

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:)
)
Informational Proceeding on Methods for)
Satisfaction of California Environmental)
Quality Act Requirements Relating to Greenhouse)
Gas Emission Impacts of Power Plants)

Docket No. 08-GHG-01

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COMMENTS OF CLEARWATER PORT LLC

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INTRODUCTION

Clearwater Port LLC is engaged in the business of developing a liquefied natural gas facility to receive, regasify, and transport natural gas via undersea pipeline to an existing natural gas infrastructure in the state of California. To meet the state's demand for natural gas, Clearwater Port LLC is proposing to construct the Clearwater Port project, an offshore liquefied natural gas ("LNG") receiving terminal and regasification facility located approximately 12.6 statute miles off the coast of the City of Oxnard, Ventura County ("Clearwater Port").

Clearwater Port is not a powerplant and the project does not include a CEC jurisdictional facility. However, Clearwater Port will include offshore power production equipment, two redundant natural gas-fired turbines (approximately 14 MW each) that will operate during LNG offloading and a natural gas-fired internal combustion engine that will provide power to the platform when not offloading LNG. Accordingly, Clearwater has an interest in how the State of California will address GHG emissions associated with power production.

Because the Clearwater Port project does not include a CEC jurisdictional facility, Clearwater will limit its comments to responding to questions 1-3 posed in the Commission's October 8, 2008 order.

QUESTIONS PRESENTED

1. GHG emissions have a cumulative impact on climate change that is global by nature. Are such global impacts appropriately subject to CEQA?

Response: Before the passage of SB 97, there was substantial uncertainty as to whether CEQA applied to GHG emissions. GHG emissions are not criteria pollutant emissions. They have no direct human health effects. The impacts are global, not localized, making the environmental setting the "globe," as opposed to the normal, geographically limited "Environmental Setting" in the typical CEQA analysis. However, with the passage of SB 97, the State of California has indicated its intent to consider GHG issues in CEQA review. The guidance from the Office of Planning & Research ("OPR") on CEQA states that all agencies can independently make and establish their own significance standards until a final report by OPR is issued and adopted by the Resources Agency. The examples cited in the following responses indicate that there is a strong potential for inequitable and inconsistent treatment of projects in the "every agency for itself" direction. In a similar fashion, the actions by the Attorney General ("AG") have focused upon disclosure and mitigation without consistent guidance on what constitutes a significant impact.

Curbing GHG emissions where feasible is an important state interest that must be achieved in concert with the State's other important interests in ensuring adequate energy supplies. In order to avoid delays, heightened regulatory costs, and the potential for driving valuable projects out of state, similarly situated projects must be treated consistently. Two examples highlighting the pitfalls from inconsistent treatment are the following: (1) the SCE peaker plant proposed in Oxnard in 2007, and (2) Poseidon Carlsbad desalination plant. Both projects were before the

California Coastal Commission (“CCC”) on the same agenda. As discussed below, the CCC took very different approaches to analyzing GHG issues for these two projects.

SCE proposed a 45 MW natural gas fired peaker project on a brownfield located in a coastal area within Oxnard, California. In evaluating the GHG emissions from the SCE project the CCC looked to the net-impact of GHG across SCE’s service territory in measuring the significance of the GHG emission’s impact. Based on its consultant’s report, the CCC found that SCE’s total CO2E emissions would *increase* by approximately 726 Metric Tonnes of CO2E over the anticipated 30 year project life. (See Exhibit 12 of CCC materials). Notwithstanding this net increase in total GHG emissions, the CCC nevertheless determined that the peaker’s GHG impact was insignificant, and no further mitigation was required.¹

In marked contrast, the CCC approach to the Poseidon Desalination project differed from that used in the SCE project. As expected, the CCC staff highlighted the purchase of electricity from the SDG&E system as the primary source of GHG emissions.² The CCC then went further to raise “lifecycle emissions” by discussing the manufacture of “materials used” in the construction of the Poseidon facility. Poseidon was required to show no “net” increase in GHG emissions: Poseidon shall “[u]se CARB and/or CCAR approved protocols and mechanisms for all emission reduction measures proposed to ensure emissions from Poseidon’s purchased electricity are ‘net zero’.” (CCC “Special Condition 10” for Poseidon.) Thus, while the SCE peaker was allowed to proceed notwithstanding an increase in GHG emission, the CCC required Poseidon to “net zero” its potential GHG effects.

The SCE peaker and the Poseidon Desalination projects both appeared on the same CCC agenda. However, CCC Staff employed two different GHG analytical models. SCE was allowed to proceed with a slight increase in GHG emissions across its fleet while Poseidon was required to show “net zero”, i.e., no net increase in GHG emissions. Such disparate treatment of similarly situated projects points to the need for the Commission to employ a non-discriminatory GHG analysis and GHG mitigation requirements for similarly situated projects.

2. Assuming CEQA does apply, what should be the CEQA “threshold of significance” for GHG emissions from a given project?

A. CEQA requires that a cumulative impact be “cumulatively considerable” for it to be significant, and air districts typically set quantitative thresholds for criteria pollutants based on this concept. What GHG emission levels are less than “cumulatively considerable?”

- power plant construction emissions?**
- “peaking” gas-fired power plants (however defined)?**
- Emissions from power plants that do not exceed limits set by SB 1368 regulations?**

¹ The CCC decision can be found at: <http://documents.coastal.ca.gov/reports/2008/8/oxnard-8-2008.pdf>

² The CCC decision can be found at: <http://documents.coastal.ca.gov/reports/2007/11/Th7a-11-2007.pdf>

Response: Section 15355 of the CEQA Guidelines defines “cumulative impacts” as follows:

“Cumulative impacts” refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.

- (a) The individual effects may be changes resulting from a single project or a number of separate projects.
- (b) The cumulative impact *from several projects* is the change in the environment which results from *the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects*. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time. (Emphasis added.)

Although Subsection (a) of Section 15355 seems to suggest on its face that a single project may result in cumulative impacts, case law confirms that cumulative impacts under CEQA deal with the potential interrelationships of two or more projects, not the impacts from a single project. Specifically, under Section 15130 of the CEQA Guidelines, an EIR is required to discuss cumulative impacts when the project’s incremental effect is “cumulatively considerable.” Section 15065(a)(3) defines “cumulatively considerable” as meaning “that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of *other* current projects and the effects of probable *future* projects.” (Emphasis added.) Thus, notwithstanding the potentially confusing language of Subsection 15355(a), a cumulative impact is an impact caused not by the impacts of a single project, but rather from the effect of a proposed project when combined with the effects of past projects, current projects or probable future projects.³

Given the state of CEQA statute and case law, the difficulty for the Commission is identifying with specificity “the change in the environment which results” from GHG emissions and the “incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects.” Clearwater is unaware of any guiding principles for such an analysis for GHG emissions which have no localized effects.

2. Assuming CEQA does apply, what should be the CEQA “threshold of significance” for GHG emissions from a given project?

* * *

B. Have other agencies adopted thresholds of significance for GHG emissions?

Response: Clearwater is unaware of any agency adopting either a threshold for determining impacts to be cumulatively significant or a threshold of significance for GHG emissions.

³ Remy *et al.*, Guide to the California Environmental Quality Act (10th ed. 1999), p. 465 (stating that “a cumulative impact consists of an impact created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts”). (Emphasis added.)

Clearwater awaits the product of the State’s SB 97 task force to see how they have addressed these issues.

Currently, there are no statutes, regulations, or guidelines that require the quantification of GHG emissions for projects located within California from sources attributable to the project that are located outside of California, with the exception of draft documents related to the Low Carbon Fuel Standard (“LCFS”) under development by the California Air Resources Board (“CARB”). Sources outside of the electric sector are required to report their indirect energy consumption, but are not required to calculate the emissions associated with that energy consumption. Emissions from facilities subject to the proposed rule are required to be reported on a facility-total basis for all stationary sources; mobile source emissions may be reported on a voluntary basis, but are not required under the proposed rule. Accordingly, there are no established CEQA thresholds of significance that provide a useful referent to the Commission.

As mentioned during the Commission’s workshop, the concept of “life cycle” GHG emissions analysis has been advocated by some. Unfortunately, there is no single accepted definition of “life cycle” emission. Of even greater significance, there is no peer-reviewed, generally accepted scientific methodology for identifying or quantifying “life cycle” emissions. Neither NEPA nor CEQA require that the environmental review of a project include greenhouse gas or other emissions from the “Life Cycle” or “supply chain.” We are attaching hereto a copy of legal authorities supporting this conclusion, a document titled “Summary of Existing Law: NEPA, CEQA, and ‘Life Cycle’ Emissions” filed by Clearwater Port as scoping comments for the EIS/EIR for its project. Although these Scoping Comments are focused on the siting of a liquefied natural gas terminal, the same legal principles apply to powerplant siting in California.

3. What is the proper CEQA “baseline” for determining the significance of GHG emissions?

Response: The notion of the CEQA “baseline” is set forth in the definition of the “Environmental Setting”:

An EIR must include a description of *the physical environmental conditions in the vicinity of the project*, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, *from both a local and regional perspective*. This environmental setting will normally constitute the *baseline physical conditions* by which a lead agency determines *whether an impact is significant*. * * * (14 CCR 15125(a); emphasis added.)

It is important to note that the CEQA baseline is set with reference to “the physical environmental conditions” considered from “both a local and regional perspective.” Given the global nature of the potential effects of GHG emission, it is difficult, if not impossible to reconcile CEQA’s emphasis on the physical setting in the vicinity of the project, considered locally and regionally, with the global nature of potential GHG effects.

CONCLUSIONS

The importance and necessity of treating similarly situated projects consistently should be an underlying theme in this proceeding. Clearwater appreciates the efforts of the Commission to provide additional certainty by addressing the proper nature and scope of GHG analysis on power plant siting. Thank you for the opportunity to file these comments, and we look forward to continued participation in this proceeding.

November 7, 2008

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By  _____

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Attachment A

**Clearwater Port Scoping Comments
October 15, 2007**

“Summary of Existing Law: NEPA, CEQA, and ‘Life Cycle’ Emissions”

Clearwater Port Scoping Comments
Filed with the US. Coast Guard
October 15, 2007

**SUMMARY OF EXISTING LAW:
NEPA, CEQA AND “LIFE CYCLE” EMISSIONS**

During the scoping process, several commenters raised the issue of “Life Cycle” emission. These commenters suggested that the Environmental Impact Statement/Environmental Impact Report (“DEIS/EIR”) for Clearwater Port, prepared pursuant to National Environmental Policy Act (“NEPA”) and the California Environmental Quality Act (“CEQA”), should examine “Life Cycle” emissions.

No definition of “Life Cycle” emission was given and there is no generally accepted definition of these effects; however, commenters suggested that the EIS/EIR should examine greenhouse gas and other emissions at different points in the supply chain, including (1) extraterritorial links in the supply chain such as gas production and liquefaction in another sovereign nation and (2) gas distribution and consumption in the United States.

As discussed below, neither NEPA nor CEQA require that the environmental review of an LNG project include greenhouse gas or other emissions from the “Life Cycle” or “supply chain.” Further, neither NEPA nor CEQA require projects to analyze the extraterritorial effects associated with the natural gas production within another sovereign nation’s territory, the liquefaction of such natural gas, and its transportation in international waters. Moreover, neither NEPA nor CEQA require that the environmental review of an LNG project include greenhouse gas or other emissions from the distribution and consumption of natural gas in the United States by end users.

The legal doctrine used to analyze extraterritorial application of environmental statutes is the “presumption against extraterritoriality.” The presumption against extraterritoriality as articulated by Justice Holmes of the U.S. Supreme Court is that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”⁴ The U.S. Supreme Court held that the only way to overcome this presumption against extraterritoriality was to demonstrate that the language of the statute clearly expressed Congress’s intent that it apply outside U.S. borders.

To overcome the presumption of extraterritoriality, the Fifth Circuit articulated a two part test. First, the court must determine whether the statute by its very nature mandated its application in foreign territory. Second, if the nature of the statute does not mandate

⁴ American Banana, 213 U.S. at 356.

extraterritorial application, the court must determine whether Congress explicitly stated its intent that the statute should apply outside the U.S.

As to the first part of the test, NEPA does not contain explicit language applying NEPA to actions taken in foreign countries. Thus, the language of NEPA is not enough to overcome the presumption against extraterritoriality. As for the second part of the test, the language of NEPA does not clearly demonstrate Congress's intent to apply NEPA extraterritorially. Courts have generally limited extraterritoriality of U.S. laws to the high seas and other places where there is no sovereign nation, such as Antarctica.

Where a sovereign nation is involved, the courts have followed the presumption against extraterritoriality to avoid the possibility of conflicting laws and to avoid compelling a U.S. agency to "second guess" the environmental judgment of a sovereign nation that has authorized the exports and associated activities. Neither NEPA nor CEQA require that environmental documents for LNG projects evaluate the potential impacts associated with the distribution and consumption of natural gas by end users over the "Life Cycle" of a project.

I. Extraterritorial Impacts of the LNG Supply Chain Are Outside the Scope of NEPA

The legal doctrine used to analyze extraterritorial application of environmental statutes is the "presumption against extraterritoriality." The presumption against the extraterritorial application of United States law was invoked by the Supreme Court in the 1909 *American Banana* decision.⁵ In this case, American Banana owned land in Panama. American Banana's land was seized by the local government at the request of competitor United Fruit Company. American Banana sued United Fruit in U.S. court under the Sherman Anti-Trust Act. While both plaintiff and defendant were U.S. companies, Justice Holmes refused to apply the Sherman Act to actions taken in a foreign country.

As Holmes explained: "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."⁶ The Court held that the only way to overcome this presumption against extraterritoriality was to demonstrate that the language of the statute clearly expressed Congress's intent that it apply outside U.S. borders. The Court found that the Sherman Anti-Trust Act contained no such language.

Almost seventy years later, this presumption against extraterritorial application was applied to an environmental statute in *United States v. Mitchell*.⁷ In *Mitchell*, the defendant was an American citizen accused of taking dolphins in Bahamian territorial waters in violation of the Marine Mammal Protection Act ("MMPA"). The Fifth Circuit considered the question of whether the MMPA applies in extraterritorial waters using a two-part test: first, determining whether the statute by its very nature mandated its application in foreign territory and second, if

⁵ *American Banana v. United Fruit Company*, 213 U.S. 347 (1909).

⁶ *Id.* at 356.

⁷ *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977).

the nature of the statute does not mandate extraterritorial application, determining whether Congress explicitly stated its intent that the statute should apply outside the U.S.

The Court first held that the nature of the MMPA did not dictate its extraterritorial application. Explaining that each country must be free to strike its own balance between protecting and exploiting natural resources, the court concluded “[w]hen Congress considers environmental legislation, it presumably recognizes the authority of other sovereigns to protect and exploit their own resources.”⁸ Applying the second part of the test, the Court held that the MMPA was not explicit enough to clearly demonstrate Congress’s intent that the MMPA apply extraterritorially. The court also considered other provisions of the statute and the legislative history, but could find no evidence that Congress intended that the statute apply in foreign waters. For these reasons, the court concluded that the MMPA did not apply extraterritorially and could not apply to Mitchell’s actions.

Other U.S. courts have generally followed *Mitchell* and have applied the presumption against extraterritorial application to environmental statutes.⁹

A. NEPA’s Statutory Language Does Not Overcome the Presumption Against Extraterritoriality

Although NEPA states that agency environmental reporting requirements apply to all “major Federal actions significantly affecting the quality of the human environment,”¹⁰ it does not contain explicit language applying the requirement to actions taken in foreign countries and courts have been reluctant to apply it extraterritorially. Thus, the language of NEPA is not enough to overcome the presumption against extraterritoriality.

B. Limited Exceptions to the Presumption Against Extraterritoriality Do Not Apply to Proposed LNG Projects

There have been two cases that have found limited exceptions to the presumption against extraterritoriality. As set forth below, these exceptions would not apply to the LNG supply chain.

In *Environmental Defense Fund v. Massey*,¹¹ the D.C. Circuit held that NEPA applied to a U.S. research station located in Antarctica, where there is no sovereign nation. The *Massey* court reasoned that since “NEPA is designed to control the decision-making process of U.S. federal agencies, not the substance of agency decisions. . .the presumption against extraterritoriality does not apply to this case.”¹² The Court further stated, “[e]ven where the significant effects of the regulated conduct are felt outside U.S. Borders, the statute itself does

⁸ *Mitchell*, 553 F.2d at 996.

⁹ Jonathan Turley, “*When in Rome*”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 628-629 (1990).

¹⁰ 42 U.S.C. § 4332(2)(C).

¹¹ *Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

¹² *Id.* at 532, 533.

not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.”¹³

The reasoning of the *Massey* decision is called the “headquarters theory.” The theory is that since procedural requirements fulfilled at agency headquarters take place within the United States, domestic environmental law should govern those agency actions, even though they may affect other countries. This theory has also been applied to the high seas where, as in Antarctica, no nation is sovereign.

While two other District Court cases have followed *Massey*,¹⁴ more recent cases indicate that application of the headquarters theory is limited to foreign territories with no independent sovereign government. In *NEPA Coalition of Japan v. Aspin*,¹⁵ decided by the D.C. district court just months after *Massey*, plaintiffs sought to require the U.S. Department of Defense to create an Environmental Impact Statement for certain military installations in Japan, arguing that under *Massey*, NEPA applies to Federal agency actions in foreign countries. The court granted summary judgment to defendants, explaining that *Massey* was unique because Antarctica is not a sovereign state. In contrast, the military base questioned in *NEPA Coalition* was governed by longstanding military treaties with Japan. The court worried about the “very real possibility of conflicting laws”¹⁶ and the “clear foreign policy and treaty concerns involving a security relationship between the United States and a sovereign power.”¹⁷

The D.C. district court again adopted the *NEPA Coalition* holding in *Born Free USA v. Norton*.¹⁸ Here, the U.S. Fish and Wildlife Service issued permits to zoos for the importation of African elephants. Plaintiffs sought a preliminary injunction of the importation, arguing that under NEPA, Fish and Wildlife Service should have prepared a full Environmental Impact Statement (“EIS”) instead of the shorter Environmental Assessment (“EA”) regarding the environmental effects of removing the elephants from Swaziland. Fish and Wildlife Service claimed that the “approval of the permits was categorically excluded from NEPA requirements” and an EIS was not required.¹⁹

The court declined to grant the injunction in part because of the presumption against extraterritorial application of NEPA. While conceding that the foreign policy implications were not as prominent as in *NEPA Coalition*, the court did not wish to compel a U.S. agency to second-guess the environmental judgment of the Swaziland government, which had authorized the exports.

¹³ *Massey*, 986 F.2d at 531.

¹⁴ See also *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1538 (9th Cir. 1994) (holding that presumption against extraterritoriality is not implicated when the conduct sought to be regulated occurs within the U.S.); *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 66 (D.D.C. 2003) (“The presumption [against extraterritoriality] is inapplicable, however, to federal agency actions within the United States that have extraterritorial effects”) (citing *Massey*).

¹⁵ *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).

¹⁶ *Id.* at 467 n.3.

¹⁷ *Id.* at 468.

¹⁸ *Born Free USA v. Norton*, 278 F. Supp. 2d 5 (D.D.C. 2003).

¹⁹ *Id.* at 17.

C. Existing Law Supports the Conclusion that an EIS/EIR Properly Excludes Consideration of the Extraterritorial Effects of the LNG Supply Chain

The DEIS for the BHP Cabrillo Port project correctly noted that Executive Order 12114 of January 4, 1979, “Environmental Effects Abroad of Major Federal Actions,” “is not applicable to the extraction and development of natural gas in foreign countries.”²⁰ As that DEIS stated, this Executive Order requires Federal agencies to consider the “potential environmental effects of major Federal actions that could significantly affect the global commons outside the jurisdiction of any nation, e.g., the oceans or Antarctica, or the environment of a foreign nation not participating with the United States and not otherwise involved in the action.”²¹ Although the DEIS does not provide a specific cite to this statement, the language is taken directly from Section 2-3 of Executive Order 12114.²²

Because the emissions from the LNG supply chain that would occur in Australia, Indonesia or elsewhere are within the jurisdiction of those nations, Executive Order 12114 does not apply to those activities. As explained in the Cabrillo DEIR:

LNG-related operations in the Scarborough or any other field and within the jurisdictional waters of Australia would be closely regulated, and any environmental impacts would be mitigated consistent with applicable Australian law. As both countries are sovereign nations, the Applicant would be required to comply with those countries' applicable environmental laws and regulations pertaining to the extraction and development of natural gas fields as well as those pertaining to the liquefaction and transfer of LNG to LNG carriers. Consideration of the Applicant's compliance with a foreign nation's applicable laws and regulations is beyond the scope of this EIS/EIR.²³

The proper conclusion is that consideration of the Applicant's compliance with a foreign nation's applicable laws and regulations is beyond the scope of NEPA.

In light of the express limitations of Executive Order 12114 and the guidance of the *Born Free USA* case, it is clear that the DEIR was correctly scoped and detailed in its analysis. To analyze greenhouse gas emissions that occur in some other sovereign nation would compel a U.S. agency to second-guess the environmental judgment of these sovereign governments. The Courts have ruled that such second-guessing of a sovereign nation violates the presumption against extraterritoriality.

²⁰ BHP, Revised DEIR, March 2006, Section 1, pp. 1-14 (line 24) to 1-15 (line 36).

²¹ *Id.*

²² <http://www.nepa.gov/nepa/regs/eos/eo12114.pdf>

²³ BHP, Revised DEIR, March 2006, Section 1, pp. 1-17 (lines 33-39).

II. Distribution and Consumption of Natural Gas that is Occurring Today and Will Occur With or Without the Clearwater Port Project is Not a Project “Impact” that Must Be Considered Under Either NEPA or CEQA

Some commenters suggested that the EIS/EIR for the Clearwater Port project should consider the emissions from burning natural gas in Southern California as part of the “Life Cycle” emissions attributable to Clearwater Port. The law does not support this request to saddle the project with the distribution and consumption of natural gas that is currently occurring in Southern California and that will occur in the future with or without Clearwater Port.

The statutory language of NEPA is quite clear that these types of impacts should not be analyzed in the environmental documents. NEPA requires an evaluation of the environmental effects of the project.²⁴ Similarly, under the CEQA regulations, “effects” include direct or indirect effects which are *caused* by the action.²⁵

The major flaw the comments seeking to saddle Clearwater Port with emissions associated with the distribution and consumption of natural gas is that the project will not cause an increase in emissions associated with the distribution and consumption of natural gas. Those emissions are occurring today without the project and they will occur in the future whether or not Clearwater Port or any LNG project is constructed. Natural gas from any LNG project will displace natural gas from other sources; it will not increase the consumption of natural gas.

There is simply no legal authority for the proposition that the impacts of existing distribution and consumption of natural gas should be evaluated as a direct or indirect effect of Clearwater Port.

Conclusions

Neither NEPA nor CEQA require that the environmental review of an LNG project include greenhouse gas or other emissions from the “supply chain,” including the extraterritorial effects associated with the natural gas production within another sovereign nation’s territory, the liquefaction of such natural gas, and its transportation in international waters. Similarly, neither NEPA nor CEQA require that the environmental review of an LNG project include greenhouse gas or other emissions from the distribution and consumption of natural gas in the United States by end users.

²⁴ 40 CFR 1500.1 *et seq.*

²⁵ 49 CFR 1508.8.