Docket #: 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH,
Appellant

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Defendant, Appellee

Petition for Review of Federal Energy Regulatory Commission Orders

Brief of Appellant, THE HOLY ORDER OF MOTHER EARTH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

JURISDICTION

Holy Order of Mother Earth ("HOME") petitions for review of the Federal Energy Regulatory Commission ("FERC") Orders granting Transnational Gas Pipelines, LLC ("TGP") a Certificate of Public Convenience and Necessity ("the Certificate"), No. TG21-616-000, and denying HOME's petition for rehearing ("Rehearing Order"), 199 FERC ¶ 72,201. Record at 2, 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under The Natural Gas Act ("NGA"), 15 U.S.C. § 717r(b), which provides that any party aggrieved by a FERC order may seek review in the U.S. circuit court in which the natural gas company is located if the party first sought rehearing before FERC and filed a timely application for review. TGP is organized under the laws of the State of New Union, and both HOME and TGP filed timely petitions for review. R. at 2, 5.

STATEMENT OF ISSUES PRESENTED

I. Was FERC's finding of project need arbitrary and capricious where 90% of the gas transported by the AFP is bound for export to Brazil?

II. Was FERC's finding that the AFP's benefits outweigh its adverse effects arbitrary and capricious when there is no public need but many adverse effects on landowners?

III. Under RFRA, was there a compelling government interest when FERC substantially burdened HOME's religious practices by curtailing its ability to adhere to its religion?

IV. Did FERC have authority under the NGA to attach the GHG Conditions, which mitigate a small amount of the project's environmental impacts, to the Certificate?

V. Under NEPA, was FERC's refusal to impose conditions mitigating downstream and upstream GHG impacts arbitrary and capricious where it relied on insufficient studies and failed to adequately explain its decision?

STATEMENT OF THE CASE

This case is about a federal agency that has abdicated its statutory responsibility to authorize proposed natural gas infrastructure projects only if the public will benefit from those projects. This case addresses FERC's failure to prioritize the public interest and its authority to impose terms and conditions on project authorizations "as the public convenience and necessity may require." This case is also about HOME, a 120-year-old religious organization whose rights are being threatened by private profiteering and government compulsion. If the project at issue is finalized, HOME could lose one of its core ceremonies, the Solstice Sojourn; HOME's private property would be commandeered, against its will and against its beliefs, to support the burning of fossil fuels; and HOME's members would be substantially burdened in the exercise of their religion. Finally, this case is about climate change and federal agencies' ongoing failure to adequately address the greenhouse gas ("GHG") emission impacts of their actions, as required by the National Environmental Policy Act ("NEPA").

I. The Proposed TGP Project

In June 2022, pursuant to Section 7 of the NGA, TGP filed an application with FERC for authorization to construct and operate a new interstate natural gas pipeline, the American Freedom Pipeline ("AFP"), and related facilities (together "the TGP Project") at an estimated cost of $600 million. R. at 4, 6. The nearly 100-mile-long pipeline would transport up to 500,000 dekatherms ("Dth") of liquid natural gas ("LNG") per day from the Hayes Fracking Field ("HFF") in the state of Old Union to the state of New Union, where 90% of the gas will be sold to Brazilian-owned International Oil & Gas Corporation ("International") and exported to Brazil. *Id.* The United States does not have a free-trade agreement with Brazil. *Id.* at 9. Only 10% will go to a domestic energy company serving New Union, New Union Gas and Energy Services Company ("NUG"). *Id.* at 6. TGP has executed binding precedent agreements with both

International and NUG. *Id.* Currently, the Southway Pipeline transports HFF's full production capacity to states east of Old Union; the AFP would reroute 35% of that LNG to New Union and Brazil. *Id.* TGP presented evidence that demand for LNG in the region served by the Southway Pipeline is steadily declining due to a population shift, efficiency improvements, and increasing electrification of heating. *Id.*

The pipeline's proposed route crosses through many miles of private property, including two miles of property belonging to HOME. *Id.* at 10. HOME was founded on the principle that the natural world is sacred, and HOME's members believe that humans should promote preserving the natural world over all other interests. *Id.* at 11. In adherence to these sincere beliefs, HOME's property is "fully devoted to Mother Earth." *Id.* at 12. On HOME's property, the AFP will require removal of approximately 2,200 trees and many other forms of vegetation, and it will cross the path of the Solstice Sojourn, a sacred coming-of-age ceremony, destroying its meaning. *Id.* at 10–12. Moreover, allowing its land to be used to transport LNG is against HOME's religious beliefs and practices given the harmful environmental effects of fracking, the environmental harm from constructing the pipeline, and the detrimental climate effects of burning fossil fuels like natural gas.[1] *Id.* at 11–12.

Over 40% of landowners along the AFP's route, including HOME, have not signed easement agreements with TGP. R. at 10. TGP's application provided one alternate route that avoids HOME's property ("the Alternate Route"). *Id.* at 11. The Alternate Route would extend

[1] To avoid the worst impacts of climate change and limit global warming to 2 degrees Celsius, about 50% of natural gas reserves cannot be burned. The Intergovernmental Panel on Climate Change, Climate Change 2023 Synthesis Report 58, https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf.

the pipeline by three miles by diverting the AFP through the Misty Top Mountains; its construction would cost an additional $51 million, less than 10% of the project's total cost. *Id.*

As part of its application and to meet its obligations under NEPA, TGP prepared an EIS. *Id.* at 15. The EIS evaluated the upstream, downstream, and construction impacts of the TGP Project's GHG emissions. *Id.* TGP concluded that: (1) at full capacity, combustion of LNG transported by the AFP would result in about 9.7 million metric tons of CO_2e per year (but noted that emissions are likely to be lower because pipelines rarely run at full capacity and some of the gas may displace other fuels or gas that would otherwise be transported via different means); (2) due to uncertainty and HFF gas already being in production, upstream emissions were irrelevant and insignificant; and (3) construction emissions would be 104,100 metric tons CO_2e per year. *Id.* The EIS did not quantify upstream emissions, calculate or predict the TGP Project's net effect on GHG emissions, or compare emissions to the no-action alternative. *Id.*

II. FERC Authorizes the TGP Project

In April 2023, FERC issued an order granting TGP a certificate for the TGP Project and authorizing construction and operation of the AFP. *Id.* at 4. In the order, FERC found that the benefits of the TGP Project outweighed any adverse effects on existing pipelines, their captive customers, landowners, and surrounding communities. *Id.* Even though 90% of the AFP's LNG will be exported, TGP's application argued the AFP would serve domestic needs, including: providing natural gas access to parts of New Union; expanding access to the United States' natural gas supply; adding competition to the natural gas market; fulfilling capacity in the NorthWay Pipeline; and improving air quality by replacing dirtier fossil fuels like coal with natural gas. R. at 8.

With respect to HOME, FERC's order included conditions that TGP bury the AFP for the two miles it crosses HOME's property and expeditiously complete construction of that portion of

the pipeline entirely between solstices. *Id.* at 12–13. Still, HOME's members believe that walking over the pipeline and its clear-cut path on the Solstice Sojourn would be unimaginable and detract from this vital religious ritual. *Id.* at 12. Based on the EIS, FERC concluded the project would result in some adverse environmental effects, but those effects would be reduced to less-than-significant levels with implementation of certain environmental conditions. *Id.* at 4. The environmental conditions ("GHG Conditions") include:

> (1) TGP shall plant or cause to be planted an equal number of trees as those removed in the construction of the TGP Project;
> (2) TGP shall utilize, wherever practical, electric-powered equipment in the construction of the TGP Project, including, without limitation:
> (a) Electric chainsaws and other removal equipment, where available; and
> (b) Electric powered vehicles, where available;
> (3) TGP shall purchase only "green" steel pipeline segments produced by net-zero steel manufacturers; and
> (4) TGP shall purchase all electricity used in construction from renewable sources where such sources are available.

Id. at 14.

III. FERC Denies TGP and HOME's Requests for Rehearing on All Issues

Later in April 2023, both HOME and TGP filed timely requests for rehearing on certain issues and conditions in the Certificate under 15 U.S.C. § 717r(a). *Id.* at 4–5. TGP sought rehearing on the GHG Conditions, arguing they are beyond FERC's authority to impose under the NGA. *Id.* at 5. HOME sought rehearing on three aspects of the Certificate: (1) FERC's finding of project need was arbitrary and capricious and not supported by substantial evidence; (2) FERC's finding that project benefits outweigh the adverse impacts was arbitrary and capricious, and the decision to route the AFP through HOME's property violated the Religious Freedom Restoration Act ("RFRA"); and (3) FERC's failure to impose environmental conditions mitigating upstream and downstream GHG emissions was arbitrary and capricious. R. at 4–5. On

May 19, 2023, FERC issued an order affirming the Certificate and denying the requests for rehearing on all issues. *Id.* at 2.

IV. Rulings Presented for Review

On June 1, 2023, HOME and TGP filed petitions for review of FERC's orders with this Court. *Id.* On appeal, HOME disputes FERC's finding of project need for the AFP where 90% of the gas it transports will be exported to Brazil. HOME also challenges the project approval because the AFP's adverse environmental and social impacts outweigh any purported benefits and its route over HOME's property violates RFRA. Lastly, HOME agrees with FERC that it has authority under the NGA to impose the GHG Conditions, but contends that, having imposed those conditions, FERC's decision not to impose further conditions mitigating upstream and downstream GHG emissions was arbitrary and capricious. On June 15, 2023, this Court granted review and ordered briefing on the merits of each of these rulings. R. at 2–3.

SUMMARY OF THE ARGUMENT

This Court should find FERC's orders to be arbitrary and capricious and should vacate the Certificate for the following reasons. First, FERC has not established project need for the AFP. When HOME submitted evidence showing that nearly all of International's LNG would be exported to Brazil, FERC should have obtained further analysis and approval from the Department of Energy ("DOE"). The United States does not have a free-trade agreement with Brazil and thus, further analysis by DOE is needed to determine whether these LNG exports would be inconsistent with the public interest. Further, precedent agreements alone cannot show project need. FERC relied on precedent agreements to indicate project need when there is a declining regional demand and no evidence of domestic benefits. While TGP discussed domestic

benefits, it provided no evidence, such as a market study, to show how the AFP would strengthen the domestic economy or support domestic jobs.

Second, FERC did not establish that public benefits outweigh the adverse effects on the surrounding community. The AFP will destroy local ecosystems by requiring removal of vast amounts of trees and vegetation; around 2,200 trees will be removed in the two-mile path on HOME's property alone. Moreover, the Certificate grants TGP eminent domain power over many unwilling landowners, including HOME, allowing a significant invasion of private property rights. These adverse effects are not outweighed by the project's minimal benefits. TGP provides no evidence, such as a market study or general studies by the U.S. Energy Information Administration or Global Reporting Initiative, to show any public benefit that would justify the harm to HOME's property rights and religious freedom.

Third, FERC routing the pipeline across HOME's land violates RFRA by eliminating their religious ceremonies, thus substantially burdening HOME members' ability to adhere to their faith by eliminating their religious ceremonies. Moreover, FERC is forcing HOME to violate their beliefs by routing the AFP through HOME's property, essentially compelling HOME to materially support fossil fuel extraction and use. FERC has failed to show a compelling governmental purpose to justify infringing on HOME's religious freedoms. Regional energy needs are already being met and are even decreasing in the area. Even if FERC's purpose to increase LNG for New Union was compelling, there are less restrictive means, as the Alternate Route would add less than 10% to the project's total cost and would preserve the sanctity of HOME's religious beliefs.

Fourth, although FERC's decision authorizing the TGP Project should be reversed, FERC had authority to impose the GHG Conditions under the NGA. The major questions doctrine does

not apply here because the GHG Conditions have minor consequences and apply only to the TGP Project, not to all natural gas companies. The GHG conditions are not the type of transformative regulatory scheme that typically implicates the major questions doctrine. Moreover, under step one of the *Chevron* doctrine, the NGA unambiguously authorizes FERC to impose environmental conditions because the statute uses intentionally broad language meant to give FERC flexibility to adapt its infrastructure review process to changing circumstances. Further, even if this Court were to find the NGA ambiguous, FERC's interpretation is reasonable at step two of *Chevron* because the NGA's text, structure, and purpose indicate that Congress intended to give FREC broad, plenary authority over natural gas infrastructure.

Lastly, FERC's order should be set aside because FERC's decision not to impose conditions mitigating upstream and downstream GHG impacts was arbitrary and capricious. The decision was based on an inadequate EIS in violation of NEPA and the APA, and FERC failed to adequately explain its decision. FERC needed to gather information to assess the potential upstream impact on production at HFF, provide an estimate of the project's net emissions impact, and discuss potential mitigation measures for indirect effects.

STANDARD OF REVIEW

A Court of Appeals reviews FERC's orders approving certificate applications under the arbitrary and capricious standard of the Administrative Procedure Act ("APA"). *See Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 105–06 (D.C. Cir 2014); 5 U.S.C. § 706(2)(A). Under this standard, courts ask "whether the agency examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1327 (D.C. Cir. 2021). An agency action is arbitrary and capricious "if the agency

… entirely failed to consider an important aspect of the problem . . . ." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

FERC's factual findings are conclusive if supported by substantial evidence. 15 U.S.C. § 717r(b). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion, but the standard may be satisfied by less than a preponderance. *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 108 (D.C. Cir. 2022).

ARGUMENT

I. FERC's finding of public convenience and necessity for the AFP is arbitrary and capricious because there is not a project need where 90% of the gas transported by that pipeline is for export.

Section 7(e) of the NGA instructs FERC to grant a certificate to construct a new pipeline only where the pipeline "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). FERC is to consider "all relevant factors reflecting on need for the project." *Certificate of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,747 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000).

Congress enacted the NGA to encourage the development of natural gas supply at reasonable prices. *City of Clarksville v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018). Another key aim of the NGA is "protect[ing] consumers against exploitation at the hands of natural gas companies." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944). Sections 7(c) and (e) prohibit FERC from authorizing construction and operation of unneeded pipelines. 15 U.S.C. §§ 717f(c), (e).

Here, TGP failed to demonstrate project need because 90% of LNG carried by the AFP will be exported to Brazil, a country with which the US does not have a free-trade agreement, and precedent agreements alone cannot show project need.

A. The export of gas to Brazil does not serve a project need because Brazil does not have a free-trade agreement with the United States and further analysis by the DOE is needed.

Under Section 3(c) of the NGA, exports to nations with which the U.S. does not have a free-trade agreement for natural gas are not presumptively in the public interest. 15 U.S.C. § 717b(c); *see City of Oberlin v. FERC*, 39 F.4th 719, 727 (D.C. Cir. 2022) (explaining that precedent agreements with Canada are in the public interest because the United States has a free-trade agreement for natural gas with Canada). These LNG exports require both DOE to determine whether the exports would be inconsistent with the public interest and FERC to authorize construction of the related facilities. 15 U.S.C. § 717b(a); *Sierra Club v. FERC*, 827 F.3d 36, 40–41 (D.C. Cir. 2016). Moreover, the DOE is usually a "cooperating agency" with FERC on EISs for LNG exports to countries the United States does not have a free-trade agreement with. *National Environmental Policy Act Implementing Procedures*, 85 Fed. Reg. 78197, 78202 (Dec. 4, 2020).

Here, FERC's project need finding was arbitrary and capricious because FERC did not adequately analyze the relevant evidence and failed to obtain further DOE approval. HOME submitted evidence showing that International's parent company is Brazilian and likely all of the LNG for International will be exported to Brazil. R. at 8. The United States does not have a free-trade agreement with Brazil. Thus, the LNG exported there is not presumptively in the public interest and needs further DOE approval, unlike in *Oberlin*, where there was a presumption of public interest for gas exported to Canada due to the free trade agreement. Moreover, DOE regulations do not allow for conditional authorizations before the completion of NEPA review, which is incomplete in the instant case. *See Procedures for Liquefied Natural Gas Export Decisions*, 79 Fed. Reg. 48132, 48133 (Aug. 15, 2014); *infra* Section V.

In light of the export information provided by HOME, FERC should have rescinded the Certificate on rehearing. FERC needed the DOE as a "cooperating agency" for the EIS and for the separate determination of whether the exports would be inconsistent with public interest. Thus, the export to Brazil does not serve a project need when further DOE analysis is required.

B. FERC's finding of public convenience and necessity for the AFP was arbitrary and capricious because project need was based largely on precedent agreements.

Evidence of project need includes, but is not limited to, "precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." 88 FERC at 61,747.

FERC decisions will be deemed arbitrary and capricious if they rely solely on precedent agreements to establish market need for a proposed pipeline, especially if the regional demand for natural gas is flat or decreasing. *Env't Def. Fund v. FERC*, 2 F.4th 953, 976 (D.C. Cir. 2021). In *Env't Def. Fund*, there was a single precedent agreement for the proposed pipeline with an affiliated shipper, and the proposed pipeline was not serving an increased load demand or leading to cost savings. *Id.* at 975–76. The court reasoned that "FERC's failure to engage with this evidence did not satisfy the requirements of reasoned decisionmaking" and thus held the finding of market need was arbitrary and capricious. *Id.*

Export precedent agreements are just one factor in assessing present and future public convenience and necessity. *City of Oberlin*, 39 F.4th at 727. In *Oberlin*, although the court credited export precedent agreements in showing project need, there were also domestic benefits as some portion of the exported gas would be imported back to the United States. *Id.* at 727–28. Moreover, domestic precedent agreements accounted for 42% of the pipeline's total capacity. *Id.* at 729. The court held that FERC reasonably explained why the export precedent agreements were considered in granting the certificate of public convenience and necessity. *Id.* at 728.

Here, the Court should find FERC's decision arbitrary and capricious because the project need finding relies too heavily on an export precedent agreement. Unlike in *Oberlin*, here the domestic precedent agreement accounts for only 10% of AFP's capacity, showing that most of the LNG does not serve a regional demand. R. at 6. And no evidence has been given that the gas will be imported back. *Id.* Similar to the proposed pipeline in *Envt. Def. Fund*, TGP is not building AFP to serve an increasing load demand as 35% of production at HFF is just being rerouted through the AFP rather than the Southway Pipeline. R. at 6. Moreover, TGP has shown no evidence that AFP will lead to cost savings. Thus, project need has not been shown because precedent agreements are the only evidence in favor of such a finding.

C. TGP's claimed serving of domestic needs is not enough to justify a project need when a market study was not done and there is evidence of self-dealing.

The Certificate Policy Statement states that "need for [a] project will usually include a market study" and "vague assertions of public benefit will not be sufficient." 88 FERC at 61,748. Moreover, market need is not shown when there are signs of self-dealing. *Env't Def. Fund*, 2 F.4th at 975. In *Env't Def. Fund*, self-dealing was likely when the proposed pipeline was not being built to serve increasing load demand and there was no evidence of cost savings. *Id.* While FERC discussed benefits including "enhanced access to diverse supply sources and the fostering of competitive alternatives," FERC had no evidence to support these assertions. *Id.* at 973. The court held that this showed a lack of project need, rendering FERC's grant of a certificate of public convenience and necessity arbitrary and capricious. *Id.* at 976.

Domestic demand and benefit are both necessary to show project need. *Allegheny Def. Project v. FERC*, 964 F.3d 1, 19 (D.C. Cir. 2020). In *Allegheny Def. Project*, there was a finding of domestic market need when there were "comments by two shippers and one end-user" and a study by an Environmental Association, all showing domestic demand. *Id.* Further, FERC has

approved pipelines where "the project will strengthen the domestic economy and support domestic jobs." *Columbia Gulf Transmission, LLC,* 180 FERC ¶¶ 61,206, 62,421 (2022).

Here, FERC violated its Certificate Policy Statement by granting the AFP where TGP did not submit evidence to show the AFP would better serve LNG demands. While TGP has presented evidence that LNG demands in Old Union are declining, no evidence has been shown that routing LNG through the AFP would better serve New Union. R. at 6. This lack of public benefit indicates that although there would be an increase in TGP's profits, TGP failed to show project need. Like the evidence of self-dealing in *Env't Def. Fund*, the AFP does not serve an increased load demand, and no concrete evidence has shown that it will lead to cost savings. Moreover, unlike in *Allegheny Def. Project*, where there was evidence of domestic demand, TGP offered no evidence that the AFP would strengthen the domestic economy or support domestic jobs. Thus, TGP's claimed domestic benefits do not support a finding of project need.

II. FERC did not have substantial evidence that the public benefits outweighed the adverse effects because the project has significant adverse effects on landowners but few public benefits.

Under Section 7 of the NGA, FERC may grant a certificate only after determining that the project is "necessary or desirable in the public interest." 15 U.S.C. § 717f(a). In order to receive a certificate, the applicant must show that a project's adverse effects are outweighed by its public benefits, typically reviewed as an economic test. 88 FERC at 61,745.[2] The applicant must show that the public benefits of the proposed project are at least proportional to the adverse effects after the applicant has made efforts to mitigate those effects. *Id.* at 61,748.

[2] Under the Certificate Policy Statement, the applicant must first show that the project does not require subsidies from customers. 88 FERC at 61,745. Here, HOME does not dispute that TGP's customers will not subsidize the project.

Here, TGP failed to provide evidence showing that the AFP's adverse impacts are outweighed by its public benefits, and so FERC's decision to grant the Certificate was arbitrary and capricious. By granting TGP the power of eminent domain, FERC allows TGP to rid nearby landowners of their property rights and devastate 99 miles of land. This damage would not be carried out for a compelling interest, as there are few project benefits for anyone other than TGP.

A. AFP has significant adverse effects on nearby landowners and communities because it erodes their property rights and destroys the local environment.

In balancing effects against benefits, FERC has a duty to protect relevant interests from adverse effects of proposed projects. *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 650–651 (D.C. Cir. 2010) (Brown, J., concurring in part and dissenting in part) (summarizing FERC's acknowledged authority under NGA). FERC shall consider avoidance of unnecessary disruptions of the environment and unneeded exercise of eminent domain among other factors when considering adverse effects. 88 FERC at 61,737.

FERC expects an applicant to design its proposed project in a way that will prevent "economic, competitive, environmental, or other" adverse effects." *Id.* Additionally, FERC focuses on three major interests when considering adverse effects: "existing customers of the pipeline [company] proposing the project, existing pipelines in the market and their captive customers, [and] landowners and communities affected by the route of the new pipeline." *Id.* at 61,745.[3]

Proposed projects may have a range of adverse effects on landowners and communities, including "negative impact[s] on the environment or landowners' property." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015). The environmental

[3] HOME does not dispute that there are no adverse effects on TGP's existing customers or other existing pipelines and their captive customers. R. at 7.

impacts of pipeline projects are obvious, but the adverse effects on the rights of property owners are more insidious. When a certificate is granted, the power of eminent domain automatically transfers to the certificate-holder, and FERC cannot restrict that power. *Berkley v. Mtn. Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018). Eminent domain allows for the taking of private land for a public purpose, but often the public purpose can be achieved through less harmful means. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

Here, destroying local ecosystems will adversely affect surrounding landowners and communities. FERC must consider environmental concerns of landowners along with general environmental impacts. Removing almost 2,200 trees and many other forms of vegetation for the two-mile path on HOME's property restricts HOME's ability to use its private property as intended while devastating the local ecosystem. R. at 10. The devastation will continue along the full 99-mile pipeline route. *Id.* at 5. Although TGP will plant an equal number of trees, the existing trees provide established habitat that supports nearby flora and fauna. *Id.* at 10.

The adverse effects of AFP also include significant effects on property rights from the unnecessary use of eminent domain. With almost half of property owners refusing to sign easement agreements, TGP's efforts to mitigate landowner effects were insufficient. *Id.* Further, one of FERC's considerations in the balancing test is to avoid unneeded eminent domain of local land, a point that FERC acknowledged. *Id.* at 7. FERC approving the Certificate grants TGP carte blanche in taking private property, allowing them to forcefully take the property of the 40% of landowners who have yet to sign easement agreements. Such an infringement on property rights would be egregious and would not fulfill a valid public purpose, as there is no need for the project. *See supra* Section I.

In order for FERC to fulfill its duty of protecting communities from adverse effects of proposed projects, it must properly balance the harm on both the local environment and landowners' property rights with the benefits of the project.

B. Without a market study or other available studies regarding demand, TGP failed to provide substantial evidence of the pipeline's benefits.

When evaluating project benefits, FERC must consider "all factors bearing on the public interest." *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959). This consideration includes factors other than the financial benefits of the proposed project. *Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 757 (1973).

The burden is on the applicant to prove that the project would be in the public interest. *W. Va. Pub. Servs. Comm'n v. DOE*, 681 F.2d 847, 851 (D.C. Cir. 1982). The applicant may describe a variety of public benefits, such as increased reliability or market need, but must support the claims instead of relying on "vague assertions." 88 FERC at 61,748. A market study will typically be included as evidence of public need, but FERC also allows general studies by entities like the U.S. Energy Information Administration. *Id.* Contracts and precedent agreements may also be included, but those are insufficient to establish market need on their own. *See supra* Section I. The public interest consideration should have a clear showing of regional need "that cannot be met by domestic gas supplies." *W. Va. Publ. Servs. Comm'n*, 681 F.2d at 860.

Public interest considerations may address "preserving reaches of wild rivers and wilderness areas . . . and the protection of wildlife." *Udall v. Fed. Power Comm'n*, 387 U.S. 428, 450 (1967). In *Udall*, the Court reversed the Commission's decision to grant utility companies a license to build a power project. *Id.* at 451. The Court reasoned that, while the Commission may consider regional energy need when determining public interest, the impacts on the environment "are all relevant to a decision" and the Commission failed to evaluate such concerns. *Id.* at 450.

Although *Udall* did not analyze FERC's responsibility under the NGA, courts have used this case to frame FERC's responsibilities in public interest determinations, stating that "subsidiary purposes" of the NGA are to address "conservation[] [and] environmental" concerns. *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 & n.6 (1976).

Here, TGP failed to provide FERC with substantial evidence of public benefits, providing neither market studies nor general studies to show demand. In fact, the regional demand is decreasing and is already being met by both NorthWay and SouthWay Pipelines. R. at 6. The precedent agreements, which showed that 90% of the gas would go to Brazil and only 10% would remain stateside, are insufficient to show market need, especially with evidence of decreasing demand. R. at 10; *supra* Section I. Similar to FERC's unfounded decision in *Udall*, FERC's review of public benefits failed to address the benefits of maintaining a healthy environment. TGP did not provide any evidence of those benefits, relying instead on vague assertions. Rather, the project's primary benefits seem to be an increase in TGP's profits.

C. FERC did not have adequate evidence to approve the Certificate because the adverse effects on landowners and communities outweighed the public benefits.

FERC does not have a bright line test for balancing public interest against adverse effects. 88 FERC at 61,748. An applicant that obtains all necessary right-of-ways from landowners, shows evidence that they are serving a new market, or provides evidence of reduced customer rates may satisfy the balancing test if the project has no environmental considerations. *Id.* at 61,749.

In the instant case, FERC's determination that the harms were proportional to the benefits is not supported by substantial evidence because TGP failed to show that the benefits outweigh the harms to neighboring landowners and communities. TGP has not obtained all right-of-ways, has not shown that the AFP will provide LNG to an unserved market, and did not provide

evidence of market need or reduced rates. On the other hand, the adverse effects are plenty: HOME's property rights would be adversely affected and, more importantly, the surrounding ecosystems, respect for which is a core tenet of HOME's faith, would be destroyed.

FERC did not have sufficient evidence to support the finding that the benefits of the projects outweighed the adverse effects. Because FERC's decision was arbitrary and capricious and not based on substantial evidence, FERC's order granting the Certificate should be set aside.

III. The approval of the AFP pipeline violates RFRA because it substantially limits HOME's ability to adhere to their religion for a non-compelling government purpose.

In response to multiple Supreme Court cases that had eroded First Amendment rights, Congress passed RFRA to enshrine religious freedom protections in statute. *Church of Lukumi Bablu Aye v. City of Hialeah*, 508 U.S. 520 (1992); Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1. Because RFRA prevents the government from "burdening" the free exercise of religion, its protections are broader than those in the First Amendment, which forbid "prohibiting" the free exercise of religion. *U.S. v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996).

To prove a RFRA violation, claimants must show that a government action meaningfully curtails their ability to adhere to their faith, that the substantial burden was not for a compelling governmental purpose, and that the government action is the least restrictive means of fulfilling that governmental purpose. 42 U.S.C. § 2000bb-1.

HOME succeeds on each of these elements. Their Solstice Sojourn and general adherence to their faith has been substantially curtailed, and there is no compelling government interest for such a burden because the region has reliable energy sources and a decreasing demand for natural gas. Further, even if increased participation in the global natural gas market is a compelling government interest, there is a less restrictive way to achieve that purpose. For these reasons, FERC violated RFRA when it approved the AFP's route over HOME's property.

A. The AFP substantially burdens HOME's exercise of its religion because the use of HOME's property for the transportation of fossil fuels and the effect on the Solstice Sojourn inhibits its members' expression of their core beliefs.

A government action violates RFRA if it "substantially burden[s] a person's exercise of religion." 42 U.S.C. § 2000bb-1(a).[4] Under the Tenth Circuit's broad standard, to constitute a "substantial burden," government action:

> "must meaningfully curtail [an individual's] ability to express adherence to his or her faith; or must deny [an individual] reasonable opportunities to engage in those activities that are fundamental to [an individual's] religion."
>
> *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (quoting *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995)).

The Ninth Circuit has applied a narrower standard for substantial burden, reasoning that government action violates RFRA when it places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 n.11 (9th Cir. 2008) (citing *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 708 (1981)). In *Navajo Nation*, the court held that the plaintiffs were not significantly burdened by snow being sprayed on their sacred peaks. *Id.* at 1074. The court reasoned that "[n]o plants would be destroyed or stunted . . . or liturgy modified," indicating that, had such effects happened, there may have been a burden. *Id.* at 1063.

The *Navajo Nation* court derived its narrow standard from two Supreme Court cases that established compelling interest tests for RFRA. *Id.* at 1068. In *Sherbert v. Verner*, the Court held that the state violated RFRA when it withheld unemployment benefits from a claimant who was fired for refusing to work on her faith's day of rest, thereby forcing the claimant to choose

[4] When examining the religious beliefs in question, courts do not question the sincerity or reasonability of the plaintiffs' belief. *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715 (1981).

between adhering to her religion or receiving benefits. 374 U.S. 398, 399, 404 (1963). In *Wisconsin v. Yoder,* the claimants faced criminal sanctions under state law if they did not send their children to school until age 16, an act that violated their religious beliefs. 406 U.S. 205, 207–08 (1972). The Court held that, by coercing a party to act contrary to their beliefs with sanctions, the state law violated RFRA. *Id.* at 218.

Neither this Court, nor the Supreme Court has established a standard for substantial burden. However, Congress amended RFRA in 2000 to extend its protections to "any exercise of religion," not just those that are central to religious beliefs. Additionally, Supreme Court cases following *Sherbert* and *Yoder* deviated from the standards in those cases, indicating that the purpose of RFRA is to "provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014) (reasoning that a corporation faced a substantial burden when lack of compliance with a government mandate would have placed them at a "competitive disadvantage"); *see also Emp. Div. v. Smith*, 494 U.S. 872, 883 (1990) (stating that the court has "abstained from applying the *Sherbert* test [outside the unemployment compensation field] at all"); *Goldman v. Weinberger*, 475 U.S. 503, 505, 507–08 (1986) (stating that a military regulation banning headgear violated the First Amendment rights of a Jewish person who wears a yarmulke). Judge Fletcher's dissent in *Navajo Nation* argues that the "extremely restrictive" standard set forth by the majority is inconsistent with the plain meaning and statutory interpretation of "substantial burden" and violates the legislative intent of RFRA. *Navajo Nation*, 535 F.3d at 1086 (Fletcher, J., dissenting).

This Court should follow the Tenth Circuit in interpreting the standard that defines a substantial burden and so should find that FERC substantially burdened HOME. By destroying the pathway for their biannual pilgrimages and coming-of-age ceremonies, AFP would curtail HOME members' ability to adhere to their faith and deny them opportunities to engage in

fundamental religious activities. R. at 11. Additionally, in using their property to support the production, transportation, and burning of fossil fuels, FERC is inhibiting expression of a central tenet of HOME's religion. *Id.* FERC's decision affects HOME's property that they have converted for religious use, explicitly violating RFRA.

Even if this Court chooses to follow the Ninth Circuit's more narrow standard, the pathway of the AFP will still substantially burden HOME. With a belief system founded in the preservation of the environment, the use of HOME's land for destructive activities would pressure HOME to violate their beliefs. *Id.* Unlike the effects in *Navajo Nation*, miles of trees and vegetation would be destroyed, and HOME's central form of liturgy would be altered.

FERC's approval of AFP substantially burdens HOME by curtailing HOME's ability to adhere to its beliefs and pressuring HOME to violate its beliefs by supporting fossil fuels.

B. The substantial burden on HOME is not for a compelling government interest because regional energy needs are already being met.

RFRA allows government actions to substantially burden a person's ability to adhere to his or her faith only "in furtherance of a compelling governmental interest." 42 U.S.C. § 2000bb-1. To determine whether the compelling government interest justifies the burden, the governmental action must survive strict scrutiny, an exceptionally demanding standard. *Singh v. Berger*, 56 F.4th 88, 93 (D.C. Cir. 2022). The burden of persuasion is on the government to show a "direct causal link between the restriction imposed and the [compelling-interest] injury to be prevented." *Id.* at 93, 100.

With no market need and very few public benefits, construction of a new pipeline does not survive strict scrutiny. Because 90% of the gas supply will be exported, there is no regional need or interest in additional pipelines. Neither FERC nor TGP showed a direct causal link between the approved AFP route and a compelling government interest, as the region is meeting

its LNG needs. The AFP does not meet a compelling government interest because New Union's energy demands are already being met.

C. If this Court determines that increased reliability is a compelling interest, there is a less restrictive way to achieve that interest.

The government must show that the action creating a burden is the least restrictive means of furthering the compelling governmental interest. 42 U.S.C. § 2000bb-1.

If the government can achieve those same interests without burdening religion, it must do so. *Singh*, 56 F.4th at 93. In *Singh*, the court held that "fostering cohesion and unity among [Marine Corps] members" was a compelling government interest but did not justify facial hair bans that forced Sikh trainees to act against their faith. *Id.* at 94, 97–99. The court reasoned that the Marine Corps failed to "demonstrate the specific harm that would—not could—result by granting specific exemptions" to the claimants. *Id.* at 97.

Additionally, RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through the application of the challenged law" to the person whose religious practices are being substantially burdened. *Hobby Lobby*, 573 U.S. at 725 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 430–31 (2006)). In *Hobby Lobby*, the Court found that a federal mandate requiring employers to provide insurance with contraceptive care substantially burdened an employer who objected for religious purposes. *Id.* at 726. The Court declared that providing general health insurance was a compelling government interest, but held that the government could achieve this interest without burdening religion, acknowledging that the least-restrictive-means standard is "exceptionally demanding." *Id.* at 728. The Court reasoned that the government could provide insurance to women in the program, stating that RFRA may "require the [g]overnment to expend additional funds to accommodate citizens' religious beliefs." *Id.* at 730.

Even if FERC's purpose in this action was to increase LNG supply for New Union, that interest can be achieved in a less restrictive manner. Similar to the Marine Corps' failure to show the injury that would result by granting exemptions to claimants in *Singh,* FERC failed to show the injury if the AFP were not routed across HOME's lands. The alternate route adds only 10% to the project's total cost and would preserve the sanctity of HOME's sacred pilgrimage. R. at 11. Like the least-restrictive-means in *Burwell,* FERC could subsidize a portion of the costs for the alternative route. Even if FERC had a compelling government interest, there is a less restrictive way of increasing natural gas supply.

By curtailing HOME's ability to adhere to its religious practices and forcing them to violate their beliefs by commandeering their property to support fossil fuels, FERC is substantially burdening HOME's religious exercise in a manner that fails the least-restrictive-means standard.

IV. FERC has authority to impose the GHG Conditions because the major questions doctrine does not apply and the NGA unambiguously empowers FERC to attach environmental conditions to certificates.

For nearly four decades, the deferential two-step *Chevron* test has governed judicial review of whether federal agencies' interpretations of their own power are within statutory boundaries. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984). Only in "extraordinary cases" where agencies assert "highly consequential power beyond what Congress could reasonably be understood to have granted," does the major questions doctrine require "clear congressional authorization" for that power. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). The NGA empowers FERC to attach "such reasonable terms and conditions as the public convenience and necessity may require" to construction certificates. 15 U.S.C. § 717f(e).

Here, the GHG Conditions are reasonable and within FERC's authority to impose. The major questions doctrine does not apply to the GHG Conditions because they are small-scale,

project-specific, and in line with FERC's jurisdiction and historical practice. Because the major questions doctrine does not apply, FERC's interpretation of the NGA is entitled to the deferential analysis under *Chevron,* where the GHG Conditions are unambiguously authorized at step one, or alternatively, based on a reasonable interpretation of the NGA at step two.

A. The major questions doctrine does not apply because the GHG Conditions will have minimal political and economic consequences and FERC has historically exercised its authority to impose environmental conditions on LNG projects.

The major questions doctrine applies only in "extraordinary cases" in which the agency seeks broad authority that it has not exercised historically, raising questions with "significant political and economic consequences." *West Virginia,* 142 S. Ct. at 2608. In such an extraordinary case, courts look for "clear congressional authorization." *Id.* at 2609.

Cases with significant political and economic consequences typically involve novel regulatory schemes that would transform entire multibillion-dollar industries. *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston, LLC,* 76 F.4th 291, 299–300 (4th Cir. 2023). In *West Virginia*, the Court found EPA's asserted authority to require power plants to shift from coal to cleaner energy sources under the Clean Air Act ("CAA") had major political and economic consequences because the plan would aggressively transform "the domestic energy industry, entail billions of dollars in compliance costs, and raise electricity prices by 10%." 142 S. Ct. at 2604. In another extraordinary case, FDA's asserted authority to regulate tobacco products as a "drug" would have resulted in a total ban on cigarettes and smokeless tobacco. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

Courts also look to the history and breadth of the agency's asserted authority to determine whether the major questions doctrine applies. *West Virginia,* 142 S. Ct. at 2608. The major questions doctrine is less likely to be implicated if: (1) the statute's structure supports the agency's regulatory scheme; (2) no other distinct regulatory scheme addressing the issue is

already in place; (3) the agency has previously invoked the same type of powers at issue; (4) the asserted power is within the agency's traditional expertise; or (5) the asserted power is not found in an "ancillary provision." *Capt. Gaston*, 76 F.4th at 297.

Here, the GHG Conditions imposed have minor, insignificant political and economic consequences and therefore this is not an extraordinary case to which the major questions doctrine applies. The GHG conditions have little in common with the type of transformative regulatory schemes that typically implicate the major questions doctrine. First, the conditions apply only to TGP and the construction of the AFP, not to all natural gas companies and projects; this is not a new, transformative regulatory scheme. Second, TGP offers no evidence the conditions will negatively affect industries, result in fewer jobs, or raise natural gas prices. R. at 14–15. Third, the conditions have a small impact; they are estimated to reduce the TGP Project's average yearly construction emissions from 104,100 metric tons CO_2e to 88,340 metric tons CO_2e, a reduction of approximately 15%. R. at 15. This minimal effect hardly amounts to a nationwide ban on fossil fuels or a ban on the use of fossil fuels in natural gas pipeline construction and has no analog in major questions cases.

Moreover, none of the history and breadth factors weigh in favor of applying the major questions doctrine. The NGA provides FERC with "plenary authority over the transportation of natural gas in interstate commerce," and no distinct regulatory scheme exists. *N.Y. State Dep't of Env't Conservation v. FERC*, 884 F.3d 450, 456–57 (2d Cir. 2018). FERC's extremely broad authority over the approval of natural gas infrastructure projects and conditioning of certificates is further supported by many other NGA provisions. *See, e.g.*, 15 U.S.C. § 717f(a) (authorizing FERC to order natural gas companies to extend or improve facilities or to sell gas to specified parties if "necessary or desirable in the public interest"); *Id.* at § 717b(a) (providing FERC analogous authority to deny applications to export or import natural gas if not "consistent with

the public interest" and to modify applications or attach "such terms and conditions as [FERC] may find necessary or appropriate"); *Id.* at § 717(o) (granting FERC broad administrative power to carry out the NGA).

As FERC noted in the Rehearing Order, this is not the first time it has imposed environmental conditions pursuant to its authority under 15 U.S.C. § 717f. R. at 17. And TGP concedes that FERC can mitigate traditional environmental harms like tree removal.[5] Finally, the asserted power is found in 15 U.S.C. § 717f(e), a primary provision of the NGA that FERC relies on every time it approves or denies a natural gas infrastructure project, not an ancillary provision that has rarely been used in the past.

Therefore, the authority FERC asserts here is distinguishable from the types of agency powers which courts have held as implicating the major questions doctrine, and no further clear congressional authorization is required.[6]

B. Under *Chevron*, the NGA unambiguously authorizes FERC to attach environmental conditions to certificates at step one. In the alternative, FERC's interpretation of Section 7 is reasonable and must be deferred to at step two.

At step one of the *Chevron* test, the court asks whether Congress "has directly spoken to the precise question at issue" and if so, "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. But if the statute is silent or ambiguous, the court proceeds to step two and must uphold any "reasonable" agency interpretation. *Solar Energy Indus. Ass'n v. FERC*, 59 F.4th 1287, 1292 (D.C. Cir. 2023).

[5] Accordingly, condition (1), that TGP replace the trees it removes during construction, is not at issue, and TGP's challenge applies to conditions (2)–(4) only. R. at 14.

[6] As FERC rightly concluded, even if the major questions doctrine did apply, the NGA provides FERC sufficiently clear congressional authorization to impose environmental conditions in the public interest. R. at 18 (citing 15 U.S.C. §§ 717f(e), b(a)).

Here, FERC imposed the GHG Conditions under Section 7(e) of the NGA, which provides that FERC "shall have the power to attach to the issuance of the [Certificate] and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e).

A statute is not ambiguous simply because it uses broad language or can be applied in situations not expressly anticipated by Congress. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). In *Massachusetts*, a CAA provision required the EPA to adopt motor vehicle emission standards for "any air pollutant . . . which may reasonably be anticipated to endanger public health or welfare." *Id.* at 528. The Court held that this language plainly included GHGs, even if Congress was unaware that burning fossil fuels caused climate change at the time the provision was drafted. *Id.* at 532. The Court reasoned that Congress intended to confer the regulatory flexibility necessary to adapt to changing circumstances and scientific developments. *Id.*

Here, Section 7(e) of the NGA is unambiguous because it uses intentionally broad language to provide FERC with the flexibility necessary to adapt its infrastructure project review process to new public interest considerations as circumstances change over time. What *is* in the public interest today is not the same as what *was* in the public interest when Congress passed the NGA in 1938. Congress could have enumerated specific factors for FERC to consider when it grants certificates under Section 7(e) but it chose not to; instead, Congress chose to give FERC broad discretion to consider the public convenience and necessity. Because the Court in *Massachusetts* found that § 202(a)(1)'s broad public interest determination unambiguously included GHGs if they contribute to climate change, Section 7(e)'s broad "public convenience and necessity" determination should also be found to include GHGs that contribute to climate

change. Therefore, at *Chevron* step one, Section 7(e) unambiguously authorizes FERC to attach conditions to certificates that mitigate the project's GHG emissions.

But if this Court were to find Section 7(e) ambiguous, the Court still must defer to FERC's interpretation if it is reasonable at *Chevron* step two. *Solar Energy Indus. Ass'n*, 59 F.4th at 1292. To determine an agency interpretation's reasonableness, courts look to the statute's language, structure, purpose, and legislative history. *Id.*

Here, FERC's interpretation of "the public convenience and necessity" as allowing FERC to impose conditions to mitigate direct and indirect GHG emissions is reasonable and should be upheld. On its face, "the public convenience and necessity" is broad enough language to include climate change impacts from GHG emissions. As discussed above, the NGA's structure strongly indicates that Congress intended to give FERC broad, plenary authority over natural gas infrastructure.[7] And the Supreme Court has analyzed the NGA's legislative history and interpreted Section 7(e) as requiring FERC "to evaluate *all* factors bearing on the public interest," including end use. *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7–8, 15–22 (1961)(emphasis added). Thus, the GHG Conditions are based on a reasonable interpretation of Section 7(e).

At *Chevron* step one, Section 7(e) unambiguously authorizes FERC to impose the GHG Conditions and other conditions mitigating the project's GHG emissions. Alternatively, at *Chevron* step two, FERC's interpretation of Section 7(e) as providing FERC with such authority is reasonable and entitled to deference. The Court should affirm FERC's order on this issue and uphold the GHG Conditions in the Certificate.

[7] *See supra* Section IV. A.

V. FERC's decision not to impose mitigation measures for downstream and upstream GHG impacts was arbitrary and capricious, in violation of NEPA and the APA, because FERC relied on a deficient EIS and failed to adequately explain why it considers indirect GHG emissions insignificant.

NEPA integrates "a broad national commitment to protecting and promoting environmental quality" into federal agencies' operations. *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1367 (D.C. Cir. 2017) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)). The effects of climate change on the human environment fall squarely within NEPA's purview. *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196, 1197 (Jan. 9, 2023) ("CEQ Climate Guidance"). NEPA plays an important role "in providing critical information to decision makers and the public" about the GHG emissions and potential climate impacts of major federal actions. *Id.*

To comply with NEPA, before authorizing construction of a major natural gas infrastructure project, FERC must prepare a detailed EIS addressing:

> (i) reasonably foreseeable environmental effects of the proposed agency action;
> (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;
> (iii) a reasonable range of alternatives to the proposed agency action …;
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

42 U.S.C. § 4332(2)(C). An agency action under NEPA is arbitrary and capricious if it relies on a deficient EIS. *Sabal Trail*, 867 F.3d at 1368. An EIS is deficient if it does not demonstrate reasoned decision-making or does not contain sufficient discussion of the relevant issues and opposing viewpoints. *Id.* Here, FERC's decision not to impose conditions mitigating upstream

and downstream GHG impacts was arbitrary and capricious because FERC relied on a deficient EIS and failed to adequately explain that decision.

A. The EIS failed to adequately analyze the significance of the TGP Project's reasonably foreseeable upstream and downstream GHG emissions or discuss potential mitigation measures for such emissions.

An EIS is inadequate when it fails to discuss the significance of the action's environmental impacts, including direct, indirect, and cumulative effects. 40 C.F.R. § 1502.16(a)(1)–(2). Direct effects "are caused by the action and occur at the same time and place"; indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable"; and cumulative effects "result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions." *Id.* § 1508.1(g)(1)–(3). Additionally, an adequate EIS must discuss "steps that can be taken to mitigate adverse environmental consequences." *Robertson*, 490 U.S. at 351–52; *see* 40 C.F.R. §§ 1502.14(e), 1502.16(a)(9).

1. FERC failed to adequately analyze reasonably foreseeable upstream GHG impacts.

FERC maintains that the TGP Project will not have reasonably foreseeable significant consequences on upstream GHG emissions because "the HFF gas is already in production, but just being transported … to different destinations." R. at 15. However, FERC's explanation "runs counter to the evidence before the agency." *State Farm*, 463 U.S. 43. FERC "should not simply assume that if the federal action does not take place, another action will perfectly substitute for it and generate identical emissions" CEQ Climate Guidance, 88 Fed. Reg. at 1205. FERC needed to provide a "quantitative estimate" of upstream GHG emissions "or explain more specifically why it could not have done so." *Sabal Trail*, 867 F.3d at 1374. At the very least, FERC needed to

attempt to gather the information necessary to assess the potential upstream impact on production at HFF. *See Food & Water Watch v. FERC*, 28 F.4th 277, 286 (D.C. Cir. 2022).

Here, TGP presented evidence showing that demand for LNG currently produced in the HFF and transported to states east of Old Union through the Southway Pipeline is, and has been, "steadily declining due to a population shift, efficiency improvements, and increasing electrification…." R. at 6. Based on this evidence, FERC should have considered that approving the TGP Project would, at least, halt the current trend of decreasing demand for HFF gas, thus preventing the gradual decline of production at HFF that would occur if the Southway Pipeline remained the only means of transportation for HFF-produced gas. This increase of gas production at HFF[8] over the baseline is a reasonably foreseeable indirect effect of approving the TGP Project and therefore, FERC had an obligation under NEPA to discuss its significance.

2. The EIS's analysis of the project's downstream GHG impacts was also inadequate.

Again, FERC had a NEPA obligation to discuss the significance of the TGP Project's reasonably foreseeable downstream GHG impacts. 42 U.S.C. § 4332(2)(C)(i)–(ii); 40 C.F.R. § 1502.16(a)(1). This includes quantifying estimated downstream emissions, attempting to estimate net emissions, and comparing those estimates "to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals." *Sabal Trail*, 867 F.3d at 1374–75. Failure to make these comparisons is a failure to "engage in informed decision making with respect to the [GHG] effects of th[e] project" and a violation of NEPA. *Id.*

[8] The EIS also did not discuss that the natural gas from HFF is produced through the process known as "fracking," which emits more GHGs, especially the most potent GHG, methane, than conventional types of natural gas extraction.

A project's downstream GHG emissions are reasonably foreseeable if some specific information about the destination and end use of the gas exists. *Food & Water Watch*, 28 F.4th at 288. In *Food & Water Watch*, the court held that a project's downstream emissions were reasonably foreseeable where the destination and end use of nearly half of the transported gas, 32,000 Dth per day, was unknown but where the other 40,400 Dth per day was under contract with another gas company. *Id.* Also, that some of a project's gas may displace existing natural gas supplies or higher-emitting fuels does not negate the reasonable foreseeability of downstream emissions. *Id.* at 289 (citing *Birckhead v. FERC*, 925 F.3d 510, 518 (D.C. Cir. 2019)).

Here, the EIS prepared by TGP failed to adequately analyze the reasonably foreseeable downstream GHG emissions of the TGP Project's approval. First, the TGP Project's downstream emissions are reasonably foreseeable because, like in *Food & Water Watch*, there is specific evidence regarding the gas's destination and end use. Most of the gas will follow a precise route from the AFP to the Port of New Union, where it will be loaded onto ships for export to its final destination, Brazil. A significant amount of the gas, 50,000 Dth per day (more than the 40,400 Dth per day that destination and end use was known for in *Food & Water Watch*), is under contract with NUG and will serve its customers in New Union.

Second, while the EIS provided a numerical estimate of downstream emissions, it did not estimate net emissions or analyze the numerical estimate's significance in relation to other projects' emissions, New Union or Old Union's total emissions, Atlantic Coast regional emissions, or national emission-control goals. R. at 15. FERC's assertion that "some of the gas may displace other fuels" or "gas that otherwise would be transported by other means" does not cure this deficiency. *Id.* Therefore, this Court should remand this issue to FERC with an order to prepare a supplemental EIS that provides a reasonable estimate of net downstream emissions.

3. The EIS failed to adequately discuss mitigation measures.

Because both upstream and downstream GHG emissions are reasonably foreseeable indirect effects of approving the TGP Project, the EIS needed to include a discussion of the extent to which those emissions could be avoided through mitigation. *Robertson*, 490 U.S. at 351–52 (citing 42 U.S.C. §4332(C)(ii)); *see* 40 C.F.R. §§ 1502.14(e), 1502.16(a)(2), (9), 1508.1(s). Neither the EIS nor the Rehearing Order discuss possible mitigating conditions for upstream or downstream GHG emissions. *See* R. at 15.

FERC has identified two primary mechanisms for mitigating indirect GHG emissions that project sponsors could adopt or that FERC could attach to project approvals: (1) market-based mitigation, including purchasing renewable energy credits and participating in carbon markets; and (2) physical mitigation, including carbon capture and storage, minimizing pipeline leaks and fugitive methane emissions, using renewable energy in operations, and environmentally based measures like planting trees and restoring wetlands. *Consideration of Greenhouse Gas Emission in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, 61,743–46 (Feb. 18, 2022). The supplemental EIS must include a discussion of these possible mitigating measures.

For these reasons, the EIS was inadequate and FERC's decision not to impose conditions mitigating upstream and downstream GHG emissions was arbitrary and capricious.

B. FERC's explanation for its decision not to mitigate indirect GHG emissions was inadequate because once FERC determined direct GHG emissions required mitigation, it was irrational to exclude indirect emissions.

While NEPA does not require an agency to adopt certain mitigation measures, the agency must provide a rational explanation for its decision not to do so. 40 C.F.R. § 1508.1(s). Here, despite finding the project's direct construction emissions significant and imposing corresponding mitigating conditions, FERC concluded that indirect GHG emissions do not warrant mitigation because: (1) "the construction impacts are a more direct result of the TGP

Project"; (2) FERC is currently drafting guidance for addressing GHG impacts; and (3) it is uncertain whether the project will "cause any significant increase in emissions." R. at 18–19. None of these explanations are satisfactory.

First, NEPA and its implementing regulations do not differentiate between direct and reasonably foreseeable indirect effects as "more direct" or "less direct," i.e., more or less worthy of mitigation. 42 U.S.C. § 4332(C)(i)–(ii); 40 C.F.R. § 1508.1(g). The environmental effects at issue, GHG emissions and their contribution to climate change, are the same whether the GHGs are emitted during construction, upstream production, or downstream combustion. It was irrational for FERC to conclude that construction emissions, estimated at 104,100 metric tons CO_2e per year, were significant, but that downstream emissions, estimated at nearly 9.7 million metric tons CO_2e per year, were not significant.

Second, that FERC is currently conducting proceedings to guide consideration of indirect GHG emissions in future project reviews does not alleviate FERC of its present statutory obligation to consider all the TGP Project's reasonably foreseeable indirect effects and determine their significance. *See* 42 U.S.C. § 4332(2)(C)(i)–(ii). Regardless of whether FERC has published guidance or not, the agency must still follow NEPA and the significant body of case law that already provides rules for considering GHG impacts in environmental analyses. Third, FERC's uncertainty about the TGP Project's net emissions effect largely stems from the inadequacy of the EIS's analysis discussed above, and uncertainty alone, like pending guidance, does not relieve FERC of its NEPA obligations.

On remand, if, after adequately analyzing indirect GHG emissions and discussing possible mitigation measures, FERC still decides not to impose conditions to mitigate indirect emissions, FERC must provide a rational explanation for its decision not to do so.

CONCLUSION

For the foregoing reasons, this Court should reverse FERC's approval of the TGP Project by setting aside FERC's orders in full or in part. In the alternative, this Court should uphold the GHG Conditions imposed in the Certificate and stay the project until FERC prepares a supplemental EIS that fully complies with NEPA and either mitigates indirect GHG emissions or adequately explains its decision not to.