before the *EarthReports* decision was published, the court released its decision in *Sierra Club v. FERC (Freeport)*, and cited that decision in *EarthReports*.¹⁴⁹ In that case, the Sierra Club challenged a FERC decision authorizing the expansion of the Freeport LNG terminal in Texas to accommodate exports.¹⁵⁰ Comparably, the Sierra Club challenged FERC’s adherence to and analysis under NEPA, claiming that the Commission failed to consider environmental consequences of increased LNG production and to analyze the cumulative effects of the natural gas exportation combined with other export projects around the country.¹⁵¹

The similarities between the two cases diverge at this point. The Commission found that the expansion in that case would have a significant impact on the human environment, and consequently, an EIS was prepared.¹⁵² In *Freeport*, the court ruled that “any . . . challenges to the environmental analysis of the export activities themselves must be raised in a petition for review from the Department’s decision to authorize exports.”¹⁵³ The alleged indirect environmental impacts caused by the Freeport expansion should have been brought before the DOE, not FERC; similarly, the same types of impacts in *EarthReports* should also have been brought before the DOE.¹⁵⁴

VII. ARGUMENT

This case was procedurally defective. Petitioners claimed that FERC was required to consider the indirect effects of the Cove Point expansion, and failed to do so.¹⁵⁵ In compliance with NEPA, FERC completed an EA to determine whether the expansion would have a significant impact on “the quality of the human environment.”¹⁵⁶ The Commission found that the expansion was not likely to have such an impact, and issued a FONSI to that effect.¹⁵⁷ Had the Commission found that the expansion would significantly affect the human environment, it

146. *Id.*

147. *Freeport II*, 867 F.3d at 192.

148. *See generally Freeport*; *see also Sabine Pass*.

149. *See generally Freeport*; *EarthReports*, 828 F.3d at 952.

150. *Freeport*, 827 F.3d at 42.

151. *Id.*

152. *Id.* at 41.

153. *Id.* at 46.

154. *Id.*; *see, e.g., EarthReports*, 828 F.3d at 952.

155. *EarthReports*, 828 F.3d at 951-52.

156. *Id.* at 953 (citing 42 U.S.C. § 4332 (2)(C), 40 C.F.R. § 1508.11).

157. *Id.* at 954.

would have been statutorily bound to complete an EIS.¹⁵⁸ Had it completed an EIS, the Commission would need to address any direct, indirect, and cumulative effects.¹⁵⁹ However, the Cove Point project never reached this stage.¹⁶⁰ Since a FONSI was issued rather than an EIS, the Commission did not have to consider any of the indirect effects of the expansion.¹⁶¹

Petitioners claimed that the expansion of Cove Point would result in an increase in climate change.¹⁶² In order for that increase in climate change to occur, four other conditions must occur.¹⁶³ Each condition is dependent on the previous one.¹⁶⁴ First, the expansion of Cove Point must result in an increase in exported natural gas.¹⁶⁵ Under the NGA, FERC does not have the power to regulate the amount of natural gas that the United States exports.¹⁶⁶ FERC only has the power to determine whether the Cove Point facility can expand in the first place.¹⁶⁷ The DOE, on the other hand, oversees the export of natural gas, and therefore has power over determining whether this first condition can occur.¹⁶⁸ Under *Public Citizen*, FERC does not have to consider effects which another agency, such as the DOE, has exclusive control over.¹⁶⁹ Since the rest of the conditions outlined by Petitioners must follow from increased exportation, which is outside the control of FERC, FERC did not have to consider any of the following effects.¹⁷⁰

The second condition is that the increased demand for U.S. natural gas will result in increased production of natural gas.¹⁷¹ Namely, this increase would involve increased fracking in the Marcellus shale region.¹⁷² The Marcellus region, which runs below Ohio, West Virginia, Pennsylvania, and New York, is where Dominion plans to extract the natural gas, which will be processed and prepared for export at the Cove Point facility.¹⁷³ In order for the third condition to occur, the increased production and transport of the natural gas must increase greenhouse

158. *Id.* at 953.

159. *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)); *see, e.g.*, 40 C.F.R. § 1508.7 (“Cumulative impact is 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 regardless of what agency (Federal or non-Federal) or person undertakes such other action”).

160. *EarthReports*, 828 F.3d at 954.

161. *Id.*

162. *Id.*

163. *Id.* at 955.

164. *Id.*

165. *EarthReports*, 828 F.3d at 955.

166. LNG, *supra* note 90.

167. *Id.*

168. *EarthReports*, 828 F.3d at 952-53.

169. *Pub. Citizen*, 541 U.S. at 772.

170. *Id.*

171. *EarthReports*, 828 F.3d at 955.

172. Peter Bacque, *Dominion Resources’ Cove Point LNG Export Project: Right Place, Right Time*, RICHMOND TIMES-DISPATCH (June 10, 2013), <https://www.dom.com/library/domcom/pdfs/gas-transmission/cove-point/cove-point-right-place.pdf>.

173. *Id.*

gas emissions.¹⁷⁴ Lastly, these increased greenhouse gases must “contribute to climate change.”¹⁷⁵

However, the precise effect this entire pattern will have is not stated. FERC did not have to consider these effects because they are all dependent on the previous condition occurring, and the first condition was one outside of FERC’s control. They were too far removed from the expansion of the Cove Point plant for FERC to have to take them into account. Under NEPA, there must be a “‘reasonably close causal relationship’ between the environmental effect and the alleged cause,” which is analogous “to ‘the familiar doctrine of proximate cause from tort law.’”¹⁷⁶ In other words, how far out may the court consider potential indirect effects? How far is too far? Certainly four separate leaps between assumptions or predictions, each predicated on the occurrence of the previous condition, is too far ahead.¹⁷⁷

The Supreme Court has previously ruled that where “an agency has no ability to prevent a certain effect due to [that agency’s] limited statutory authority over the relevant action[],” then that action “cannot be considered a legally relevant ‘cause’ of the effect[]” for NEPA purposes.¹⁷⁸ Since the eventual accumulation of greenhouse gases depends on the first condition of increased export of LNG, which is outside FERC’s statutory authority, the expansion cannot be a “legally relevant” cause of the accumulation of greenhouse gases.¹⁷⁹ The export of LNG, which is the first condition, breaks the causal chain between the expansion of the plant and the indirect environmental effects because it is solely the DOE’s province to regulate LNG exports.¹⁸⁰

One major difference between *Freeport* and *EarthReports* is that in *Freeport*, FERC and the court accorded weight to the fact that there was no particular place that the exported natural gas would come from; therefore, there was not necessarily going to be an increase in the production of natural gas.¹⁸¹ In *EarthReports*, Dominion plans to extract natural gas specifically from the Marcellus shale region, which demonstrates that there will be increased production.¹⁸² However, since the “increased production” condition follows the “increased export” condition, that problem should be raised before the DOE rather than FERC, because FERC has no control over whether imports, and thus production, will actually increase.¹⁸³ In *Southeast Market Pipelines Project*, the Court of Appeals noted that “when the agency has no legal power to prevent a certain environmental effect, there is no

174. *EarthReports*, 828 F.3d at 955.

175. *Id.*

176. *Pub. Citizen*, 541 U.S. at 767.

177. *Freeport*, 827 F.3d at 46-47.

178. *Pub. Citizen*, 541 U.S. at 770.

179. *Id.*

180. *Freeport*, 827 F.3d at 47-48 (citing *Pub. Citizen*, 541 U.S. at 769).

181. *Id.* at 47.

182. Bacque, *supra* note 172.

183. *Pub. Citizen*, 541 U.S. at 771.

decision to inform, and the agency need not analyze the effect in its NEPA review.”¹⁸⁴ Since the FERC had no authority to increase imports or exports by granting a license, it was not required to analyze the indirect effects that could be indirectly caused by increased natural gas production and consumption.¹⁸⁵

VIII. DIRECT EFFECTS

A. Ballast Water

One of the direct effects the Petitioners raised was the “impact of ballast water” on the quality of water in and around Lusby.¹⁸⁶ Petitioners argued that FERC “‘arbitrarily minimized’ the impact” of foreign water on the local ecosystem.¹⁸⁷ In its EA, FERC noted that it received “several” comments concerned with the impact of ballast water on the local ecosystem.¹⁸⁸ The court examined the EA, which discussed a number of risks posed by the introduction of ballast water, and held that FERC adequately considered those risks. In fact, FERC dedicated three pages to the impact of ballast water in the EA and considered more impacts than just that of the potential introduction of invasive species.¹⁸⁹ FERC acknowledged that potential, but stated that the regulations in place are adequate to address and minimize these impacts.¹⁹⁰

First, the Commission noted that Dominion had been authorized by the DOE to receive 200 ships, but only anticipated receiving eighty-five, so any assumptions and predictions based on the higher number of ships arriving at Cove Point would likely overestimate the actual impacts.¹⁹¹ Any ships entering Cove Point would still be subject to a number of regulations mandating procedures to maintain water quality and lessen the impact of ballast water.¹⁹² These regulations are numerous and include the National Invasive Species Act of 1996, the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, the National Ballast Water Management Program, and U.S. Coast Guard regulations, which were recently amended, among others.¹⁹³ The new Coast Guard regulations began to be enforced between December 2013 and 2016, depending on the age of the arriving ship.¹⁹⁴ These regulations mandate that ballast water cannot be discharged from an international ship within 200 nautical miles of a U.S. shore.¹⁹⁵ FERC found that the

184. *Se. Mkt. Pipelines Project*, 867 F.3d at 1372.

185. *Id.*

186. *EarthReports*, 828 F.3d at 952.

187. *Id.* at 956 (citing Pet’rs Reply Br. 47).

188. ENVTL. ASSESSMENT FOR THE COVE POINT LIQUEFACTION PROJECT, <https://www.ferc.gov/industries/gas/enviro/eis/2014/05-15-14-ea/ea.pdf> (last visited Feb. 27, 2017).

189. *Id.* at 53-55.

190. *Id.* at 54.

191. *Id.* at 53.

192. *Id.*

193. For a complete list of the regulations arriving ships will be subject to, *see* ENVTL. ASSESSMENT, *supra* note 188, at 53.

194. *Id.* at 54; Final Rule, Standards for Living Organisms in Ships’ Ballast Water Discharged in U.S. Waters, 77 Fed. Reg. 17,254, 17,267 (Mar. 23, 2012) (to be codified at 33 C.F.R. pt. 151, 46 C.F.R. pt. 162).

195. ENVTL. ASSESSMENT, *supra* note 188, at 54.

new rules “provide more consistent control over the concentrations of organisms than the current ballast water exchange program and would significantly minimize the introduction and establishment of nonindigenous species.”¹⁹⁶ Although it is nearly impossible to completely protect against the introduction of foreign species into U.S. waters, FERC found that the new regulations are the best protection possible to prevent and minimize the impact of the release of ballast water.¹⁹⁷ Moreover, Maryland does not have its own ballast water regulations, but rather follows the federal ones.¹⁹⁸ FERC regarded that absence as evidence of the adequacy of the current federal regulations.¹⁹⁹

FERC also briefly examined the impact such water would have on the salinity, dissolved oxygen levels, water temperature, and acidity of U.S. coastal waters.²⁰⁰ It found that ballast water with higher or lower salinity than coastal waters would naturally mix with the “water in the Chesapeake Bay” and would eventually even out.²⁰¹ The temperatures of both the coastal and the ballast waters would be roughly the same, since ballast water is maintained below the waterline of the ship.²⁰² The dissolved oxygen and acidity may differ slightly, but FERC found that neither these nor the issues of salinity or water temperature would have “discernable impacts” on the water or the creatures that live in it.²⁰³

FERC dedicated three pages to analyzing multiple impacts that the introduction of ballast water could have on the environment, but most of that analysis was focused on the impact of foreign species.²⁰⁴ The sole discussion of the acidity of the new water consists of one sentence: “The pH of the ballast water may vary slightly from that of the Chesapeake Bay.”²⁰⁵ FERC, in its EA, did not discuss the impacts that a higher or lower acidity level of ballast water can have on the environment.²⁰⁶

It is possible that this portion of the decision may meet the arbitrary and capricious standard because it does not appear to be well-reasoned, or for that matter, reasoned at all. Overall, however, FERC undertook an analysis of the current regulations that the arriving ships would be subject to, and determined how many vessels carrying ballast water were likely to arrive at Cove Point per year.²⁰⁷ This attention to detail and level of consideration cannot be said to be less than informed or well-reasoned, and thus does not meet the arbitrary and capricious standard and cannot be overturned.²⁰⁸

196. *Id.*

197. *Id.*

198. *EarthReports*, 828 F.3d at 957 (citing Order Denying Rehearing and Stay, *Dominion Cove Point LNG, LP*, 151 F.E.R.C. ¶ 61,095 at PP 72-74 (2015) [hereinafter Order Denying Rehearing]).

199. *Id.*

200. ENVTL. ASSESSMENT, *supra* note 188, at 54.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 53-55.

205. ENVTL. ASSESSMENT, *supra* note 188, at 54.

206. *Id.*

207. *Id.* at 53-54.

208. *Hodel*, 865 F.2d at 294; APA § 706 (2)(A).

B. North Atlantic Right Whale

Petitioners also challenged the expansion of the facility on grounds that it would have an adverse effect on the population of North Atlantic right whales, which are known to live off the northeastern coast of the United States.²⁰⁹ They argued that FERC refused to analyze the impact on the whale, and that it relied on an outdated study to evaluate the risks posed to the whale population.²¹⁰ However, according to the D.C. Circuit, the Petitioners pointed to no specific part of the study that was inaccurate, but simply claimed that since the study was completed in 2007, it could not possibly reflect current facts, figures, and risks.²¹¹ The D.C. Circuit noted that the Commission also considered similar studies from 2006 and 2009, but did not find any “significant difference in the type of impacts and available mitigation measures” between those studies and the 2007 study that was ultimately relied on.²¹²

The EA contains a discussion of potential impacts on the whales, and thus FERC did not fail to analyze the impacts on the whale.²¹³ The FERC did state, however, that it received a comment about the wellbeing of the whales.²¹⁴ Since it responded to this sole comment about the whales, but is only required to respond to significant comments, it must have considered the concern to be of enough importance to address, if only briefly, in the EA.²¹⁵

Moreover, both FERC and the D.C. Circuit stated that it is the province of the NOAA, not FERC, to enact measures and regulations to protect whales.²¹⁶ In the EA, FERC noted that since the NOAA enacted new regulations, which mandate that ships over sixty-five feet in length may not travel more than ten knots in coastal areas where right whales are known to live, there have been no right whale strikes where the whale has died.²¹⁷ These regulations have effectively protected the whale population, and since the ships arriving at and leaving the Cove Point facility will also be subject to those regulations, this pattern is likely to continue.²¹⁸ In case those regulations are not enough, Dominion has also implemented a “Vessel Strike Avoidance Measures and Injured and Dead Protected Species Reporting Plan” aimed at protecting the small population of North Atlantic right whales off the Cove Point coast.²¹⁹

FERC’s decision concerning the North Atlantic right whale is not arbitrary and capricious.²²⁰ While the issue was only given a paragraph in the EA, it was

209. *EarthReports*, 828 F.3d at 957-58.

210. *Id.*

211. *Id.* at 958.

212. *Id.*; Order Denying Rehearing at P 76.

213. ENVTL. ASSESSMENT, *supra* note 188, at 71-72.

214. *Id.* at 71.

215. *See generally id.* at 71-72.

216. *Id.* at 72; *EarthReports*, 828 F.3d at 958 (citing Order Denying Rehearing at P 78).

217. ENVTL. ASSESSMENT, *supra* note 188, at 72.

218. *Id.*

219. *Id.* at 71.

220. *EarthReports*, 828 F.3d at 958.

discussed at length in the Rehearing Order.²²¹ FERC looked at the current regulations, which are issued by a different agency and completely outside of FERC's control, and found that they were perfectly adequate.²²² Since the plaintiffs' concern was that the increase in ship traffic would result in more whale strikes, but the ships would be subject to the same NOAA regulations that have proved to effectively protect the whale population, FERC had no reason to doubt the adequacy of those regulations or to find that the risk to those whales would be greater.²²³

C. Public Safety

The final direct effect the Petitioners properly raised was public safety.²²⁴ There are residential neighborhoods bordering the Cove Point facility, as well as the Calvert Cliffs nuclear power plant seven miles away.²²⁵ In regards to public safety, the plaintiffs were primarily concerned with the proximity of these residents to the presence of toxic, dangerous, and explosive chemicals, and claimed that FERC failed to adequately consider these concerns.²²⁶ They claimed that the "footprint" – that is, the amount of space occupied by – the Cove Point facilities was too small for its capabilities and a catastrophe was likely to result from the proximity of all these chemicals to each other.²²⁷ The FERC acknowledged that risk, but noted that the Cove Point facilities only take up 131 acres on a 1,017-acre parcel that Dominion owns.²²⁸ If there is some sort of malfunction or accident, it is likely that it can be contained in that parcel and can be prevented from reaching the rest of Lusby and its residents.²²⁹

In the EA, FERC extensively analyzed the public safety risks posed by the expansion of Cove Point.²³⁰ It listed multiple accidents that have happened at LNG facilities and required Dominion to submit a list of all the accidents that have ever occurred at Cove Point.²³¹ These mainly consisted of small gas leaks, fires that were not LNG-related, and the drowning of a worker.²³² It noted that the largest accident that ever occurred at Cove Point occurred in 1979, when fumes entered the electrical system, caused a fire, and a worker died.²³³ Dominion was also required to submit a list of actions taken to prevent such accidents from happening again and a statement of lessons learned from each accident.²³⁴ FERC

221. Order Denying Rehearing at PP 75-78.

222. ENVTL. ASSESSMENT, *supra* note 188, at 72.

223. *Id.*

224. *EarthReports*, 828 F.3d at 958.

225. ENVTL. ASSESSMENT, *supra* note 188, at 118; Driving Directions from Cove Point to Calvert Cliffs, *supra* note 73.

226. *EarthReports*, 828 F.3d at 958.

227. *Id.*

228. *Id.* at 958-59; ENVTL. ASSESSMENT, *supra* note 188, at 3.

229. ENVTL. ASSESSMENT, *supra* note 188, at 3.

230. *Id.* at 123-59.

231. *Id.* at 130-31.

232. *Id.*

233. *Id.*

234. ENVTL. ASSESSMENT, *supra* note 188, at 130-31.

discussed multiple stringent requirements for “design, construction, operation, maintenance . . . [and] safety systems proposed to detect and control [potential] hazards,” and FERC subsequently conditioned its approval upon proof of completion and maintenance of safety-related measures.²³⁵ These measures include a Process Hazard Analysis, Hazard & Operability Analysis, Layers of Protection Analysis, and Safety Integrity Level Analysis, among many others.²³⁶

Moreover, the plaintiffs submitted a news article and affidavits from residents of Lusby stating they were concerned about the potential for a large explosion and the impact on their homes and livelihoods.²³⁷ As understandable as their concern is, these affidavits and the news article were not part of FERC’s record.²³⁸ They were submitted to the D.C. Circuit to establish standing, but the court could not take them into account because they were not part of the record.²³⁹ Additional information outside of the record before FERC cannot be used to establish whether an agency’s decision was arbitrary and capricious.²⁴⁰

Regarding public safety, FERC did not act arbitrarily and capriciously in conditionally authorizing the Cove Point expansion.²⁴¹ It undertook an extensive analysis of the possible risks that the plant would encounter, the likelihood of those risks, and mandated multiple safety-oriented measures that must occur before the project can move forward.²⁴² If anything, these additional conditions are assurance that FERC is sufficiently concerned with the health, wellbeing, and safety of the residents of Lusby.²⁴³ Its decision was well-considered and discussed in depth the different risks that the residents of Lusby might encounter, and how Dominion plans to prevent or mitigate those potential harms.²⁴⁴ The court accurately found that the Commission’s analysis and decision were not arbitrary and capricious, and could not be overturned.²⁴⁵

IX. FUTURE IMPLICATIONS

In order to successfully bring a suit challenging the expansion of an LNG facility on the basis of environmental concerns, any prospective plaintiffs must ensure that they name the correct party or agency as the defendant.²⁴⁶ Here, the plaintiffs should have named the DOE as the proper agency in the suit.²⁴⁷ Had EarthReports sued the DOE, their chain of future indirect effects of expansion, such as those impacting climate change, might have been considered by the

235. *Id.* at 131-32.

236. *Id.* at 135.

237. *EarthReports*, 828 F.3d at 959.

238. *Id.*

239. *Id.*

240. *Id.* (citing *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095-96 (D.C. Cir. 1996)).

241. *EarthReports*, 828 F.3d at 959.

242. ENVIRONMENTAL ASSESSMENT, *supra* note 188, at 123-59.

243. *Id.*

244. *Id.*

245. *EarthReports*, 828 F.3d at 959.

246. *Id.* at 952-53, 955-56.

247. *Id.* at 955-56.

Court.²⁴⁸ The plaintiffs severely limited themselves by suing a party which had no control over the actual increase of exported LNG and therefore would not be responsible for the types of harms that may result from the expansion.²⁴⁹

Moreover, neither FERC nor the court was bound to consider any of those effects under NEPA.²⁵⁰ NEPA requires that reports concerning “major Federal actions significantly affecting the quality of the human environment” must contain detailed statements about the action’s environmental impacts, unavoidable adverse environmental effects, alternatives, “relationship[s] between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity,” and “irreversible and irretrievable commitments of resources” involved in the proposed project.²⁵¹ However, these five aspects only need to be addressed if the proposed project is one that “significantly affect[s] the quality of the human environment.”²⁵² FERC found that the expansion of the facilities at Cove Point would not have a significant impact on the human environment; therefore, it was not required to address any of those five effects.²⁵³ Since FERC issued a FONSI regarding the expansion of Cove Point, it was only obligated to complete an EA, which would not include those five aspects.²⁵⁴ FERC, though not obliged to, took it upon itself to analyze these effects, even though the court held that they were too far removed from those matters within FERC’s purview.²⁵⁵

In the future, once a plaintiff has determined the correct agency to file suit against regarding environmental concerns, the plaintiff would likely be more successful if it argued a narrower chain of indirect effects stemming from the claim.²⁵⁶ In both *Freeport* and *EarthReports*, the Court accorded significant weight to the fact that it was not the expansion of the facility at issue, but rather the purported increase in exported LNG, that was the source of the proposed indirect environmental effects and was each plaintiff’s main complaint.²⁵⁷ Alternatively, in any similar future cases, plaintiffs should challenge the agency’s issuance of a FONSI.²⁵⁸ Challenging the FONSI determination would require the court and the agency to explain their finding, and would ensure that the plaintiffs would have their environmental concerns heard regardless of whether the agency is required to take those effects into account at a later stage.²⁵⁹ This would safeguard against the possibility of a court refusing to address those effects, since it is not bound to once a FONSI has been issued.²⁶⁰

248. *Id.*

249. *Id.*

250. *EarthReports*, 828 F.3d at 955-56.

251. NEPA, § 4332 (C).

252. *Id.*

253. *EarthReports*, 828 F.3d at 953-54.

254. *Id.*; NEPA, § 4332.

255. *EarthReports*, 828 F.3d at 953-54, 956.

256. *Id.* at 955-56.

257. *Id.*

258. *See Sabine Pass*, 827 F.3d at 63; *see also EarthReports*, 828 F.3d at 953-54.

259. *See generally* NEPA, §§ 4331-4332.

260. *Id.*

X. CONCLUSION

The FERC issued a FONSI after the EA was completed, as opposed to requiring a further EIS.²⁶¹ Under *City of Shoreacres*, direct effects (such as those on water quality, the North Atlantic right whale, and public safety) as well as indirect effects (such as those on climate change) must be addressed at the EIS stage.²⁶² The Cove Point proposal never reached that stage, therefore the court was not statutorily bound to consider those effects.²⁶³ The FERC completed an in-depth analysis of the potential impacts on those three direct effects listed above, so its decision could not be arbitrary and capricious.²⁶⁴ The FERC took a hard look at the potential impacts that expansion of the Cove Point facility could create.²⁶⁵

Moreover, since the DOE has authority to regulate exports of natural gas, but FERC merely handles management of the facilities, any issues indirectly caused by the exportation of LNG from the Cove Point facility should have been raised against the DOE.²⁶⁶ Petitioners attempted to tie the expansion of the facility to an eventual increase in climate change.²⁶⁷ However, under *Freeport*, the indirect effects caused by the export of LNG are separate and distinct from the indirect effects caused by the expansion of a facility.²⁶⁸ This approach is consistent across a trio of cases recently heard and decided by the D.C. Circuit, and is not likely to change anytime soon.²⁶⁹ In the future, a plaintiff must ensure that he raises challenges against the correct agency if he wishes to succeed, instead of simply suing the agency currently permitting an action he disagrees with.²⁷⁰

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261. *EarthReports*, 828 F.3d at 953-54.

262. *City of Shoreacres*, 420 F.3d at 452.

263. *EarthReports*, 828 F.3d at 953-54.

264. *Kleppe*, 427 U.S. at 410 n.21.

265. *Id.*

266. *EarthReports*, 828 F.3d at 956.

267. *Id.* at 955.

268. *Freeport*, 827 F.3d at 46.

269. See *Freeport*, 827 F.3d at 42; *Sabine Pass*, 827 F.3d at 63; *EarthReports*, 828 F.3d at 954-56.

270. *EarthReports*, 828 F.3d at 956.

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