

Docket No. 23-01109

**THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT**

TRANSNATIONAL GAS PIPELINES, LLC
Petitioner

-and-

HOLY ORDER OF MOTHER EARTH
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

On Petition for review filed by Holy Order of Mother Earth in Docket. 23-01109. Petition for review filed by Transnational Gas Pipelines, LLC was docketed as 23-01110, and was consolidated with Docket 23-01109. Chief Judge Delilah Dolman

Brief of Appellant, TRANSNATIONAL GAS PIPELINES, LLC

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National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions

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Power Sector Evolution, EPA, (May 19, 2023), [https://www.epa.gov/power-sector/power-sector-](https://www.epa.gov/power-sector/power-sector-evolution)

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Twelfth Circuit has jurisdiction over Petitions for Review of final decisions issued by FERC under 15 U.S.C. § 717r(b) (1938). The Federal Energy Regulatory Commission (“FERC”) issued an Order (the “Rehearing Order”) on May 19, 2023, denying rehearing requests for an order granting a Certificate of Public Convenience and Necessity (the “CPCN”) for the construction of the American Freedom Pipeline (“AFP”) by Transnational Gas Pipelines, LLC (“TGP”). FERC had subject-matter jurisdiction to grant the CPCN and issue a denial of the rehearing, which is a final decision, under 15 U.S.C. § 717f (1938). TGP and the Holy Order of Mother Earth (“HOME”) filed Petitions for Review of the CPCN and Rehearing Order on June 1, 2023.

STATEMENT OF ISSUES PRESENTED

- I. Was FERC’s finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project need where 90% of the gas transported by that pipeline was for export?
- II. Was FERC’s finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?
- III. Was FERC’s decision to route the AFP over HOME property despite HOME’s religious objections in violation of the Religious Freedom Restoration Act (“RFRA”)?
- IV. Were the Green House Gas Conditions imposed by FERC beyond FERC’s authority under the Natural Gas Act (“NGA”)?
- V. Was FERC’s decision not to impose any Green House Gas Conditions addressing downstream and upstream Green House Gas impacts arbitrary and capricious?

STATEMENT OF THE CASE

I. The Pipeline

Liquified natural gas (“LNG”) demand has been declining in states east of Old Union that were traditionally served by production at the Hayes Fracking Field (“HFF”) and transported via the Southway Pipeline. R. at 6. TGP seeks to reroute approximately 35 percent of the unneeded LNG produced at HFF to new customers by constructing the AFP and connecting it with the Southway Pipeline. R. at 6. FERC issued a CPCN to TGP for the construction of the AFP in April 2023. R. at 4.

In anticipation of the AFP’s construction, TGP executed two binding precedent agreements with International Oil & Gas Corporation (“International”) and New Union Gas and Energy Services Company (“NUG”). R. at 4. Between these two agreements, the AFP will deliver 500,000 dekatherms (“Dth”) of LNG per day to customers which otherwise might have gone unused because of diminishing demands on the Southway pipeline. R. at 4, 9. This project, consisting of nearly 100 miles of pipeline and costing almost \$600 million, will provide natural gas to previously unserved areas of New Union, better optimize the LNG infrastructure in New and Old Union, and serve international natural gas demands. R. at 4-5, 8.

Under the precedent agreements, International and NUG will use the total capacity of the AFP without requiring more natural gas production at HFF or impacting existing customers. R. at 6, 8. Approximately 90 percent of the gas will travel to the Port of Union City for International to export to Brazil, and 10 percent will serve new domestic customers in New Union. R. at 8.

The AFP takes a cost-effective and direct route from the Southway Pipeline’s Main Rd. M&R Station in Old Union across property owned by HOME to the Northway Pipeline’s Broadway Road M&R Station in New Union. R. at 4-5, 11, 21. HOME’s property spans 15,500 acres in New Union. R. at 5. The 30-inch diameter pipe used in constructing the AFP will run

parallel to the Misty Top Mountains, running underground across approximately 2 miles of HOME's property to its connection with the Northway Pipeline. R. at 4, 10-12. TGP will remove approximately 2,200 trees on HOME's property to construct the AFP. R. at 10.

HOME is a religious organization that "considers the natural world to be sacred," and believes that people should preserve nature at any cost. R. at 11. Members of HOME take a bi-annual ceremonial "Solstice Sojourn" to the foothills of the Misty Top Mountains. R. at 11. The path of the Solstice Sojourn would intersect the AFP in two places. R. at 11. In response to landowners' complaints about the pipeline, TGP has changed over 30 percent of the project. R. at 10. TGP has agreed to bury the AFP where it crosses HOME's property while expediting construction to avoid interference with the Solstice Sojourn. R. at 10. HOME would prefer FERC re-route the AFP over the Misty Top Mountains, which would cause more environmental harm to a sensitive ecosystem and cost an additional \$51 million. R. at 10-11.

FERC has attached several conditions to the construction of the AFP in the CPCN Order to mitigate greenhouse gas emissions (the "GHG Conditions"). R. at 14. With the GHG Conditions in place, the AFP will produce approximately 88,340 metric tons of GHG per year, or 104,100 metric tons without the GHG Conditions. R. at 15. FERC has imposed similar conditions in four of five subsequent CPCN orders for other pipeline constructions. R. at 16. To comply with the GHG Conditions, TGP must ensure that for every tree that is removed in construction, another is planted. R. at 14. TGP must also use electric chainsaws, tools, and vehicles while constructing the AFP "wherever practical". R. at 14. Additionally, TGP is restricted to purchasing "green" steel from net-zero manufacturers and electricity from renewable sources for the construction, "where such sources are available." R. at 14. FERC estimates that if these conditions are imposed, it will reduce the construction's annual

greenhouse gas emissions by about 20,000 metric tons. R. at 15. FERC has declined to impose GHG Conditions to mitigate the nearly 9.7 million metric tons of greenhouse gases that will result annually from the AFP's operation. R. at 15-16.

II. The Certificate of Public Convenience and Necessity Process

Congress granted FERC the authority to regulate the interstate transportation of natural gas in the NGA. 15 U.S.C. §§ 717b, 717c (1938). Under Section 7 of the NGA, FERC has the authority to approve or deny a CPCN for the construction or extension of interstate natural gas pipelines. *Id.* § 717f(c); *Cal. Gas Producers Ass'n v. FPC*, 383 F.2d 645, 648 (9th Cir. 1967) (holding that granting a CPCN is peculiarly within the discretion of FERC). A CPCN shall be issued to “any qualified applicant” that demonstrates the extension or construction “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e) (1938). FERC's issued Policy Statement outlines the criteria considered during the application process for a CPCN. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified* 90 FERC ¶ 61,128, *further certified*, 92 FERC ¶ 61,094 (2000).^{*} The threshold question for granting a CPCN requires FERC to confirm that “the project can proceed without subsidies from . . . existing customers.” 88 FERC ¶ 61,227, at 61,745. The parties stipulate this is not an issue in this case. R. at 7.

FERC then establishes if there is a market need for the proposed project. 88 FERC ¶ 61,227, at 61,745. If so, FERC then must engage in an “economic test” to determine if the public

^{*} In February 2022, FERC issued an order updating the policy statement to reflect new criteria. *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022). However, FERC issued an order in March 2022 that converted the new policy statements to draft policy statements and included that it will not apply to “applications filed before the Commission issues any final guidance in these dockets,” rendering the 92 FERC Order the governing policy on factors to evaluate a CPCN. *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,197 (2022).

benefits outweigh the adverse effects of the project that could not be minimized or eliminated. *Id.* FERC must balance the benefits against the adverse effects on existing pipeline customers and landowner communities affected by the new pipeline's route. *Id.* The parties stipulate that there are no adverse effects on existing customers or existing pipelines in the market and their captive customers. R. at 7. FERC only issues a CPCN when the project's adverse effects are outweighed by the public benefits, considering all relevant factors. 90 FERC ¶ 61,128, at 61,396. FERC may attach "reasonable terms and conditions" to a CPCN as required. 15 U.S.C. § 717f(e) (1938); *Murray Energy Corp. v. FERC*, 629 F.3d 231, 234 (D.C. Cir. 2011).

III. The National Environmental Protection Act Process

FERC also simultaneously incorporates an environmental review of the project under the National Environmental Policy Act ("NEPA"). National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1969); *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196 (Jan. 9, 2023). FERC must prepare an environmental impact statement for all "major Federal actions" that significantly impact the "quality of the human environment." 42 U.S.C. § 4332(2)(C) (1970). This process requires that federal agencies review proposed projects to identify reasonable alternatives to the proposed actions and look hard at the environmental effects of the project. *Corridor H Alts., Inc. v. Slater*, 166 F.3d 368, 374 (D.C. Cir. 1999); *City of Bos. Delegation v. FERC*, 897 F.3d 241, 246 (D.C. Cir. 2018). TGP completed a detailed Environmental Impact Statement ("EIS") for the AFP and FERC used it to conduct its NEPA analysis. R. at 15, 18.

IV. The Proceedings

FERC granted TGP a CPCN for the construction of the AFP in April 2023. R. at 2. Later that month, both HOME and TGP filed petitions for rehearing on several issues in the CPCN. R.

at 2. TGP contended that the GHG conditions imposed by FERC were beyond FERC's authority under the NGA. R. at 2. HOME argued that FERC incorrectly granted the CPCN, contending that there was no project need for the CPCN, that the AFP route violated RFRA, and that FERC should have imposed GHG Conditions to address the AFP's upstream and downstream greenhouse gas effects. R. at 2. FERC denied these petitions. R. at 2. In June 2023, both parties filed Petitions for Review in this Court, challenging FERC's denial. R. at 2.

SUMMARY OF ARGUMENT

FERC's granting of the CPCN Order was not arbitrary and capricious because there is substantial evidence to demonstrate project need for the AFP through precedent agreements and other domestic benefits. FERC considers all relevant factors when evaluating project need which includes market demand, precedent agreements, and public benefits. The AFP serves multiple domestic benefits beyond the export of LNG that are sufficient to establish project need required for a CPCN. The largest domestic public benefits provided are the transportation of LNG to the NUG terminal for domestic use and the 500,000 Dth per day that will travel across state borders and connect to the Northway Pipeline. Moreover, the AFP provides gas to domestic customers and improves access to natural gas for previously unserved areas. These are all evidence of important domestic public benefits that support the need for the AFP.

The NGA does not require public benefit to be exclusively domestic, so despite 90 percent of the LNG transported through the AFP being exported, it is still demonstrative of project need. The NGA does not require the project need to be solely domestic simply because it is a domestic statute. TGP also transports and sells natural gas in interstate commerce, placing it under the regulation of the NGA. Exported gas is still sufficient evidence to establish a project need for a CPCN when the project also engages in domestic use. Furthermore, the LNG

transported in the AFP is involved in interstate commerce because it is transported across state lines from Old Union to New Union. Additionally, the LNG that is being exported comes along with the LNG that is being used domestically, making the International LNG itself part of interstate commerce and sufficiently indicative of project need.

Precedent Agreements are sufficient evidence to establish project need for a CPCN. TGP's two precedent agreements, accounting for 100 percent of the pipeline capacity, are concrete examples of market need that justify the CPCN. Even if this Court determined that International's precedent agreement was not evidence of project need, the precedent agreement with NUG for 10 percent of AFP's load capacity is still sufficient evidence as there is no minimum floor subscription rate a company must meet. Accordingly, this Court should affirm FERC's Rehearing Order because FERC's finding of public convenience and necessity for the AFP was not arbitrary and capricious.

The CPCN Order for the AFP is supported by a meaningful analysis of the public benefits against the adverse environmental and social harms the project to landowners and surrounding communities. FERC's finding that the benefits from the AFP outweighed the adverse effects was not arbitrary and capricious because TGP mitigated the adverse effects to the extent feasible. TGP worked with HOME to mitigate the adverse environmental effects of the loss by agreeing to bury the pipeline for the two miles crossing HOME's property and expediting construction to minimize disruption.

Additionally, TGP worked with other surrounding landowners to change over 30 percent of the pipeline in response to landowners' comments and negotiated mutually acceptable easement agreements with over 50 percent of landowners. Despite TGP's best efforts to minimize the adverse effects of the pipeline, it is not possible to reroute the entire pipeline to

satisfy every landowner. This Court should find that FERC properly determined that the adverse environmental effects on HOME's property do not outweigh the substantial public benefits of the AFP.

The CPCN was appropriately granted because the alternative route is more environmentally harmful than the approved AFP route. FERC has the discretion to reject an alternative that has greater projected environmental effects than the original project proposal. The alternate route would cause more objective environmental harm because it would add three miles to the AFP through the more environmentally sensitive ecosystem of the Misty Top Mountains. FERC correctly decided that the significant environmental effects of the alternative route are less preferable than the original route, especially considering TGP's mitigation efforts.

The adverse effects of the AFP on HOME's religious beliefs do not outweigh the public benefits of the AFP. TGP mitigated the adverse effects of the AFP to the extent feasible on HOME's religious beliefs by agreeing to bury the pipeline and expediting the building process to a four-month period to avoid the Solstice Sojourns. Beyond using the more environmentally destructive proposed alternative route, TGP could not mitigate the effects any further. Accordingly, this Court should affirm FERC's Rehearing Order because the AFP's adverse effects do not outweigh the public necessity of the project.

FERC's decision to route the AFP over HOME's property did not violate RFRA because FERC did not substantially burden HOME's exercise of religion. RFRA prohibits the government from taking actions that place a "substantial burden" on religious exercise unless that burden furthers "a compelling government interest" and "is the least restrictive means of furthering that . . . interest." Religious Freedom Restoration Act of 1993, 42 U.S.C § 2000bb-1(a) (1993). Government actions that interfere with the practice of religion do not rise to the level of

substantial burden under RFRA unless there is an element of coercion. Coercion is present when the religious organization is faced with an impossible choice of violating its religious tenants or suffering severe penalties. Though the construction of the AFP will diminish HOME's subjective satisfaction in its religious practices, the AFP will not prevent HOME from practicing its religion. Additionally, HOME has not demonstrated a substantial burden because it faces no penalty for following its religion.

Even if this Court finds that FERC imposed a substantial burden on HOME, the CPCN serves a "compelling government interest" and the CPCN is the "least restrictive means of furthering that . . . interest." *Id.* § 2000bb-1(b). The government has a compelling interest in maintaining a coherent, efficient system of natural gas pipelines. FERC should not be required to yield to every dissatisfied landowner by inefficiently routing pipelines to avoid private property. Allowing this would create a chaotic, disjointed national energy system and increase inefficiency.

TGP has made several changes to the AFP to accommodate landowners' concerns. The AFP will be buried over HOME property, and TGP will expedite construction under the CPCN. This demonstrates that the CPCN is the least restrictive means of furthering FERC's compelling government interest. This Court should affirm FERC's denial of rehearing on HOME's argument that the CPCN violates RFRA.

FERC is attempting to go beyond its statutory authority under the NGA by imposing the GHG Conditions on the AFP's construction. The GHG Conditions raise a major question because Congress did not intend to grant FERC the power to regulate climate change. FERC has exceeded its statutory authority by wielding its power to attach "reasonable terms and conditions as the public convenience and necessity may require" to CPCNs and mandate the types of chainsaws and trucks TGP can use in the AFP's construction. 15 U.S.C. § 717f(e) (1938). The

agency itself acknowledges that “the issue of how to address climate change as a whole is undoubtedly a major question,” yet has imposed GHG Conditions in this case and in four of five subsequent CPCNs. Imposing GHG Conditions in CPCNs will discourage companies from expanding natural gas infrastructure in the United States, and this Court should not allow such a “radical departure” from FERC’s traditional authority under the NGA. This Court should vacate FERC’s Rehearing Order on this issue and remand with instructions to remove the GHG Conditions.

Additionally, FERC’s decision not to impose GHG Conditions addressing downstream and upstream effects was not arbitrary and capricious because doing so would raise a major question. While FERC may consider the indirect and cumulative effects of the AFP in its analysis, mandating mitigation efforts would be beyond its statutory authority because the mandates would have significant economic and political implications. Allowing FERC to impose these mitigation conditions would have a chilling effect on natural gas infrastructure development.

Even if the GHG Conditions would not raise a major question, FERC’s decision was not arbitrary and capricious because NEPA does not require FERC to mitigate upstream and downstream effects. NEPA’s requirements are procedural and do not mandate a specific government action. While FERC must take a hard look at the reasonably foreseeable indirect and cumulative effects of major actions, the agency is not required to take any particular course of action. FERC properly evaluated the quantity of natural gas the AFP will transport and the emissions from burning it. That is all NEPA requires the agency to do. FERC’s decision to impose the GHG Conditions on the AFP’s construction does not change this analysis. The emissions from construction would be new, but the emissions from burning the natural gas are

already occurring because the AFP is merely re-routing gas from an existing pipeline. While TGP maintains that FERC's decision to impose GHG Conditions on the AFP's construction is outside the agency's statutory authority, FERC's decision not to impose mitigation requirements for upstream and downstream effects was not arbitrary and capricious. This Court should affirm FERC's denial of rehearing on this issue.

STANDARD OF REVIEW

The standard of review for a FERC Order denying rehearing on a CPCN is limited to determining if the order was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A), 706(2)(D) (1946). The decision to grant or deny a CPCN is “peculiarly within the discretion of” FERC, so this Court should not “substitute its judgment” in place of FERC upon review. *Okla. Nat. Gas Co. v. FPC*, 257 F.2d 634, 639 (D.C. Cir. 1958); *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004). When evaluating FERC's decision, this Court should determine whether FERC's decision was “reasoned, principled, and based upon the record.” *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). If FERC's decision is supported by substantial evidence, then FERC's “findings of fact” are conclusive and the CPCN should be upheld. *B&J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004) (citing 15 U.S.C. § 717r(b) (1938)).

ARGUMENT

I. FERC'S FINDING OF PUBLIC CONVENIENCE AND NECESSITY FOR THE AFP WAS NOT ARBITRARY AND CAPRICIOUS BECAUSE THE PROJECT NEED IS SUPPORTED BY PRECEDENT AGREEMENTS AND MULTIPLE DOMESTIC BENEFITS.

FERC's decision to grant the CPCN is not arbitrary and capricious because there is substantial evidence to demonstrate that the AFP serves multiple domestic benefits, “project

need” is not required to be interpreted as solely a domestic need, and precedent agreements are sufficient in determining market need. When establishing project need, FERC considers all relevant factors including but not limited to “precedent agreements, demand projections, potential cost savings to consumers, or comparison of projected demand with the amount of capacity currently serving the market.” 88 FERC ¶ 61,227, at 61,747. Public benefits sufficient to demonstrate project need include “meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.” *Id.* at 61748. TGP has established that there is a clear market need for the AFP through the precedent agreements and other public benefits that the pipeline would create.

A. The AFP serves multiple domestic benefits that are sufficient to establish a project need required for a CPCN.

The AFP serves multiple domestic benefits beyond the export of gas that are sufficient to establish project need required for a CPCN. Under the NGA, FERC is required to evaluate “all factors bearing on the public interest.” *Atlantic Refin. Co v. Pub. Serv. Com’n of N.Y.*, 360 U.S. 378, 391 (1959). A wide variety of factors are indicative of a public benefit beyond those outlined in FERC’s Policy Statements. *Minisink Residents for Env’t Pres. & Safety v. FERC*, 762 F.3d 97, 102-04 (D.C. Cir. 2014) (“*Minisink*”) (holding that legitimate benefits for a CPCN application included increased capacity to customers in high demand markets, increased gas delivery to interconnections, and enabling bi-directional gas flow on an existing pipeline); *Nat’l Comm. for the New River*, 373 F.3d at 1325 (holding that benefits included providing fuel for new electric generation plants, additional gas supplies to existing local distribution companies, and bringing natural gas service to new areas).

Beyond the exportation of LNG, the AFP serves multiple other domestic needs that are sufficient in establishing a public benefit. The greatest domestic benefits are the ten percent of gas the AFP will transport to the NUG terminal for domestic use and the 500,000 Dth per day that travels to the interconnection and through the Northway Pipeline. R. at 9. The AFP also expands access to sources of natural gas supply in the United States, fulfills an undersubscribed capacity in the Northway Pipeline, expands service to new areas that did not have access in New Union, and can potentially improve regional air quality by using cleaner-burning gas instead of other fossil fuels. R. at 8. FERC determined that the AFP provides gas to domestic customers. R. at 9. Additionally, FERC determined that the AFP fills capacity at the International New Union City M&R station, provides transportation for domestically produced gas, and prepares for the future possibility of transmitting gas that may not be used because of diminishing gas demands. R. at 9. Each of these benefits are sufficient evidence of potential market needs and are indicative on their own that the AFP would serve a market need.

B. TGP has established the project need for the AFP because the NGA does not require the public benefit to be exclusively domestic.

Exported gas is still sufficient evidence to establish a project need for a CPCN. *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 730 (D.C. Cir. 2022) (“*Oberlin II*”); *see Fuel Safe Wash. v. FERC*, 389 F.3d 1313, 1318-19 (10th Cir. 2004) (upholding a CPCN for an interstate pipeline project that would interconnect with an existing and new Canadian pipeline to transport gas to British Columbia); *see also Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1180 (D.C. Cir. 2023) (“*Center for Biological Diversity II*”) (upholding a CPCN for a pipeline that was anticipated to “export *substantial* volumes of natural gas”) (emphasis added). Additionally, the gas transported in the AFP is in interstate commerce, making it demonstrative of project need regardless of future exportation. *Oberlin II*, 39 F.4th at 726 (holding that the Nexus pipeline

crossing Pennsylvania and Ohio state lines was indicative of project need because the gas was “indisputably” in interstate commerce). The project in *Oberlin II* had eight precedent agreements, two of which were with Canadian companies intending to export the gas. *Id.* at 723. Like the precedent agreements for the Nexus pipeline which transported gas for sale across state lines, the AFP will transport natural gas across state lines from Old Union to New Union in interstate commerce, which is evidence of market need. R. at 4-6.

Additionally, International’s export precedent agreement shows substantial evidence of project need because the exported LNG will comeingle with the LNG used for interstate domestic needs. *Okla. Nat. Gas Co. v. FERC*, 28 F.3d 1281, 1285 (D.C. Cir. 1994) (holding that “gas comingled with other gas indisputably flowing in interstate commerce becomes itself interstate gas”). Ten percent of the AFP’s daily capacity will travel through interstate commerce for NUG to use domestically. R. at 6. That same LNG will comeingle with gas International will export. R. at 6. Gas comingled this way under a binding precedent agreement for export demonstrates project need. *Oberlin II*, 39 F.4th at 726 (upholding export precedent agreements as a valid factor in FERC’s CPCN analysis where gas intended for export to Canada would mix with gas intended for both domestic and interstate use).

The NGA does not require “project need” to be interpreted only as domestic simply because the NGA is a domestic statute. The NGA is intended to “regulate the transportation and sale of natural gas in *interstate* commerce.” *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019) (“*Oberlin I*”) (emphasis added). A gas company that exports and imports gas, and transports and sells natural gas in interstate commerce, falls under the regulation of the NGA requiring CPCNs. *Cf. Border Pipe Line Co. v. FPC*, 171 F.2d 149, 151-2 (D.C. Cir. 1948) (holding that a pipeline operating in Texas that only transports gas to Mexico did not fall under

the NGA requirement for a CPCN because it did not transport or sell natural gas in interstate commerce). The LNG in the AFP constitutes interstate gas and is transported and sold within the United States across the state borders of Old Union and New Union. R. at 4. TGP falls under the regulation of the NGA as a natural gas company. R. at 4. Since the actions of the AFP place TGP under NGA jurisdiction, the project need can include foreign action if it is engaged in interstate commerce.

C. Precedent agreements for the AFP are sufficient to establish the market need required under a CPCN.

FERC is not required to consider more than precedent agreements as evidence of market need when assessing the benefits of the project. *Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 113-114 (D.C. Cir. 2022); *Minisink*, 762 F.3d at 111 n.10; *Oberlin I*, 937 F.3d at 605-06. Precedent agreements “constitute significant evidence of demand for the project.” 88 FERC ¶ 61,227, at 61,748; *Nat’l Comm. for the New River*, 373 F.3d at 1325 (holding that seven precedent agreements accounting for 87 percent of the pipeline project capacity were indicative of “ample market demand”). Precedent agreements are indicative of market need because they are “long-term contracts in which gas shippers agree to buy the proposed pipeline’s transportation services.” *Del. Riverkeeper Network*, 45 F.4th at 113-114 (Quoting *Allegheny Def. Project v. FERC*, 964 F.3d 1, 19 (D.C. Cir. 2020)).

TGP’s two precedent agreements are concrete examples of market need that justify the CPCN. In *Delaware Riverkeeper Network*, the Adelpia Gateway Project pipeline entered into four precedent agreements with natural gas shippers, which accounted for approximately 76 percent of the pipeline capacity. 45 F.4th at 113. There, the precedent agreements were evidence of market need because FERC made a reasonable conclusion that concrete demonstrations of purchase obligations are “better evidence of market need” than more speculative reports on

future demand. *Id.* at 114. Similarly, TGP has two precedent agreements that account for 100 percent of the pipeline capacity, demonstrating that there is concrete evidence of market need to justify the CPCN. R. at 6. TGP's precedent agreements demonstrate a project need with real public benefits. *Cf. Env't Def. Fund v. FERC*, 2 F.4th 953, 976 (D.C. Cir. 2021) (holding that FERC's decision to grant a CPCN was arbitrary and capricious where there was a singular precedent agreement with an affiliated shipper to establish market need when there was no prospective increase in load demand for the area serviced). The AFP will provide service to areas in New Union that previously had no natural gas access and prepare for diminishing demands in Old Union. R. at 6.

Even if this Court were to determine that International's precedent agreement was not evidence of market need because it would be exported, TGP's precedent agreement with NUG is still sufficient to show project need when considering other public benefits and domestic needs. Precedent Agreements do not have a minimum floor subscription rate to be met for FERC to determine that they are evidence of project need for a CPCN. *Oberlin II*, 39 F.4th at 730; *Oberlin I*, 937 F.3d at 605 (rejecting the argument that precedent agreements for 59 percent of the pipeline capacity were too low a subscription rate to justify project need for a CPCN). TGP's precedent agreement with NUG accounts for 10 percent of the pipeline capacity. R. at 6. Taken into consideration with all other factors, the precedent agreement with NUG is sufficient evidence of market need. R. at 6.

II. FERC'S FINDING THAT THE BENEFITS FROM THE AFP OUTWEIGHED THE ENVIRONMENTAL AND SOCIAL HARMS WAS NOT ARBITRARY AND CAPRICIOUS BECAUSE TGP MITIGATED THE ADVERSE EFFECTS.

This Court should affirm FERC's Rehearing Order because the AFP's adverse effects do not outweigh the public necessity of the project. The CPCN is supported by a meaningful analysis of the public benefits weighed against the adverse environmental and social harms the project will

impose on landowners and surrounding communities. FERC can refuse to issue a CPCN only when the adverse effects, which cannot be minimized or mitigated, outweigh the public benefits of the AFP. U.S.C. § 717b(a) (1938) (FERC “shall issue” a CPCN “unless it determines doing so will *not* be consistent with the public interest”) (emphasis added). TGP has minimized and mitigated the environmental and social impacts.

A. The AFP’s imposed environmental harms do not outweigh the public benefits because TGP is mitigating the adverse effects and the alternative route imposes greater environmental harm.

The environmental harms imposed by the AFP do not outweigh the public benefits. TGP actively worked to minimize the adverse effects of the AFP on HOME and other landowners through alterations to the pipeline. Moreover, HOME’s proposed alternate route is not a legitimate option because it would impose greater environmental harm than the AFP.

1. TGP actively worked to minimize and mitigate the adverse effects of the AFP, which do not outweigh the public benefits.

The environmental impacts on HOME’s property are not significant enough to outweigh the public benefits of the AFP because TGP has agreed to mitigate the adverse effects. The adverse environmental effects of a project must be substantial to outweigh the public benefits. *Center for Biological Diversity II*, 67 F.4th at 1188. In *Center for Biological Diversity II*, the court upheld a CPCN for an 800-mile pipeline that was substantially more environmentally damaging than the AFP because the benefits of transport, liquification, and export outweighed the harms. 67 F.4th at 1188. There, FERC determined that the substantial economic and commercial benefits of the pipeline outweighed the temporary, long-term, and permanent environmental effects of the project. *Id.* at 1180. Some of the long-term and permanent effects included the permanent alteration of 8,225 acres of wetlands and disruption of endangered Cook Inlet beluga whale activity. *Id.* at 1186, 1188.

Here, TGP worked with HOME to mitigate the adverse environmental effects on HOME's property. R. at 10. The AFP pipeline passes through two miles of HOME's property and TGP will remove approximately 2,200 trees and other forms of vegetation that cannot be replaced on the route. R. at 10. However, TGP agreed to bury the AFP through the entirety of HOME's property and expedite the construction on HOME's property to minimize disruption. R. at 10. The potential adverse environmental effects of the AFP, particularly those on HOME's property, pale in comparison to the substantial environmental impacts outlined in *Center for Biological Diversity II* that would permanently destroy thousands of acres of wetlands and impact an endangered species habitat even with implementation of mitigation efforts. 67 F.4th at 1186, 1188. This Court should find that FERC properly determined that the adverse environmental effects on HOME's property do not outweigh the substantial public benefits of the AFP.

TGP has mitigated the adverse effects of the AFP, despite its inability to establish easement agreements with some landowners. A CPCN grants the right to "exercise . . . eminent domain" to acquire any land that is necessary to complete the project under Section 7 of the NGA. 15 U.S.C. § 717f(h) (1938). This allows the CPCN holder to initiate a condemnation action against surrounding landowners and communities and to condemn certain easements over the necessary land. *Id*; *Oberlin II*, 39 F.4th at 722; *Adorers of the Blood of Christ U.S. Province v. Transcon. Gas Pipe Line Co., LLC*, 53 F.4th 56, 59 (3d Cir. 2022) (holding that a CPCN authorized Transco to use eminent domain to take rights-of-way from any property owners unwilling to voluntarily sell them). Failed negotiations with surrounding landowners are not sufficient to demonstrate a lack of mitigation. *Adorers of the Blood of Christ*, 53 F.4th at 56, 59

(upholding a CPCN where the pipeline company changed about 50 percent of the route in response to landowner concerns, but still had to condemn some properties).

TGP actively participated in the pre-filing process and changed over 30 percent of the proposed pipeline route in order to address landowners' concerns and negotiate mutually acceptable easement agreements. R. at 10. Despite TGP's best efforts to minimize the adverse effects of the pipeline, it is not possible to reroute the entire pipeline to satisfy every landowner. According to FERC, the "use of eminent domain is common in construction of pipelines, so the lack of easement agreements is not significant to our consideration." R. at 10-11. TGP's lack of signed easement agreements with over 40 percent of landowners, including HOME, is not significant evidence that it has not made efforts to mitigate the residual adverse effects of the AFP. R. at 10.

2. HOME's proposed alternative route is not a legitimate option because it imposes greater environmental harm.

FERC appropriately granted the CPCN because the alternative route is more environmentally harmful than the approved AFP route. A proposed alternative route is not a legitimate option when it imposes more environmental harm than the initial route with minimal benefits to surrounding communities. *Minisink*, 762 F.3d at 97; *see Nat'l Comm. for the New River*, 373 F.3d at 1333 (upholding a CPCN where FERC found that none of the alternative routes were environmentally superior because they increased the length of the pipeline and the impact on environment and residential areas); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1324 (D.C. Cir. 2015) (upholding a CPCN where FERC found that the 30-mile looping pipeline alternative to a proposed compressor station "would cause a greater environmental disturbance"); *Center for Biological Diversity II*, 67 F.4th at 1183 (upholding a CPCN where FERC rejected reasonable alternatives because they offered no significant

environmental advantage and some imposed more environmental harm). FERC has the authority to reject an alternative that has greater projected environmental impact than the original project proposal. *Center for Biological Diversity II*, 67 F.4th at 1183.

FERC has broad discretion when balancing the competing interests in CPCN applications. *Minisink*, 762 F.3d at 111. In *Minisink*, petitioners unsuccessfully sought rehearing on a CPCN, arguing that a nearby alternative site for the “Minisink Project,” a new natural gas compressor station located along an existing pipeline, was better than the approved location by FERC. *Id.* at 101. However, the alternative would require the replacement of a seven-mile section of the pipeline that was not required to be replaced for the initial location. *Id.* at 103. FERC determined that the original location was preferred because the negative environmental consequences of upgrading the existing segment outweighed the minimal advantages of avoiding impacts on noise-sensitive areas. *Id.* at 104. The court upheld FERC’s decision to grant the CPCN because FERC amply considered alternatives sites and adequately explained that the significant environmental effects related to the alternative made it less preferable than the originally proposed location. *Id.* at 107-8.

Here, like the proposed alternative compressor causing more significant environmental harm in *Minisink*, HOME’s proposed alternative route would cause more objective environmental harm than the approved route. R. at 11. HOME’s alternative route would add three miles of pipeline through the mountains, a more environmentally sensitive ecosystem than HOME’s property. R. at 11. It would also cost an additional \$51 million. R. at 11. FERC considered the alternative route and correctly decided that the significant environmental effects of the alternative route are less preferable than the AFP’s original route. Considering TGP’s mitigation efforts, this decision is well within FERC’s discretion.

B. The social harm to HOME's religious beliefs does not outweigh the public benefits of the project because TGP mitigated the adverse effects.

The religious beliefs of one group do not outweigh the public benefits of an entire project and TGP has made efforts to mitigate the adverse effects. HOME incorrectly cites *Adorers of the Blood of Christ* as support for its argument that its religious claims should be a substantial factor in the CPCN analysis. 53 F.4th at 58 (upholding a CPCN for a pipeline that transversed the land of an order of Roman Catholic nuns whose religion required them to “protect, preserve, and treasure the land” they own). The court stated that FERC may have denied or altered the CPCN if the Adorers had engaged in the administrative process, not that their religious beliefs definitely would have resulted in the denial of the CPCN. *Id.* at 61.

TGP should prevail on this claim as well because the social harm of the infringement on HOME's religious beliefs does not outweigh the project benefits of the AFP. TGP has mitigated the adverse effects of the AFP on HOME's religious beliefs by agreeing to bury the pipeline and expediting the building process to a four-month period to avoid the Solstice Sojourns. R. at 10. Moreover, HOME's religious beliefs are more appropriately reviewed under RFRA.

III. FERC'S DECISION TO ROUTE THE AFP OVER HOME'S PROPERTY WAS NOT IN VIOLATION OF RFRA BECAUSE FERC DID NOT SUBSTANTIALLY BURDEN HOME'S EXERCISE.

HOME has failed to demonstrate that FERC substantially burdened HOME's exercise of religion under RFRA by approving the AFP route over HOME's property. RFRA prohibits the government from taking actions that place a “substantial burden” on religious exercise unless that burden furthers “a compelling government interest” and “is the least restrictive means of furthering that . . . interest.” 42 U.S.C § 2000bb-1(a) (1993). RFRA no longer applies to states but does apply to federal agencies. *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997).

A. FERC did not apply coercion, a necessary element of showing a substantial burden on its religious practices.

FERC did not substantially burden HOME because FERC did not attempt to coerce HOME into altering its religious practices. Whether a burden is substantial turns on “*the intensity of the coercion* applied by the government to act contrary to [one's] beliefs.” *Mack v. Yost*, 63 F.4th 211, 233 (3d Cir. 2023) (citing *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014)). HOME has not been “forced to choose between following the tenets of their religion and receiving a government benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.” *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008). Even government actions which significantly interfere with an individual’s ability to practice their religion, without an element of coercion, are not enough to constitute a substantial burden under RFRA. *Navajo Nation*, 535 F.3d at 1067; *Thiry v. Carlson*, 78 F.3d 1491, 1495-96 (10th Cir. 1996) (holding that the relocation of grave sites for a highway did not constitute a substantial burden because despite causing “distress” to the religious practitioners, they would still be able to practice their religion).

HOME has not demonstrated that FERC’s decision substantially burdens its religious practice for three reasons. First, while HOME’s spiritual fulfillment in the Solstice Sojourn will be diminished, HOME faces no financial or legal penalty. R. at 12; *Navajo Nation*, 535 F.3d at 1070; *Snoqualmie Tribe v. FERC*, 545 F.3d 1207, 1214-15 (9th Cir. 2008) (holding that the Snoqualmie Tribe was not substantially burdened by the construction of a hydroelectric plant near a sacred waterfall because the Tribe members would not face a “Catch-22 situation” where they must either “lose a government benefit or face” legal penalties for exercising their religion); *cf. Burwell*, 573 U.S. at 720 (holding that a government program requiring companies to provide

health insurance coverage for certain types of contraceptives or face severe economic consequences constituted a substantial burden under RFRA).

Second, the construction of the AFP and the presence of the bare spot over the pipeline will not interfere with the Solstice Sojourn. R. at 12-13. Physical impediment to religious practice is a necessary element of creating a substantial burden. *Navajo Nation*, 535 F.3d at 1063. Additionally, TGP has agreed to expedite construction to avoid any overlap with either solstice. R. at 13. Although TGP will remove trees along the path of the Solstice Sojourn that cannot be replanted, HOME will not be physically prevented from crossing where the pipeline is buried. R. at 13. Like the Tribe in *Snoqualmie Tribe*, who could still access the sacred waterfall to practice its religion, HOME is not faced with an impossible choice between violating its religious beliefs or facing government sanctions. 545 F.3d at 1063. The AFP only affects HOME's "subjective spiritual experience," which is not enough to demonstrate a substantial burden. *Navajo Nation*, 535 F. 3d at 1063.

HOME argues that it would be "unimaginable" to cross over the pipeline's location, given the necessary removal of trees and the importance of nature to HOME's religious beliefs. R. at 12. However, it is not enough for HOME to suggest that its satisfaction with the Solstice Sojourn will be diminished because TGP will remove trees along the path. *Navajo Nation*, 535 F.3d at 1069-70 (holding that mere "diminishment of spiritual fulfillment," without coercion, is not enough to constitute a substantial burden on religious exercise). HOME has not demonstrated that the construction will force them to "engage in conduct that seriously violates [its] religious beliefs," as RFRA requires. *Hobby Lobby*, 573 U.S. at 720; *Real Alts., Inc. v. Sec'y Dept. of Health & Hum. Servs.*, 867 F.3d 338, 357-59 (3d Cir. 2017) (holding that employees were not forced to support contraceptive use merely by subscribing to a healthcare plan that covered

contraceptives). HOME's argument is almost indistinguishable from the failed attempt by the tribes in *Navajo Nation* under RFRA to prevent the use of artificial snow on the mountain that they believed to be sacred. 535 F.3d at 1069-70.

HOME additionally argues that the CPCN Order forces it to support practices that harm the environment because LNG will be transported over its property. R. at 12. RFRA was not intended to grant unlimited "individual veto to prohibit government action solely because it offends his religious beliefs, sensibilities . . . or fails to satisfy his religious desires." *Navajo Nation*, 535 F.3d at 1063. Like the employees in *Real Alternatives*, who unsuccessfully argued that they were forced to support contraceptive use by subscribing to a health plan that included coverage for contraceptives, HOME is in no way being forced to support that practice. 867 F.3d at 357.

Finally, re-routing the pipeline would cause more environmental harm than the existing path. R. at 11. Even if this Court accepts that the AFP will cause HOME to support the burning of natural gas, it is undisputed that re-routing the pipeline would cause greater environmental harm than the current path. R. at 13. HOME's support of the alternative route contradicts its claim that FERC has violated RFRA because even if the pipeline is re-routed, it will still carry natural gas and more environmental harm will occur. R. at 13.

Some courts have wrongly adopted a less-stringent view of what constitutes a substantial burden. In a pre-*Hobby Lobby* case addressing a RFRA challenge to the contraceptive mandate, the Seventh Circuit held that substantial burdens arise "when the government 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Korte v. Sebelius*, 735 F.3d 654, 682-83 (7th Cir. 2013) (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)). In that case, the court found a substantial burden because the penalties imposed

placed substantial pressure on the employers to violate their religious beliefs. *Id.* at 683-84. Even though the standard is lower than that in *Navajo Nation*, the key to the court’s application of the substantial burden test was still the large financial penalties the companies faced for noncompliance with the mandate. *Id.*

Here, there is no severe economic consequence for HOME in approving the pipeline over HOME property. Even under the lower standard of substantial pressure, HOME still has not demonstrated that it faces government pressure significant enough to constitute a substantial burden. For these reasons, this Court should affirm FERC’s Rehearing Order on the RFRA claim because the CPCN Order does not impose a substantial burden on HOME’s religious exercise.

B. Even if the decision imposed a substantial burden, FERC’s action satisfies strict scrutiny because there is a compelling government interest in natural gas transportation and burying the pipeline across HOME’s property was the least restrictive means of serving that interest.

Even if the AFP substantially burdens HOME’s religious exercise, FERC is still permitted to issue the CPCN because doing so serves a “compelling government interest” and the CPCN is the “least restrictive means of furthering that...interest.” 42 U.S.C § 2000bb-1(b) (1993). A compelling government interest is one “of the highest order” or “paramount.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). FERC may limit religious liberty “to accomplish an overriding governmental interest.” *United States v. Lee*, 455 U.S. 252, 257 (1982). RFRA has incorporated “the compelling government interest test as set forth in [*Sherbert*] and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).” 42 U.S.C. § 2000bb(b)(1) (1993); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). The interests motivating government mandates are scrutinized against “the asserted harm of granting specific exemptions to particular religious claimants.” *Gonzales*, 546 U.S. at 431.

FERC has a compelling government interest in maintaining an organized system of natural gas pipelines that do not take unnecessary diversions. Compelling government interests arise in several areas. *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000) (finding a compelling government interest in taxation); *Lee*, 455 U.S. at 258 (finding the same in social security); *Yoder*, 406 U.S. at 213 (finding the same in education). One key factor that weighs in the government's favor is the need for comprehensive systems to be consistent and coherent. *Lee*, 455 U.S. at 258 ("The social security system in the United States serves the public interest by providing a comprehensive insurance system."); *Yoder*, 406 U.S. at 213 ("Providing public school ranks is at the very apex of the function of a State.").

The need for consistent permitting of natural gas pipelines is a compelling government interest. Congress enacted the NGA so that the United States could develop a coordinated, plentiful, and affordable supply of natural gas. *Myersville Citizens for a Rural Cmty., Inc.*, 783 F.3d at 1307. In 2021, almost 40 percent of all electricity generated in the United States was from natural gas. *Power Sector Evolution*, EPA, (May 19, 2023), <https://www.epa.gov/power-sector/power-sector-evolution>. Approximately three million miles of natural gas pipelines span the United States. *Natural Gas Explained: Natural Gas Pipelines*, Energy Info. Admin., (Nov. 18, 2022), <https://www.eia.gov/energyexplained/natural-gas/natural-gas-pipelines.php>. If FERC was forced to re-route pipelines every time a landowner expressed concern, the nation's energy infrastructure would become unnecessarily disjointed.

The CPCN Order is the least restrictive means of advancing this interest because re-routing the pipeline would cause more environmental harm and is cost-prohibitive. TGP has already made several concessions to lessen the AFP's adverse effects. R. at 10. TGP has altered over 30 percent of the pipeline to address landowners' concerns. R. at 10. Additionally, TGP has

agreed to bury the pipeline across HOME property and finish construction quickly to avoid interference with the Solstice Sojourn. R. at 10. Further, HOME’s proposed alternative route would not only be cost-prohibitive, adding an additional \$51 million, but also it would cause more objective environmental harm than the current route. R. at 11. The pipeline would be longer under the alternate route and pass through “more environmentally sensitive ecosystems” than the proposed path over HOME territory. R. at 11. This Court should affirm the Rehearing Order denying HOME’s RFRA challenge because even if there is a substantial burden, the CPCN serves a compelling government interest and is the least restrictive means of furthering that interest.

IV. THE GHG CONDITIONS WERE BEYOND FERC’S AUTHORITY UNDER THE NGA BECAUSE CONGRESS HAS NOT CLEARLY GIVEN FERC THE AUTHORITY TO REGULATE CLIMATE CHANGE.

FERC’s decision to impose GHG Conditions on the construction of the AFP was beyond its authority under the NGA. While the NGA grants FERC broad authority, nothing in the statute contemplates the agency dictating which types of trucks or chainsaws the industry should use in construction. Climate change is a national concern, and FERC’s attempt to mitigate the effects of climate change raises a major question. Without a clear statement from Congress authorizing FERC to mitigate GHG emissions, FERC is acting outside the scope of its authority. Accordingly, this Court should vacate FERC’s denial of rehearing on this issue and remand with instructions to void the GHG Conditions.

A. FERC has not demonstrated a clear grant of authority from Congress to regulate GHG emissions.

The structure of the NGA does not contemplate giving FERC broad authority to regulate GHG emissions from the trucks and tools used to construct the pipelines. FERC may attach “reasonable terms and conditions as the public convenience and necessity may require” to the

issuance of a CPCN, but this power is not unlimited. 15 U.S.C. § 717f(e) (1938). Agencies only have power to act if “Congress in fact meant to confer the power the agency has asserted.” *West Virginia v. EPA*, 142 S.Ct. 2587, 2607-08 (2022). Without clear statutory authority, agencies exceed the scope of their authority when they attempt to take broad grants of power and impose requirements that have significant political or economic impacts. *West Virginia*, 142 S.Ct. at 2607-08; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126-27 (2000) (finding that the EPA lacked authority to regulate tobacco under its grant of authority to regulate “drugs and devices”); *Ala. Ass’n. of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S.Ct. 2485, 2486 (2021) (holding that the CDC exceeded its statutory authority by imposing a nationwide moratorium on evictions during the COVID-19 pandemic); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 325-28 (2014) (holding that EPA exceeded its statutory authority by attempting to “tailor” the Clean Air Act’s grant of power to classify greenhouse gases as “pollutants”).

Congress did not intend for FERC to wield the NGA as a tool to combat climate change. The Major Questions Doctrine (MQD) prevents agencies from claiming that they have broad grants of authority where “congress did not mean to regulate the issue in the way claimed.” *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 296 (2023) (“*North Carolina Coastal Fisheries*”) (citing *West Virginia*, 142 S.Ct. at 2608). To overcome this barrier, an agency must show “something more than a merely plausible textual basis” for its action and must have clear authorization from Congress. *West Virginia*, 142 S.Ct. at 2609. FERC has shown nothing more than a merely plausible textual basis.

In its Rehearing Order, FERC relies on a footnote from the Third Circuit to support its grant of authority. R. at 16; *Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 261 n. 15 (3d. Cir. 2018). There, the court addressed FERC’s authority to impose remediation measures and other

penalties if companies violated the terms of the CPCN. *Twp. of Bordentown*, 903 F.3d at 261 n. 15 (affirming FERC’s authority to “enforce any required remediation” and “impose civil fines”). FERC cannot take broad grants of authority and use them for purposes Congress did not intend. *Midship Pipeline Co., LLC v. FERC*, 45 F.4th 867 (5th Cir. 2022). In *Midship Pipeline*, FERC unsuccessfully attempted to argue that its authority under the NGA to regulate pipelines allowed FERC to assign costs for remediation activities on private property that were damaged from the construction of a pipeline. *Id.* at 870-71, 876. Here, FERC is attempting to take its authority to attach conditions to CPCNs and use it for a purpose Congress did not intend.

FERC has not shown that Congress has given it the authority to impose GHG mitigation efforts in constructing the AFP. FERC argues that these requirements are merely a “continuation of existing practice” that “is not of significant economic or political consequence.” R. at 17-18. Major questions arise in areas of national significance that “have significant political and economic consequences.” *North Carolina Coastal Fisheries*, 76 F.4th at 296 (citing *West Virginia*, 142 S.Ct. at 2608). However, the major questions doctrine can apply where the statutory “structure indicates that Congress did not mean to regulate the issue in the way claimed,” or if there is another statute “already in place to deal with the issue” presented. *North Carolina Coastal Fisheries*, 76 F.4th at 297. MQD also applies where an agency attempts to exercise “new-found powers” or “when the asserted authority falls outside the agency’s traditional expertise.” *Id.* This “non-exhaustive” list of indicators aids courts in determining when to look for a clear grant of Congressional authority for an agency’s action. *Id.*

B. Imposing GHG Conditions on the construction of new pipelines has major social and economic effects.

FERC is improperly attempting to wield its authority to impose GHG Conditions on the construction of natural gas pipelines. R. at 17. Not only is FERC applying GHG conditions in

this case, but it also has imposed GHG Conditions in four of five subsequent CPCN orders and is currently reviewing options to widen its ability to apply GHG conditions. R. at 16. FERC is attempting to expand its authority and provide a wholistic approach to addressing climate change, which FERC itself concedes would be a major question. R. at 17. Imposing GHG Conditions on pipeline construction will discourage gas companies from expanding infrastructure, creating a chilling effect. Nothing in the record indicates that FERC will not apply these conditions going forward. FERC's own interim guidance shows that the agency is attempting to expand its control over GHG emissions. *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 at 15 (2022). Moreover, a dissenting FERC Commissioner correctly classified this attempt as a "radical departure" from FERC's traditional authority under the NGA. *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 at 2 (2022) (Daly, Comm'r, dissenting).

C. The EPA is better positioned than FERC to regulate emissions.

The NGA is primarily focused on regulating pipelines to promote the construction of natural gas infrastructure at competitive prices. *Id.* The major questions doctrine applies where the statutory "structure indicates that Congress did not mean to regulate the issue in the way claimed," or if there is another statute "already in place to deal with the issue" presented. *North Carolina Coastal Fisheries*, 76 F.4th at 297. By implementing the GHG Conditions on the construction of the AFP, FERC is exceeding its authority and attempting to appropriate EPA's authority to regulate emissions.

Regulation of emissions from mobile sources and stationary sources, such as construction vehicles and power generating facilities, is squarely within the authority of the EPA and the states under the Clean Air Act. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013) ("One regulatory regime the NGA expressly does not preempt is the system of

state emissions regulations established by the Clean Air Act.”); Clean Air Act, 42 U.S.C. §§ 7401-7671q (1955); 40 C.F.R. §§ 60, 70-71, 98 (2009). FERC is exceeding its authority by imposing the GHG Conditions not only because it lacks a clear grant of authority to address the major question of climate change, but also because EPA is “already in place” to regulate emissions. *North Carolina Coastal Fisheries*, 76 F.4th at 297.

V. FERC’S DECISION NOT TO IMPOSE GHG CONDITIONS ADDRESSING DOWNSTREAM AND UPSTREAM IMPACTS WAS NOT ARBITRARY AND CAPRICIOUS.

FERC’s decision not to impose GHG Conditions addressing downstream and upstream GHG impacts was not arbitrary and capricious because imposing such conditions would be beyond FERC’s authority under the NGA. While FERC claims broad authority to consider the significance of indirect effects in the CPCN process, FERC’s attempt to mitigate the effects of climate change raises a major question. Even if this Court concludes that it does not raise a major question, FERC’s decision was still not arbitrary and capricious because FERC is not required to take any particular action when considering downstream and upstream GHG impacts.

A. FERC does not have the authority under the NGA to mitigate upstream and downstream impacts.

FERC does not have the authority under the NGA to mitigate upstream and downstream impacts. Instead, this is a major question because it will have wide-reaching economic and political significance. *North Carolina Coastal Fisheries*, 76 F.4th at 296 (citing *West Virginia*, 142 S.Ct. at 2608). The draft policy statement issued by FERC evaluating its future role in GHG mitigation is far beyond its statutory authority under the NGA. *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 at 1-2 (2022) (Christie, Comm’r, dissenting) (correctly noting that the FERC draft policy on GHG emission “represents a truly radical departure from decades of Commission practice and precedent implementing the NGA”). Even if this Court

finds that the GHG Conditions for the construction of the AFP are not subject to MQD, the imposition of upstream and downstream mitigation efforts is a major question. This action would impermissibly require industry-wide mitigation since FERC is required to take a “hard look” at indirect effects. *Id.* at 28 (noting industry opposition to considering GHG emissions in CPCN orders); *West Virginia*, 142 S.Ct. at 2608 (applying the major questions doctrine where the agency attempted to exercise expansive power over industry).

Under the “rule of reason” announced in *Public Citizen*, when an agency lacks the statutory authority to prevent upstream or downstream effects, it does not have to consider those effects in its analysis. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768-70 (2004); *Ctr. for Biological Diversity v. U.S. Army Corp of Eng’rs*, 941 F.3d 1288, 1300 (11th Cir. 2019) (“*Center for Biological Diversity I*”) (criticizing *Sierra Club v. FERC*, 867 F.3d 1357, 1380-81 (D.C. Cir. 2017) for ignoring limits on FERC’s authority under the NGA and precedent). FERC can take no action in the CPCN process to affect the production of natural gas that the AFP will carry because the gas is already being produced and consumed. R. at 6. The AFP is merely rerouting approximately 35 percent of that gas. R. at 6. No new production facilities are being constructed on the AFP. R. at 6. Instead, the AFP is diverting capacity from one pipeline to another. R. at 6. While HOME may take issue with the impacts the AFP poses to its own property and object to the burning of fossil fuels in general, it has not shown that the operation of the AFP will contribute to an overall increase in GHG emissions. R. at 19.

B. Even if FERC has the authority to mitigate upstream and downstream impacts, it is not required to do so.

Even if FERC has the authority to mitigate upstream and downstream impacts, it is not required to do so. FERC is only required to take a hard look “at the environmental effects of [its] decisions, and not to take one type of action or another.” *Citizens Against Burlington Inc. v.*

Busey, 938 F.2d 190, 194 (D.C. Cir. 1991). FERC is not required to mitigate GHG effects because NEPA’s requirements are procedural. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); 42 U.S.C. § 4321 et seq (1969). Indirect environmental impacts must be “reasonably foreseeable” to be worthy of FERC’s consideration. *Food & Water Watch v. FERC*, 28 F.4th 277, 285 (D.C. Cir. 2022); 40 C.F.R. § 1508.8(b) (2020). If FERC gathers necessary information and considers the effects, it may make any determination that is consistent with its findings. *Id.* at 286.

FERC adequately gathered information and considered both the potential upstream and downstream effects of the AFP. In considering the upstream effects, FERC correctly noted that all the LNG transported through the AFP is merely being re-routed from an already existing pipeline. R. at 6. New production of LNG will not occur because of the AFP’s construction. R. at 6; see *Birckhead v. FERC*, 925 F.3d 510, 517-18 (D.C. Cir. 2019) (finding that FERC did not act in an arbitrary and capricious manner in refusing to mitigate upstream effects of a pipeline where no additional wells would be needed for the project). The EIS determined that the upstream impacts were not significant and did not impose mitigation requirements. R. at 19. This is all that is required under NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (holding that “NEPA does not require a fully developed plan detailing what steps will be taken to mitigate adverse environmental impacts.”); *Stryker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (“[O]nce an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot” mandate “the choice of action.”) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976)).

FERC correctly determined that the downstream effects would not rise to the levels of “significance” requiring mitigation. R. at 19. FERC sought out the necessary information to determine the destination of the LNG transported by the AFP. R. at 6. This is all FERC is required to do because downstream emissions from the burning of natural gas are not categorically “a reasonably foreseeable indirect effect of a pipeline project.” *Birckhead*, 925 F.3d at 519. The EIS estimated that if used at full capacity, the AFP could generate 9.7 million metric tons of GHG emissions per year. R. at 15. However, even at this “upper bound” FERC did not consider this impact significant enough to require mitigation. R. at 15, 16.

C. FERC’s determination that the construction impacts are significant enough to require mitigation does not require FERC to find that the indirect effects of the AFP are also significant.

FERC’s decision to impose the GHG Conditions on the AFP’s construction does not require FERC to find that the indirect effects of the AFP are also significant. Construction impacts on GHG emissions and indirect effects from burning natural gas are categorically different. The GHG emissions from construction will average about 88,340 metric tons annually, or about 104,100 metric tons per year without the GHG Conditions. R. at 15. The annual average emissions for the combustion of gas from the AFP dwarfs both numbers at 9.7 million metric tons, and FERC does not consider that amount “significant under NEPA.” R. at 15, 19. Though TGP reasserts that FERC would be exceeding its authority to require mitigation in either circumstance, HOME has no basis for arguing that enforcing one and not the other is inconsistent. The GHG emissions from trucks, heavy equipment, and cutting down trees have no bearing on the GHG emissions that will result from end users burning the LNG that the AFP transports. This court should affirm FERC’s Rehearing Order on the upstream and downstream GHG impacts.

CONCLUSION

For the foregoing reasons, TGP respectfully requests this Court to affirm in part and vacate in part FERC's Rehearing Order in favor of TGP. TGP asks this Court to affirm the Rehearing Order pertaining to all findings except the GHG Conditions. We request this Court vacate the part of the Rehearing Order regarding the GHG Conditions that FERC imposed on the AFP's construction.