

NON MEASURING BRIEF

Docket No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH
Plaintiff-Petitioner

-and-

TRANSNATIONAL GAS PIPELINES, LLC
Plaintiff-Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Defendant

Appeal of the Federal Energy Regulatory Commission's Certificate of Public Convenience and
Necessity Order and Rehearing Order in consolidated case nos. 23-01109 and 23-01110.

Brief of Petitioner, THE HOLY ORDER OF MOTHER EARTH

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STATEMENT OF JURISDICTION

The Holy Order of Mother Earth (“HOME”) filed a Petition for Review of the Certificate of Public Convenience and Necessity Order (“CPCN”) and Order Denying Rehearing issued by the Federal Energy Regulatory Commission (“FERC”) in consolidated cases 23-01109 and 23-01110. HOME filed its petition within 60 days of the issuance of the Order Denying Rehearing, pursuant to 15 U.S.C. § 717r(b). Under the Natural Gas Act (“NGA”), a party aggrieved by a FERC order has the right to challenge that order in the United States Court of Appeals for the circuit where the natural gas company involved is located or has its principal place of business. 15 U.S.C. § 717r(b). Accordingly, the United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal.

STATEMENT OF ISSUES PRESENTED

- I. Was FERC’s finding of public convenience and necessity for the American Freedom Pipeline (“AFP”) arbitrary and capricious, or not supported by substantial evidence insofar as FERC found the AFP was needed where 90% of the natural gas transported by the AFP would be for export. Was FERC’s finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?
- II. Was FERC’s decision to route the AFP over HOME’s property in violation of the Religious Freedom Restoration Act (“RFRA”)?
- III. Were the GHG Conditions attached to the CPCN beyond FERC’s authority under the NGA?
- IV. Was FERC’s decision not to impose any GHG conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

STATEMENT OF THE CASE

I. HOME

HOME is a religious order that was founded in 1903. Order Denying Rehearing, 199 FERC ¶ 72,201 P 46 (2023) (hereinafter Rehearing Order). The core principle of HOME's religion is that the natural world is sacred. *Id.* To HOME, nature itself is a deity warranting worship and respect. *Id.* HOME's founders formed their belief system in large part as a response to the harmful environmental effects of capitalistic industrialization. *Id.* As such, a core tenet of HOME's belief system is that humans should do everything in their power to promote the preservation of the natural world, especially in the face of economic interests that would cause environmental harm. *Id.* P 47.

As a legal entity, HOME exists as a non-profit religious organization under the laws of the State of New Union. *Id.* P 9. HOME owns a 15,500-acre estate in Burden County, New Union, which is the site of its headquarters. *Id.* HOME uses this property to practice its religious beliefs. *Id.* P 48. One of its central religious practices is the Solstice Sojourn, a rite that HOME members have performed every winter and summer solstice since at least 1935. *Id.* During the Solstice Sojourn, members of HOME travel on foot from a temple on their property's western border to a sacred hill near the Misty Top Mountains, close to their property's eastern border. *Id.* Upon reaching the sacred hill, HOME children who have turned fifteen since the previous solstice undergo a sacred religious ceremony. *Id.* After the coming-of-age ceremony, HOME members travel back to the temple along a different route. *Id.* The entirety of the Solstice Sojourn journey takes place on HOME's private property. *Id.*

II. The Impact of the AFP on HOME

Transnational Gas Pipelines, LLC ("TGP") proposed the AFP, a 30-inch diameter

pipeline stretching approximately 99 miles between Jordan County, Old Union, and Burden County, New Union, to facilitate the transport of liquified natural gas (“LNG”). *Id.* P 1. As approved by the CPCN, a buried two-mile section of the AFP would bisect HOME’s property. *Id.* P 38. Burying the AFP where it crosses HOME’s property would necessitate the removal of approximately 2,200 trees, as well as many other forms of vegetation. *Id.* The vast majority of these trees would not be able to be replaced, resulting in a permanent clear-cut scar running across the property that HOME has specifically dedicated to its religious veneration of nature. *Id.*

Additionally, the AFP’s path would run across the routes that HOME has been using for its Solstice Sojourn for the past century. *Id.* P 48. HOME’s members have testified that crossing a deforested path concealing an LNG pipeline would not only destroy the meaning of the Solstice Sojourn, it would render its continued practice “unimaginable.” *Id.* P 57.

HOME’s concerns are not limited to the physical damage the AFP would wreak on its property and the resulting impacts on its religious practices; it also vehemently opposes the use of its land to transport LNG. *Id.* P 58. This use is directly at odds with the purposes of HOME’s past, present, and intended future stewardship of their land. *Id.* HOME objects to the fracking process that will be used to obtain the LNG, the environmental harm that will result from constructing the AFP, and the detrimental climate effects that will result when the LNG transported by the AFP is burned. *Id.*

III. AFP Proposed Construction and Use

The AFP would not transport a new source of natural gas, but merely reroute existing natural gas production, almost all of which would eventually be exported. *Id.* PP 12, 24. The natural gas that the AFP would transport is produced in the Hayes Fracking Field (“HFF”) in Old Union. *Id.* P 12. Hydraulic fracturing, or fracking, results in a number of detrimental

environmental impacts, including greenhouse gas (“GHG”) emissions. Anna Lin-Schweitzer, *Integrated effort needed to mitigate fracking while protecting both humans and the environment*, YALE SCH. OF PUB. HEALTH (Mar. 30, 2022), <https://perma.cc/V6LL-ZQK6>. GHGs trap heat in the atmosphere, which causes an enhanced greenhouse effect and drives climate change. U.S. ENV’T PROT. AGENCY, *Greenhouse Gases* (July 14, 2023) <https://perma.cc/3RRV-D7DN>. Among the harms of climate change and its related impacts are: injuries to people and species, drastically changed habitats, damaged property, strained infrastructure, and reduced agriculture outputs. *Id.*

Currently, the full production of natural gas at the HFF is transported by the Southway Pipeline to markets east of Old Union. Rehearing Order, 199 FERC ¶ 72,201 at P 12. However, the demand for natural gas in that area has been declining. *Id.* P 13. The AFP would reroute approximately 35% of the HFF’s production away from the Southway Pipeline. *Id.* P 12. TGP owns a transmission facility in New Union, and to connect the AFP, it intends to build a receipt tap and receipt meter station near the HFF (“Main Road M&R Station”). *Id.* P 10. The AFP would also require TGP to construct a meter, regulation, and delivery station (“Broadway Road M&R Station”) at the transmission facility, as well as pig launcher/receiver facilities and pig trap valves at both the Main Road and Broadway Road M&R Stations. *Id.*

TGP has yet to sign easement agreements with over 40% of landowners along the proposed AFP route, including HOME. *Id.* P 42. Although TGP would prefer to build the AFP across HOME’s property, it has evaluated an alternate route that would avoid crossing HOME’s property (“Alternate Route”). *Id.* P 44. The Alternate Route would run through the Misty Top Mountains and add three miles in length to the AFP. *Id.* TGP estimated that using the Alternate Route would increase its construction costs from \$599 million to \$650 million. *Id.*

The AFP is designed to provide up to 500,000 dekatherms (Dth) per day of firm transportation service of LNG. *Id.* P 1. TGP has executed a precedent agreement with International Oil & Gas Corporation (“International”) for 450,000 Dth per day of firm transportation service, as well as with New Union Gas and Energy Services Company (“NUG”) for 50,000 Dth per day of firm transportation service. *Id.* P 11. These precedent agreements bind International and NUG to purchase LNG from TGP if the AFP is constructed. *Id.* To deliver LNG to International, the AFP would connect at the Broadway Road M&R Station to the NorthWay Pipeline, and LNG would be routed to a meter and receipt station that International operates at the Port of New Union on Lake Williams (“New Union City M&R Station”). *Id.* P 14. International would then transport the LNG on tankers from Lake Williams, via the White Industrial Canal, to the Atlantic Ocean for export to Brazil (see diagram in Appendix 1). *Id.* Thus, 90% of the LNG transported by the AFP would be exported. *Id.* P 24. International’s parent company is Brazilian. *Id.* The United States does not have a free trade agreement with Brazil. *Id.* P 33.

The Environmental Impact Statement prepared by TGP (“AFP EIS”) indicated that downstream end-use of the LNG transported by the AFP could result in the yearly emission of 9.7 million metric tons of CO₂e, a GHG. *Id.* P 72. Although burning natural gas emits less GHG than coal or petroleum products, it nevertheless releases a significant amount of CO₂, a GHG. U.S. ENERGY INFO. ADMIN., *Natural gas explained* (Nov. 7, 2022), <https://perma.cc/MU8K-8GZY>. Natural gas storage and transportation also lead to leaks, primarily of methane, an incredibly potent GHG. *Id.*

Additionally, the four-year process of constructing the AFP and its associated infrastructure would likely result in the release of more than 415,000 metric tons of CO₂e.

Rehearing Order, 199 FERC ¶ 72,201 at P 73. However, with certain mitigation efforts, the average yearly release of CO₂e caused by the AFP’s construction could be reduced to just over 88,000 metric tons. *Id.* In order to realize these reductions in GHG emissions, the CPCN requires TGP to take certain mitigation measures (“GHG Conditions”). *Id.* PP 72-73. Specifically, the GHG Conditions would require TGP to: ensure that an equal number of trees are planted as would be destroyed by the AFP’s construction; where practical, use electric-powered equipment to construct the AFP; purchase steel pipeline segments produced only by net-zero steel manufacturers; and, where possible, purchase all electricity used for the AFP’s construction from renewable energy sources. *Id.* P 67.

IV. Procedural History

On June 13, 2022, TGP filed an application with FERC to construct and operate the AFP. On April 1, 2023, FERC issued a CPCN to TGP to construct the AFP. On April 20, 2023, HOME petitioned for a rehearing from FERC regarding the issuance of the CPCN. On May 19, 2023, FERC issued an order denying HOME’s rehearing petition and affirming the CPCN as originally issued. Rehearing Order, 199 FERC ¶ 72,201. On June 1, 2023, HOME filed a timely petition with this Court for review of both the CPCN and FERC’s order denying a rehearing. On June 15, 2023, this Court ordered HOME to submit this brief.

SUMMARY OF THE ARGUMENT

In issuing the CPCN, FERC acted arbitrarily and capriciously because it did not consider important facts when analyzing the project need, public benefits, and GHG Conditions. Further, placing the AFP on HOME’s property would violate RFRA.

FERC's decision to issue the CPCN violates the Administrative Procedure Act (“APA”) because it failed to consider relevant facts when it determined the AFP is needed and provides

public benefit. In issuing the CPCN, FERC ignored its own guidance that it should look beyond precedent agreements when assessing if a project is needed. *See Certification of Nat. Gas Facilities*, 178 FERC ¶ 61,686 at P 54 (2022) (hereinafter Draft Policy Statement); *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (hereinafter Certificate Policy Statement). In determining that the AFP was needed, FERC relied solely on precedent agreements, despite no evidence of increased demand in natural gas, which is contrary to FERC's own policies. *Id.* Even if FERC could rely solely on precedent agreements, it does not have the authority to determine that exporting natural gas to a country without a free trade agreement is not inconsistent with the public interest. *See Transcon. Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 at P 34 (2017) (citing 15 U.S.C. § 717b(a)). Even if FERC could make this determination, it failed to explain how a precedent agreement for exporting natural gas to a non-free trade country constitutes a need for the AFP or provides public benefit. *See City of Oberlin v. FERC*, 39 F.4th 719, 724 (D.C. Cir. 2022) (hereinafter *Oberlin II*) (citing *City of Oberlin v. FERC*, 937 F.3d 599, 606 (D.C. Cir. 2019) (hereinafter *Oberlin I*)). FERC's decision to ignore HOME's concerns about the AFP's lack of need and public benefit was unreasonable. *See Env't Def. Fund v. FERC*, 2 F.4th 953, 974 (D.C. Cir. 2021). Without the export precedent agreement, only 10% of the AFP's capacity would be filled, which is insufficient to support a finding of project need. The potential public benefits outlined in the CPCN are vague and FERC did not provide evidence that these public benefits were even likely to occur.

Pursuant to its own policy guidance, FERC should have considered TGP's use of eminent domain and the intangible harm to HOME's interests when identifying adverse effects. Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,749; Draft Policy Statement, 178 FERC ¶

61,686 at P 81. FERC did not consider all the important factors when analyzing whether the minimal to nonexistent public benefits substantially outweigh the adverse effects. Draft Policy Statement, 178 FERC ¶ 61,686 at P 53.

The CPCN violates RFRA because it substantially burdens HOME's religious exercise and does not further a compelling government interest through the least restrictive means. HOME's religious beliefs are sincere, and their sincerity is not an issue before this Court. Rehearing Order, 199 FERC ¶ 72,201 at P 51. The CPCN would allow TGP to deforest portions of HOME's property that it uses for a religious ceremony of central importance, thereby substantially burdening HOME's religious exercise. *Id.* P 57. There is no evidence the CPCN will further a compelling government interest; the AFP would merely reroute natural gas for export. *Id.* P 12. Even if the AFP served a compelling interest, the proposed route is not the least restrictive means to accomplish it. The Alternate Route would bypass HOME's property, thus there would be no substantial burden on HOME's religious practice. *Id.* P 39.

Imposing GHG conditions on the AFP is within FERC's vested authority under the NGA. 15 U.S.C. § 717f(e). Both the executive branch and Council on Environmental Quality ("CEQ") expressly recognize the climate crisis and encourage agencies to take action to minimize or mitigate GHG impacts. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021); National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023) (hereinafter CEQ Guidance). While FERC is not legally obligated to follow CEQ regulations, as an executive agency, it typically adheres to CEQ guidance and is in the process of formulating its own GHG mitigation regulations. Rehearing Order, 199 FERC ¶ 72,201 at P 70. FERC's authority to impose GHG conditions derives from the NGA and the National Environmental Policy Act ("NEPA"), and courts have

affirmed prior GHG conditions imposed by FERC. 15 U.S.C. §§ 717b(a), 717f(e); 42 U.S.C. § 4332(C); *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017); *Twp. of Bordentown* 903 F.3d 234, 261 n.15 (3d Cir. 2018); *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at app. A (2017), *on reh'g*, 164 FERC ¶ 61,100 (2018). The results of the AFP EIS indicate GHG mitigation measures are necessary. Rehearing Order, 199 FERC ¶ 72,201 at P 80. FERC properly acted in accordance with NEPA and the NGA to impose GHG conditions in granting the CPCN. *Id.* P 82. Imposing GHG Conditions on TGP is not a major question because the conditions are project-specific and do not impose broad requirements to regulate the natural gas industry. *West Virginia v. EPA*, 142 S. Ct. 2587, 2604 (2022).

FERC's failure to require mitigation for upstream and downstream GHG emissions from the AFP is arbitrary and capricious. 5 U.S.C. § 706. The AFP's significant GHG emissions are a reasonably foreseeable consequence of its construction and operation. FERC's contradictory findings that the GHG impacts of the AFP construction are significant and require mitigation, while the upstream and downstream GHG impacts are not significant, are arbitrary and capricious. Rehearing Order, 199 FERC ¶ 72,201 at PP 81-82. Therefore, FERC is obligated to require TGP to mitigate both upstream and downstream GHG emissions of the AFP. Requiring upstream and downstream GHG mitigation is not a major question, as Congress has explicitly authorized FERC to impose "necessary and proper" conditions on proposed projects. *See West Virginia*, 142 S. Ct. at 2595; 15 U.S.C. § 717f(e); 40 C.F.R. §§ 1502.16, 1508.8 (2023). Addressing GHG emissions falls squarely within FERC's authority to address environmental concerns. 15 U.S.C. § 717f(e).

STANDARD OF REVIEW

An agency's interpretation or application of a statute is a question of law reviewed de

novo. *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006). A reviewing court must set aside a final agency action if that action is arbitrary and capricious or not in accordance with the law. 5 U.S.C. § 706(2)(A); *Sithe/Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999).

FERC must provide a “reasoned” basis for its decisions. *N. States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994). The Court’s role is to assure that “the Commission’s decision making is reasoned, principled, and based upon the record.” *Minisink Residents for Env’t. Pres. & Safety v. FERC*, 762 F.3d 97, 106 (D.C. Cir. 2014).

The APA governs the procedures used by federal agencies, including FERC, when making decisions that affect the public. 5 U.S.C. § 553. The APA ensures that agencies make decisions fairly and transparently based on law and evidence. *Id.* §§ 555-57. The APA requires FERC to follow specific rules when making decisions about pipeline permits. *United States v. Cotton*, 760 F. Supp. 2d 116, 126 (2011). Notably, the APA empowers courts to strike down agency actions that are “arbitrary and capricious.” 5 U.S.C. § 706(2)(A). Agency actions are considered arbitrary and capricious if the agency:

[1] entirely failed to consider an important aspect of the problem, [2] offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, [3] failed to base its decision on consideration of the relevant factors, or [4] made a clear error of judgment.

New Mexico ex rel. Richardson v. BLM, 565 F.3d 683, 704 (10th Cir. 2009).

ARGUMENT

I. FERC acted arbitrarily and capriciously in issuing a CPCN for the AFP because it failed to consider important aspects of project need and public benefit.

The NGA vests FERC with the power to regulate interstate transportation of natural gas. 15 U.S.C. §§ 717(b)-(c). FERC can issue a CPCN to authorize the construction of new natural

gas facilities if they will be for the “public convenience and necessity.” *Oberlin II*, 39 F.4th at 722 (quoting 15 U.S.C. 717f(e)). FERC must consider all factors impacting the public interest when determining if a proposed project is or will be in the “public convenience and necessity.” *Atl. Refining Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959); Draft Policy Statement, 178 FERC ¶ 61,686 at P 51.

In issuing a CPCN, FERC must first determine that an applicant has demonstrated project need. *Sierra Club*, 867 F.3d at 1379. FERC cannot rely solely on precedent agreements to determine if a project is needed. *Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 114-15 (D.C. Cir. 2022) (citing Draft Policy Statement, 178 FERC ¶ 61,686 at P 54). “[L]ooking only to precedent agreements, and ignoring other, potentially contrary, evidence may cause [FERC] to reach a determination on need that is inconsistent with the weight of the evidence in any particular proceeding, in violation of both the NGA and the Commission’s responsibilities under the [APA].” Draft Policy Statement, 178 FERC ¶ 61,686 at P 54.

Ensuring a project meets the public convenience and necessity is crucial as a CPCN authorizes condemnation of land. *Env’t Def. Fund*, 2 F.4th at 961; *see* 15 U.S.C. § 717f(h). Even if a project is determined to be needed, FERC cannot issue a CPCN if the adverse effects outweigh the anticipated public benefits. *Sierra Club*, 867 F.3d at 1379 (quoting *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)); Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747-48. A sliding scale approach is used to determine whether the adverse effects outweigh the potential public benefits – the more adverse effects to environmental and landowner interests, the greater the public benefits required to justify the project’s approval. Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,749.

FERC’s issuance of a CPCN is reviewed under the APA’s arbitrary and capricious

standard. *Env't Def. Fund*, 2 F.4th at 968 (citing *Minisink*, 762 F.3d at 105-106; 5 U.S.C. § 706(2)(A)). FERC's decision is arbitrary and capricious when it provides "no reasoned basis to justify its decision." *United Airlines, Inc. v. FERC*, 827 F.3d 122, 124 (D.C. Cir. 2016).

A. FERC's finding of project need and public benefit is arbitrary and capricious because it solely relied on precedent agreements and did not support its determination with other evidence.

To prevent unnecessary destruction of the environment and harm to landowners' interests, FERC must look beyond precedent agreements to determine if a project is needed. Draft Policy Statement, 178 FERC ¶ 61,686 at P 54. This is especially important when the proposed pipeline does not respond to an increased demand for natural gas. *Env't Def. Fund*, 2 F.4th at 973 (citing Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748). Under these circumstances, a project should provide more evidence than just a precedent agreement to show project need. Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748 (a market study should be used to demonstrate that the project is needed when there is not an increased demand for natural gas).

After determining if a project is needed, FERC will assess whether a project serves a public benefit. *Id.* at 61,747. FERC defines "public benefits" to include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives." *Oberlin II*, 39 F.4th at 722 (citing *Myersville*, 783 F.3d at 1309) (quoting Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748).

1. FERC arbitrarily and capriciously relied solely on precedent agreements to find the project was needed.

FERC's reliance on two precedent agreements that fill the AFP's capacity is arbitrary and

capricious because FERC ignored the fact that the AFP is not meeting an increased demand for natural gas. Precedent agreements, although important, are not always sufficient to support a finding of project need. *See Env't Def. Fund*, 2 F.4th at 972. This is especially true when a project is not responding to an increased demand for natural gas. Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748. Precedent agreements become questionable evidence of project need when other evidence supports a contrary finding. *See Draft Policy Statement*, 178 FERC ¶ 61,107 at P 60 (“market need is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreements”).

There is not sufficient evidence demonstrating the AFP is needed. Only 10% of the AFP’s capacity will be used within the United States, while the other 90% will be exported to Brazil. Rehearing Order, 199 FERC ¶ 72,201 at PP 11, 24. The de minimis amount of natural gas transported by the AFP that will be used by NUG does not demonstrate an increased demand for natural gas. *Id.* PP 12-13. Although a market study showed that demand was decreasing east of Old Union, this study did not show a demand for more natural gas in New Union. *Id.* P 13. Despite the insufficient evidence of increased demand, FERC relied solely on two precedent agreements to find the AFP was needed. *Id.* PP 30, 34. Contrary to its own guidance, FERC ignored evidence demonstrating the AFP is not needed. *Id.* PP 11, 13, 33; Draft Policy Statement, 178 FERC ¶ 61,107 at P 54; Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748. There is a credible risk that the AFP is not designed to serve a need or provide a public benefit, but is instead a project to ensure that TGP has a market for its LNG in light of declining market needs east of Old Union. Rehearing Order, 199 FERC ¶ 72,201 at PP 12-13. FERC’s failure to inquire about the market need in New Union is especially concerning given that one of

the precedent agreements ultimately exports approximately 90% of the AFP's capacity to a foreign market. *Id.* P 32. Without the export precedent agreement, the AFP's capacity will only be filled 10%, which is insufficient to find a market need. *Id.* PP 11, 24.

2. FERC cannot assume exports are not inconsistent with the public interest and did not articulate how the export precedent agreement produces a public benefit.

FERC is required to articulate how precedent agreements for natural gas that will be exported provide a domestic public benefit. *Oberlin II*, 39 F.4th at 724 (citing *Oberlin I*, 937 F.3d at 606 (D.C. Cir. 2019)). The Department of Energy ("DOE") must determine whether exporting natural gas to a country without a free trade agreement is consistent with the public interest. *Sierra Club v. FERC*, 827 F.3d 36, 40 (D.C. Cir. 2016) (citing 15 U.S.C. § 717b(a)). FERC has recognized that it lacks the authority to determine that exporting natural gas is consistent with the public interest. *Transcon. Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 at P 34 (2017) (citing 15 U.S.C. § 717b(a); 10 C.F.R. § 590.201 (2017)). FERC should apply to the DOE to ensure that exporting natural gas to countries without a free trade agreement is not inconsistent with the public interest. 10 C.F.R. § 590.202 (2023).

FERC is required to articulate how exporting natural gas would provide domestic benefits. *Oberlin I*, 937 F.3d at 606. FERC ignored this requirement and issued the CPCN without ascertaining what domestic public benefits the AFP would provide. Rehearing Order, 199 FERC ¶ 72,201 at P 33. FERC's assertion of public benefits is arbitrary and capricious because it did not articulate how exportation of natural gas to a country without a free trade agreement provides a public benefit. *Id.*; *Oberlin II*, at 39 F.4th at 724.

FERC did not consult the DOE and compounded its error by assuming, without a rational explanation, that natural gas exported to a country without a free trade agreement is not

inconsistent with the public interest. Rehearing Order, 199 FERC ¶ 72,201 at P 33. FERC's only attempt to consider this issue was its recognition that Brazil does not have a free trade agreement, a distinction it found to be meaningless without any explanation to support its conclusion. *Id.* Determining whether exporting natural gas is not inconsistent is outside of FERC's expertise and this Court should not give deference to FERC's assumption. *See Transcon. Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 at P 34.

B. FERC failed to consider HOME's concerns that the AFP was not needed and does not provide a public benefit.

HOME's concerns should have compelled FERC to look beyond the precedent agreements and conduct a thorough assessment of the market need for the AFP. FERC must look beyond precedent agreements when third parties identify evidence that a project is not needed. *See Env't Def. Fund*, 2 F.4th at 975 (petitioners identified evidence that the project was not responding to demand and provided no cost savings to ratepayers, which suggested self-dealing). FERC's failure to look beyond precedent agreements violates the APA because FERC did not consider "an important aspect of the problem." Draft Policy Statement, 178 FERC ¶ 61,686 at P 54 n.174 (citing *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)). FERC did not rationally connect the facts regarding AFP's project need and public benefit when making its decision to issue a CPCN.

In finding that export precedent agreements can justify the AFP's project need, FERC improperly analogized to its previous decision to permit the Nexus pipeline. Rehearing Order, 199 FERC ¶ 72,201 at PP 30-31. A court found FERC's reasoning supported the Nexus's need and public benefits because: (1) it was facilitating exports to Canada – a country with a free trade agreement with the United States; (2) the precedent agreement established the need for additional capacity; (3) there was an increased demand for natural gas; and (4) gas transported to Canada

would increase the availability of natural gas that could be imported back into the United States. *Oberlin II*, 39 F.4th at 726-28 (citations omitted). The export precedent agreements for Nexus only accounted for 17% of the pipeline's total capacity and the project proponents had purchased or come to agreements for 93% of the land to be used by the pipeline. *Id.* at 723, 729. The Nexus was needed and provided public benefits, whereas, the AFP lacks most, if not all, these characteristics.

The AFP is distinguishable from the Nexus. The AFP is not needed and does not provide a public benefit because: (1) the AFP's export precedent agreement is for natural gas to be exported to a country without a free trade agreement; (2) the NorthWay Pipeline and the New Union City M&R Station are undersubscribed; (3) there is not an increased demand in natural gas; and (4) the natural gas that is exported will not be returned to the United States. Rehearing Order, 199 FERC ¶ 72,201 at PP 27, 32-34. The export precedent agreement accounts for approximately 90% of the AFP's capacity and eminent domain will be used to acquire over 40% of the land needed for the AFP. *Id.* PP 24, 42. FERC's decision making was arbitrary and capricious because it failed to consider both Brazil's lack of a free trade agreement and the absence of increased demand for natural gas.

C. FERC's finding of public benefit is not supported by sufficient evidence.

FERC cannot vaguely assert that a project will yield public benefits; it must present concrete evidence that a potential public benefit is likely to occur. Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748; *Env't Def. Fund*, 2 F.4th at 973-74. The circumstances surrounding the AFP are similar to those in *Environmental Defense Fund*, where the court vacated FERC's CPCN for a pipeline because FERC accepted the applicant's claims of public benefits without supporting evidence. 2 F.4th at 974. The pipeline had been constructed even though there was

flat demand for natural gas, the pipeline would not reduce costs to ratepayers, and a single precedent agreement between affiliates supported the pipeline. *Id.* The court found this context important to determine that FERC's acceptance of the company's assertions of public benefits did not reflect "reasoned and principled decision making." *Id.*

Here, the AFP is being proposed when there is no increased demand for natural gas in the service market, there is decreasing demand in the current market, and the precedent agreements are inadequate evidence to determine the project is needed. Rehearing Order, 199 FERC ¶ 72,201 at PP 12-13. Despite this concerning context, FERC accepted TGP's assertions of potential public benefits that simply recite the Certificate Policy Statement's list of public benefits without supporting evidence. *Id.* P 27; Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747-48. FERC's failure to fact-check undermines reasoned decision making. Rehearing Order, 199 FERC ¶ 72,201 at P 34.

FERC contended that the AFP provides a public benefit by filling additional capacity at the New Union City M&R Station and NorthWay Pipeline. *Id.* PP 13, 34. Although the units would increase subscription, 100% of the natural gas produced at HFF is already being transported to markets in Old Union. *Id.* P 13. If this Court accepted FERC's reasoning here, it would establish a precedent – unsupported anywhere in statute or previous court decisions – that simply reshuffling natural gas provides a public benefit in itself that FERC is not obligated to justify. *Id.* P 34.

D. FERC improperly balanced the AFP's adverse effects and public benefits because it failed to consider intangible harm and the use of eminent domain.

FERC's failure to weigh public benefits against adverse impacts is a grave concern when there is no new load demand and no evidence that a project provides a public benefit. *See Env't Def. Fund*, 2 F.4th at 973. The magnitude of public benefits required to justify a project must

increase in proportion to the number and severity of the adverse impacts it causes. Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,749. In balancing interests and benefits, FERC considers intangible harms and economic interests, such as property rights. *Id.*; Draft Policy Statement, 178 FERC ¶ 61,686 at P 81. Condemnation of property causes intangible impacts that FERC cannot sufficiently analyze by simply looking towards the monetary damages of eminent domain. Draft Policy Statement, 178 FERC ¶ 61,686 at P 81.

FERC requires applicants to engage affected communities and landowners continuously throughout the project proposal process because eminent domain can cause irreversible harm. *Id.* PP 81-82. The affected landowners' interests are to be measured by the robustness of early and continued community engagement. *Id.* P 81; *see also* Certificate Policy Statement, 88 FERC at 61,748 (interest of landowners is to avoid unnecessary construction, and any adverse effects on their property associated with a permanent right-of-way).

Given the AFP's minimal public benefits, FERC's failure to adequately consider the significant economic and intangible harms that the use of eminent domain would inflict on HOME and other property owners is arbitrary and capricious. Rehearing Order, 199 FERC ¶ 72,201 at P 43. FERC's reasoning that using eminent domain is common in the construction of pipelines reflects insufficient consideration of the use of eminent domain. *Id.* This is contrary to both FERC's Certificate Policy Statement and precedent, demonstrating that its decision lacked thoughtful analysis. *Id.* P 33; *e.g.*, *Oberlin II*, 39 F.4th at 730 (no adverse effects because the project obtained land from 93% of landowners without using eminent domain); Draft Policy Statement, 178 FERC ¶ 61,686 at P 55 (applications missing information on end-use of gas may prevent an applicant from meeting its burden to show project need). FERC's decision that TGP took sufficient steps to minimize adverse effects is therefore arbitrary and capricious.

II. FERC violated RFRA because the AFP, as authorized by the CPCN, would substantially burden home’s religious exercise and does not further a compelling government interest through the least restrictive means.

RFRA safeguards the fundamental right to engage in the free exercise of religion without undue interference from facially neutral laws. 42 U.S.C. § 2000bb–1(a). When the government causes a substantial burden on religious expression, RFRA requires justification of this burden by showing that it is furthering a compelling interest through the least restrictive means. *Id.* § 2000bb–1(b).

RFRA was passed in 1993 to overturn *Employment Division v. Smith*. 494 U.S. 872, 877 (1990). In *Smith*, the Supreme Court held there was no need to inquire whether a restriction on religious expression served a significant government interest so long as the restriction was imposed by a law that was facially neutral in its application. *Id.*; 42 U.S.C. § 2000bb(a)(4). RFRA restored the compelling interest test, which is reviewed using strict scrutiny. 42 U.S.C. § 2000bb(b)(1); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1088 (9th Cir. 2008) (Fletcher, J., dissenting) (“by restoring the ‘compelling interest test,’ Congress restored the application of strict scrutiny”).

The interpretation of terms within RFRA, “including the definitions as to what constitutes a substantial burden,” is subject to de novo review. *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996). FERC’s interpretations of RFRA are not entitled to any special deference because FERC is not specifically charged with administering it; RFRA is a statute of general applicability to all actions taken by governments. *See Chevron U.S.A. Inc., v. NRDC*, 467 U.S. 837, 843 (1984); 42 U.S.C. § 2000bb(b).

Here, FERC’s issuance of the CPCN substantially burdens HOME’s free exercise by authorizing TGP to create a clear-cut area on HOME’s land that would destroy the meaning of a

practice that is central to HOME's religious expression. The CPCN does not serve a compelling government interest because the AFP merely functions to reshuffle natural gas distribution to secure TGP a commercial outlet. Even if the AFP were somehow found to further a compelling government interest, the CPCN is not the least restrictive means to do so; the AFP can be built using an Alternate Route that would bypass HOME's property entirely. Rehearing Order, 199 FERC ¶ 72,201 at P 39.

A. FERC's authorization of the AFP substantially burdens HOME's religious exercise.

The purpose of RFRA is to restore the requirement that the government satisfy the compelling interest test "in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Crucially, RFRA does not define what constitutes a substantial burden, which has created uncertainty and caused inconsistent applications of the law. The term "substantial burden" fails to appear anywhere in the text of the two cases that the RFRA cites as examples of the compelling interest test. *Id.* The lack of both statutory direction and Supreme Court interpretation has created a circuit court split on how to delineate when a facially neutral law substantially burdens religion.

1. The Court should use the plain meaning of substantial burden to further RFRA's legislative intent.

Some circuit courts, notably the Tenth Circuit, have broadly defined when a burden on religion qualifies as substantial. *E.g., Thiry*, 78 F.3d at 1495. By expanding the scope of circumstances where facially neutral laws that restrict religious practice can be challenged, the Tenth Circuit's interpretation aligns with both the plain meaning of the statutory language as well as RFRA's purpose. Other courts, notably the Ninth Circuit, have narrowly defined what constitutes a substantial burden on religious exercise. *E.g., Navajo*, 535 F.3d at 1062-63. This

interpretation is contrary to both RFRA’s plain reading and congressional intent. The Ninth Circuit has narrowly defined substantial burden to only apply to the two specific scenarios presented in *Sherbert v. Verner* and *Wisconsin v. Yoder. Id.*; *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (choosing between forfeiting government benefits and following religious precepts); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (perform acts at odds with fundamental religious tenets or face criminal sanctions). The text of RFRA clearly establishes that *Sherbert* and *Yoder* are referenced only for purposes of outlining the parameters of the compelling interest test. 42 U.S.C. § 2000bb(b)(1) (“The purposes of this chapter are (1) to restore the compelling interest test as set forth in [*Sherbert* and *Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened”).

The broader interpretation of the substantial interest test – which aligns best with both the text and intent of RFRA – is best articulated in *Thiry v. Carlson*. In *Thiry*, the court held that the state of Kansas could condemn the Thirys’ land and force the Thirys to relocate the gravesite of their recently-buried daughter. 78 F.3d at 1496. Although the gravesite held religious significance to the Thirys, the particular location was neither central nor fundamental to their religious practice, and thus the burden on the Thirys’ religion was insubstantial. *Id.* The court cogently outlined that for a regulation to meet RFRA’s substantial burden threshold, it must:

significantly inhibit or constrain conduct or expression that manifests some central tenet of . . . an individual’s beliefs; 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.

Id. at 1495 (quoting *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (internal brackets omitted)). Amendments to RFRA in 2000 removed the “central tenet” language, and with it the necessity that a religious exercise be mandatory to be protected under RFRA, thus making the

substantial burden test even broader. *Williams v. Wilkinson*, 645 F. App'x. 692, 698 (10th Cir. 2016).

The narrower interpretation of substantial burden that FERC uses comes from *Navajo Nation v. United States Forest Service*, which concerned land that was owned by the government, but considered sacred to several tribes. 535 F.3d at 1062-63. The court in *Navajo* repeatedly emphasized that the land at issue was government-owned because it was afraid that a broader interpretation of substantial burden would allow a flood of RFRA litigation that would constrain the government's intended uses of its own land. *Id.* at 1063-64 ("any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens"). By narrowly construing substantial burden to include only those situations in which the government has coerced someone to "act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate" their beliefs, the court focused on the form that a burden must take instead of the effect the burden has on religious exercise. *Id.* at 1063.

Here, the Tenth Circuit's substantial burden test should be applied because it aligns with the statutory language and furthers RFRA's purpose. Following the Tenth Circuit's interpretation, allowing the AFP to run across HOME's land would substantially burden the religious exercise of HOME's members. Unlike the plaintiffs in *Thiry*, who had only recently established their sacred gravesite, HOME's religious pilgrimage has been going on for a century. Rehearing Order, 199 FERC ¶ 72,201 at P 48. The AFP's route would decimate a portion of HOME's land it uses for its Solstice Sojourn, a practice of central religious significance. *Id.* The plaintiffs in *Thiry* lacked this significant detriment as their religious experience extended equally to other parts of their property, not just the gravesite. 78 F.3d at 1496. Thus, construction of the AFP on

HOME's land would substantially burden religious expression in a way that the grave relocation in *Thiry* did not. The deforestation would destroy the meaning of the ceremony and prevent HOME's members from exercising their religion on their own property. Rehearing Order, 199 FERC ¶ 72,201 at P 57.

The Ninth Circuit's substantial burden test as laid out in *Navajo* should not be applied here because both the facts and the court's reasoning are fundamentally distinguishable. Here, the land at issue is not government-owned; it is owned by HOME. *Id.* P 9. The court in *Navajo* was concerned about RFRA obstructing the government's intended uses of its own land, not about the government appropriating privately-owned sacred sites. 535 F.3d at 1063-64. The Ninth Circuit's interpretation of "substantial burden" does not further RFRA's purpose nor does it align with the statute's plain meaning.

2. Under the plain meaning of substantial burden, FERC's authorization of the AFP violates RFRA.

FERC relies on an overly narrow interpretation of substantial burden in order to avoid applying the compelling interest test. FERC asserted that only a physical barrier to religious exercise can rise to the level of a substantial burden. Rehearing Order, 199 FERC ¶ 72,201 at P 59. No court has found that RFRA is confined to such a limited scenario. FERC should have followed clear precedent: "a regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Civ. Liberties for Urb. Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

B. The CPCN does not further a compelling government interest.

When an otherwise neutral government action substantially burdens religious exercise, the government must furnish a compelling interest as justification. 42 U.S.C. §§ 2000bb-1(a -b).

Proffering an interest that qualifies as compelling is not an easy hurdle for the government to clear: “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Yoder*, 406 U.S. at 215.

Here, it is plain that the government cannot clear that hurdle. Indeed, neither FERC nor TGP articulate a compelling government interest that the AFP serves. Rehearing Order, 199 FERC ¶ 72,201 at PP 61-63. FERC has not even demonstrated that the AFP serves the public necessity under Section 7 of the NGA. *See infra* pp. 16-17. The AFP is merely an unnecessary rerouting of LNG that will eventually bring the vast majority of the LNG it transports to foreign markets. *See infra* p.13. Providing Brazil with LNG is not an interest of the highest order for the United States government. FERC has failed to provide any justification for the AFP that would suggest it serves a compelling government interest, therefore FERC has no grounds to substantially burden HOME’s religious exercise.

C. Burying the AFP on HOME’s property is not the least restrictive means of carrying out the government’s interest.

Even if the AFP served a compelling government interest, FERC does not use the least restrictive means to accomplish that interest. The AFP can be completed with an Alternate Route through the Misty Top Mountain range. Rehearing Order, 199 FERC ¶ 72,201 at P 39. This route avoids HOME’s property entirely and demonstrates that less restrictive means exist to complete the AFP without substantially burdening HOME’s religious exercise. *Id.*

In order to qualify as a least restrictive means, a government action must be “essential to accomplish an overriding governmental interest.” *S. Ridge Baptist Church, v. Indus. Comm’n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990) (quoting *United States v. Lee*, 455 U.S. 252, 257 (1982)). The standard is “exceptionally demanding,” requiring a showing that the government “lacks other means of achieving its desired goal without imposing a substantial burden on the

exercise of religion.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014).

Both FERC and TGP misinterpret the least restrictive means test. FERC poses that the “least restrictive means inquiry under RFRA involves comparing the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity.” Rehearing Order, 199 FERC ¶ 72,201 at P 63 n.15 (citing *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957 (E.D. Mich. 2014)). This is a simple cost analysis, which is inconsistent with the case law FERC cites. The precedent cases relied upon in *Ave Maria Foundation* define cost as the subjective weight of the burden on religious exercise. *S. Ridge Baptist Church*, 911 F.2d at 1206 (court must weigh “the extent to which accommodation of the defendant would impede the state’s objectives”); *Grosz v. City of Miami Beach*, 721 F.2d 729, 735 (11th Cir. 1983) (“The importance of the burdened practice within the particular religion’s doctrines and the degree of interference caused by the government both figure into the calculus.”). FERC’s simple monetary cost analysis effectively nullifies the purpose of the least restrictive means test because the government would always spend more money than individual religious practitioners regarding a particular action or law.

The correct and established interpretation of the least restrictive means test requires the government to execute its actions in a way that creates the smallest burden on religious exercise while still achieving its compelling interest. *Hobby Lobby*, 573 U.S. at 728. In certain circumstances, no less restrictive means are available. *E.g.*, *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000). But, where a “less restrictive means is available for the Government to achieve its goals, the Government must use it.” *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815, (2000). In *Indianapolis Baptist Temple*, the court held that applying federal employment tax laws to churches was the least restrictive means for the

government to achieve its compelling interest in an efficient income tax system. 224 F.3d at 629. Creating tax carve-outs for every religious organization would render the government unable to achieve its compelling interest, so there was no less restrictive means to keep religion from being burdened. *Id.*

Here, the least restrictive means scenario is easily distinguishable. Not only does a means less restrictive already exist in the Alternate Route, there is no cost to the government of making use of this means. TGP, not the government, would be responsible for the estimated \$51 million in additional construction costs that the Alternate Route would entail. Rehearing Order, 199 FERC ¶ 72,201 at P 44. Thus, even under the most literal and de-contextualized interpretation of the *Ave Maria Foundation* least restrictive means test, the costs to HOME would outweigh the nonexistent costs borne by the government.

TGP's contention that "maintaining a coherent natural gas pipeline permitting system," constitutes the least restrictive means confuses both the nature of least restrictive means and HOME's RFRA claim. *Id.* P 63. HOME is not challenging the pipeline permit system as a whole, but whether running the AFP over its property serves a compelling interest in a way that imposes the lightest possible burden on its religious exercise. Unlike taxes, which are imposed uniformly, the construction of gas pipelines is inherently ad hoc, so challenges to the route of a two-mile section of one pipeline do not imperil FERC's permitting system nationally. Indeed, FERC regularly makes decisions on a case-by-case basis by accounting for individual landowners. *See, e.g.,* Draft Policy Statement, 178 FERC ¶ 61,686 at P 84 (FERC establishing a policy of staying certificate orders during rehearing on a case-by-case basis when eminent domain will be used); Draft Policy Statement, 178 FERC ¶ 61,686 at P 93 (FERC using a case-by-case decision making process to develop public benefit analysis when environmental justice communities are

involved). Requiring FERC to make a case-specific determination here and utilize the least restrictive means of burdening HOME's religious exercise is not special treatment, it is in accordance with the law and FERC's own guidance.

III. The GHG conditions imposed by FERC are within its authority under the NGA.

FERC has power under the NGA to impose GHG mitigation conditions as part of its responsibility to evaluate public convenience and necessity when issuing a CPCN. 15 U.S.C. § 717f(e). Courts have confirmed that FERC should exercise this authority to protect the public interest. *Sierra Club*, 867 F.3d at 1374; *Bordentown*, 903 F.3d at 261 n.15.

The GHG Conditions in the CPCN align with the climate mitigation goals of both the CEQ and the executive branch. CEQ Guidance, 88 Fed. Reg. 1196; 86 Fed. Reg. 7037. Because the AFP EIS indicated clear and foreseeable GHG impacts, FERC was within its authority to impose the GHG Conditions. *See Sierra Club*, 867 F.3d at 1374. The imposition of the GHG Conditions does not constitute a major question because requiring GHG conditions is within the traditional scope of FERC's regulatory power. Rehearing Order, 199 FERC ¶ 72,201 at P 88; *see West Virginia*, 142 S. Ct. at 2595. Whether FERC has authority to impose GHG conditions is a question of law reviewed de novo. *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012).

A. The GHG Conditions follow CEQ Climate Guidance, executive branch policy, and FERC's own precedence.

The GHG Conditions are based on the CEQ's climate guidance, which expressly recognizes the climate crisis and encourages agencies to mitigate GHG emissions associated with their proposed actions. CEQ Guidance, 88 Fed. Reg. 1196. While FERC is not required to follow CEQ rules, it generally does so. Rehearing Order, 199 FERC ¶ 72,201 at P 70. FERC is in the process of drafting regulations to formalize requirements for pipeline applicants to mitigate GHG impacts. *Id.*

FERC is housed within the DOE, an executive branch agency. The executive branch has expressly directed agencies to take reasonable actions to minimize GHG emissions. 86 Fed. Reg. 7037. The imposition of the GHG Conditions is consistent with the executive branch's commitment to mitigating GHG emissions, and within FERC's authority. *Id.*; CEQ Guidance, 88 Fed. Reg. 1196; Rehearing Order, 199 FERC ¶ 72,201 at P 70.

FERC's consideration of the AFP's GHG impacts is not a novel endeavor. *See Sierra Club*, 867 F.3d at 1374; *Bordentown* 903 F.3d at 261 n.15; 15 U.S.C. §717b(a); *Atl. Coast Pipeline*, 164 FERC ¶ 61,100. FERC has a well-established precedent of considering GHG impacts in permitting decisions in accordance with the legal framework provided by the NGA. *Id.* FERC's history of imposing GHG conditions in CPCNs demonstrates its commitment to addressing GHG emissions associated with pipeline construction and operation. *Id.*

This precedent, outlined in environmental assessments for projects like the Philadelphia Lateral Expansion Project and the Minisink Compressor Project, is a reasonable and justified exercise of FERC's authority. Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (construction emissions); Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515000, at 29 (Feb. 29, 2012) (operation emissions). The AFP GHG Conditions align with prior lawful requirements of GHG mitigation that FERC has imposed on other projects. The imposition of GHG mitigation requirements in the CPCN is supported by precedent rooted in FERC's responsibility to ensure that public convenience and necessity are upheld.

B. The AFP EIS indicated that GHG mitigation efforts were necessary.

Under NEPA, FERC has a responsibility to consider the environmental impacts of issuing CPCNs for pipeline projects. *See* 42 U.S.C. § 4332(C). NEPA requires an environmental impact

statement (“EIS”) for any major federal action likely to significantly impact the environment. *Id.* If an EIS identifies significant environmental impacts associated with a proposed pipeline project, FERC can require mitigation to reduce those impacts as a condition of issuing a CPCN. 15 U.S.C. § 717; 42 U.S.C. § 4332. FERC has the authority to require a wide range of mitigation measures, such as using the best available technologies, implementing emissions reduction strategies, and restoring or enhancing affected natural resources. FED. ENERGY REGUL. COMM’N, GUIDANCE MANUAL FOR ENV’T REPORT PREPARATION, 1-27 (Feb. 2017).

The AFP EIS is essential to assessing the lawfulness of FERC’s imposition of GHG mitigation efforts. Rehearing Order, 199 FERC ¶ 72,201 at P 72. FERC analyzed downstream GHG impacts, focusing on utilizing LNG transported by the AFP. *Id.* Additionally, FERC examined the GHG impacts of constructing the AFP. *Id.* P 73. Requiring mitigation of the clearly foreseeable GHG emissions is reasonable, feasible, and proportionate to the project’s environmental impacts.

The AFP EIS evaluation of GHG impacts, both downstream and during construction, aligns with FERC’s statutory mandate under the NGA to consider public convenience and necessity when issuing CPCNs. 15 U.S.C. §§ 717b(a), 717f(e). This mandate includes the authority to impose reasonable terms and conditions on CPCNs, such as conditions to mitigate GHG emissions. *Sierra Club*, 867 F.3d at 1374. FERC’s imposition of GHG mitigation measures is a lawful exercise of its authority under NEPA and the NGA.

C. The GHG Conditions do not fall under the major questions doctrine.

The Supreme Court has recently articulated the major questions doctrine, which underscores the necessity for clear congressional authorization in extraordinary cases where an agency action bears large-scale, industry-wide economic and political significance. *West*

Virginia, 142 S. Ct. at 2595. Here, the GHG Conditions are specific and project-focused. Rehearing Order, 199 FERC ¶ 72,201 at P 89. They are not broad mandates affecting the economy at-large, nor even the entire natural gas sector. *Id.* Instead, they mitigate the specific environmental impact of the AFP, minimizing their economic and political ripple effects. *Id.*

Section 7 of the NGA unambiguously empowers FERC to set specific terms and conditions when permitting projects, including the requirement of environmental mitigation measures. 15 U.S.C. §§ 717b(a), 717f(e). Because of FERC’s explicit congressional authorization to impose conditions when granting CPCNs, it is not subject to the major questions doctrine. *See West Virginia*, 142 S. Ct. at 2604; *N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 296 (4th Cir. 2023). Courts have consistently supported this authority, a recognized aspect of FERC’s regulatory power. *Sierra Club*, 867 F.3d at 1374; *Bordentown* 903 F.3d at 261 n.15; 15 U.S.C. §717b(a); *Atl. Coast Pipeline*, 164 FERC ¶ 61,100.

FERC possesses the discretionary authority to impose conditions to mitigate what are traditionally considered “environmental harms.” *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 393 (D.C. Cir. 2017). FERC’s discretionary authority is grounded in its mandate under the NGA and has become a fundamental component of its regulatory framework. 15 U.S.C. §§ 717b(a), 717f(e); *Bordentown*, 903 F.3d at 261 n.15; *Sierra Club*, 867 F.3d at 1374. It is both logical and legally tenable for FERC to extend this mitigation authority to address the growing concern of GHG emissions. Rehearing Order, 199 FERC ¶ 72,201 at P 88.

IV. FERC’s decision not to impose any conditions addressing downstream and upstream GHG impacts is arbitrary and capricious.

FERC is obligated to consider and mitigate upstream and downstream GHG emissions when issuing CPCNs for natural gas pipelines, and its failure to require upstream and downstream mitigation of the AFP violates its statutory mandate under both NEPA and the NGA.

Upstream and downstream GHG emissions are reasonably foreseeable indirect effects of authorizing natural gas pipelines and must be considered under NEPA. *See* 40 C.F.R. § 1508.8(b) (2023). FERC’s decision to require mitigation for the significant GHG construction impacts of the AFP, while failing to analyze or mitigate the significant upstream and downstream GHG emissions associated with the project, is arbitrary and capricious.

Whether FERC’s imposition of GHG mitigations is arbitrary and capricious is a question of law and is reviewed de novo. *Miranda*, 684 F.3d at 849. FERC's failure to comply with the APA is a frequent ground for judicial review. 5 U.S.C. §§ 702, 706. In *Food & Water Watch v. FERC*, the court found that in its environmental assessment for a proposed pipeline, FERC arbitrarily and capriciously failed to account for the GHG emissions associated with burning the gas that the pipeline would transport. 28 F.4th 277, 281 (D.C. Cir. 2022). Similarly, in *Sierra Club*, the court held that FERC acted arbitrarily and capriciously because its EIS for a proposed pipeline failed to consider the GHG emissions associated with the pipeline’s downstream use. 867 F.3d at 1374.

A. FERC has explicitly-delegated authority from Congress to require upstream and downstream mitigation of GHG emissions.

Congress has explicitly granted FERC the authority under both NEPA and the NGA to require mitigation of GHG emissions for upstream and downstream impacts of projects. 15 U.S.C. § 717f(e); 40 C.F.R. §§ 1502.16, 1508.8 (2023). Under NEPA, FERC must consider a proposed project’s direct, indirect, and cumulative effects, including GHG emissions and climate change impacts. 40 C.F.R. § 1508.25 (2023). The NGA mandates FERC regulate the interstate transmission and sale of natural gas in the public interest. 15 U.S.C. § 717f(e). This authority includes the power to require mitigation of GHG emissions from natural gas pipelines. *See Sierra Club*, 867 F.3d at 1374. In light of this congressional mandate, FERC is obligated to

require mitigation of the AFP's upstream and downstream GHG emissions.

B. Upstream and downstream impacts of the AFP are reasonably foreseeable.

NEPA mandates that an EIS examines a project's reasonably foreseeable direct and indirect effects. 40 C.F.R. §§ 1502.16, 1508.8, 1508.8(b) (2023). An environmental impact is reasonably foreseeable when it is sufficiently likely to occur, and a person of ordinary prudence would consider it when making decisions. *Id.* § 1508.8(b); CEQ Memorandum on Indirect Effects, 87 Fed. Reg. 23453 (Aug. 10, 1981) (to be codified at 40 C.F.R. §§ 1502, 1507-08); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 490-91 (1989). In December 2014, the CEQ issued a draft guidance to provide agencies with direction when considering the effects of GHG emissions and climate change. CEQ Guidance, 88 Fed. Reg. 1196 (Jan. 9, 2023). This guidance clarified that emissions resulting from agency actions must be incorporated into the NEPA analysis. *Id.* CEQ's interpretation of NEPA carries substantial deference. *Ky. Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 407 (6th Cir. 2013).

FERC's duty to mitigate these reasonably foreseeable upstream and downstream impacts is supported by *Sierra Club*. 867 F.3d at 1374. There, the court ruled that FERC had to consider the full climate impact of a pipeline, including the GHG emissions from the power plants it would supply. *Id.* Here, GHG emissions are indirect effects of authorizing the AFP, and FERC can reasonably foresee them. Rehearing Order, 199 FERC ¶ 72,201 at P 72-73. Therefore, FERC has a "legal authority to mitigate the impact," and failure to do so would violate FERC's legal obligations. *Bordentown*, 903 F.3d at 261 n.15.

FERC is obligated to consider both upstream and downstream GHG emissions as indirect effects when issuing CPCNs for natural gas pipelines. *Food & Water Watch*, 28 F.4th at 281.

NEPA requires that in an EIS, the agency takes a "hard look" at a proposed action's

environmental consequences and reasonable alternatives. *Robertson*, 490 U.S. at 350; *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989); *Kleppe v. Sierra Club*, 427 U.S. 290, 410 n.21 (1976). GHG emissions have environmental consequences, and FERC can condition its approval of pipeline projects on the mitigation of GHG impacts. FED. ENERGY REGUL. COMM'N, NOTICE INVITING TECH. CONFERENCE COMMENTS, Docket No. PL21-3-000 (Nov. 16, 2021). In determining the extent of GHG emissions mitigation, FERC considers reasonably foreseeable emissions with a reasonably close causal relationship to the proposed action. *Id.* Downstream GHG emissions are indirect effects of natural gas pipelines because they are a foreseeable consequence of building and operating pipelines. *See Sierra Club*, 867 F.3d at 1374.

The gas transported by the AFP will be produced in the HFF. Rehearing Order, 199 FERC ¶ 72,201 at P 12. Because FERC is aware of the upstream impact of the AFP, it must take steps to mitigate the GHG emissions caused by the fracking that will produce the LNG transported by the AFP. Similarly, the downstream impacts of the GHG emissions caused by the burning of the LNG the AFP would transport and leaks during storage and transportation are not just reasonably foreseeable, but certain. Therefore, FERC must mitigate the downstream and upstream impacts of the AFP.

C. FERC's failure to require mitigation of upstream and downstream impacts of the AFP violates the APA.

Despite findings in the AFP EIS that the project could generate 9.7 million metric tons of CO₂e per year in downstream emissions, FERC did not require any mitigation of the AFP's upstream or downstream GHG emissions. Rehearing Order, 199 FERC ¶ 72,201 at P 97. FERC's decision to forgo any mitigation measures for the AFP's substantial GHG emissions, despite clear evidence of their environmental harm, is arbitrary and capricious. FERC's failure to act on

the well-documented environmental impacts of the AFP's projected GHG emissions demonstrates a clear disregard for the public interest.

FERC argues that mitigating upstream and downstream GHG emissions is not required unless the impacts are "significant." Rehearing Order, 199 FERC ¶ 72,201 at P 81. FERC has yet to determine whether GHG impacts are significant or insignificant. *Id.* However, despite this, FERC determined that the construction GHG impacts were significant and thus warranted mitigation. *Id.* P 82. FERC's finding that the construction GHG impacts were significant while failing to find that the upstream and downstream impacts were significant is arbitrary and capricious. FERC's decision to issue the CPCN without requiring mitigation of upstream and downstream GHG emissions was not based on the relevant factors, its explanation for the decision was not rational and was not supported by the evidence, and its decision was inconsistent with its own regulations and past decisions.

D. Requiring upstream and downstream mitigation of GHG emissions does not constitute a major question.

FERC stated that its authority to require mitigation of upstream and downstream GHG emissions is not limited by the major questions doctrine. Rehearing Order, 199 FERC ¶ 72,201 at P 86. The NGA unequivocally grants FERC the authority to establish specific terms and conditions on permitting pipeline construction, and this authority is consistently exercised to protect the public interest. 15 U.S.C. § 717f(e). FERC has a long history of imposing mitigation conditions on CPCNs to address environmental impacts, including GHG emissions. *Sierra Club*, 867 F.3d at 1374 ("As we have noted, greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate."); *Bordentown*, 903 F.3d at 261 n.15 (noting FERC's authority to enforce any required remediation is supported by the NGA). GHG Conditions imposed by FERC do not

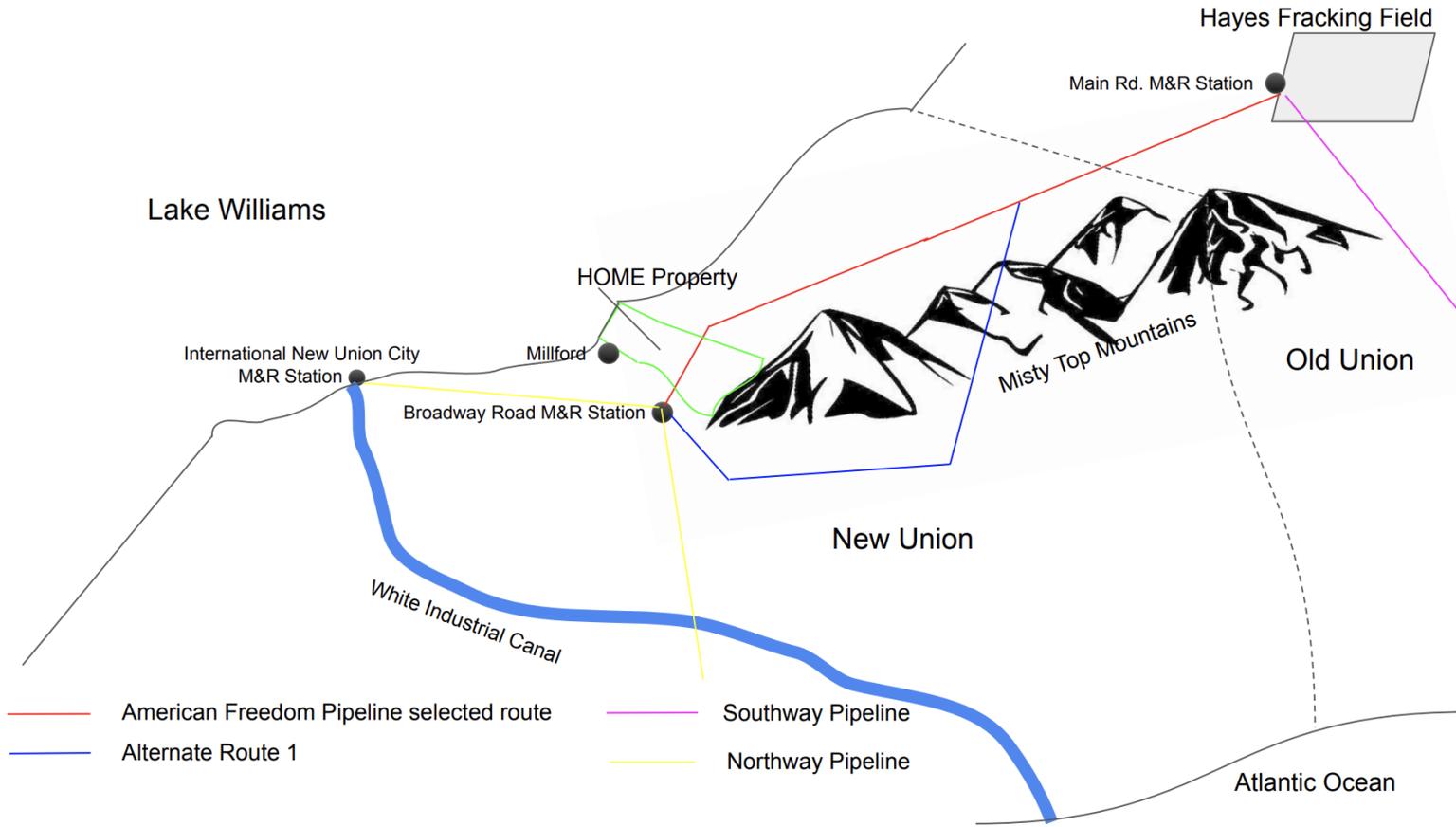
address major questions outside the scope of FERC's delegated authority. *See infra* pp. 29-30. Therefore, FERC requiring upstream and downstream mitigation when permitting a project is within FERC's authority.

CONCLUSION

For the foregoing reasons, HOME respectfully requests that this Court vacate FERC's CPCN to TGP for the construction of the AFP and remand the matter to FERC for further consideration. The Court should vacate FERC's decision because there are serious flaws in FERC's decision making process, and there will be minimal disruptive consequences since there is no pressing need for the project and construction of the AFP has not begun. *Env't Def. Fund*, 2 F.4th at 978 (quoting *Allied-Signal, Inc. v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). Moreover, natural gas will not be wasted if the project is canceled because the 100% of the natural gas obtained from the HFF is currently being used to service areas in Old Union. Therefore, FERC's decision should be vacated as FERC failed to provide the necessary facts and sound reasoning to justify granting a CPCN.

APPENDICES

I. Appendix 1- Diagram of AFP



II. Appendix 2- Abbreviations Used in Brief

AFP: American Freedom Pipeline

APA: Administrative Procedures Act

CEQ: Council on Environmental Quality

CPCN: Certificate of Public Convenience and Necessity

DOE: Department of Energy

EIS: Environmental Impact Statement

FERC: Federal Energy Regulatory Commission

GHG: Greenhouse gas

HFF: Hayes Fracking Field

HOME: Holy Order of Mother Earth

LNG: Liquefied natural gas

NEPA: National Environmental Policy Act

NGA: Natural Gas Act

NUG: New Union Gas and Energy Services Company

TGP: Transnational Gas Pipelines, LLC