

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH,
Petitioners,

-and-

TRANSNATIONAL GAS PIPELINES, LLC,
Petitioners,

v.

UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Review of Order of the Federal Energy Regulatory Commission

Brief of Petitioner, THE HOLY ORDER OF MOTHER EARTH

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STATEMENT OF JURISDICTION

The Federal Energy Regulatory Commission (Commission) issued a Certificate of Public Convenience and Necessity (CPCN) to Transnational Gas Pipeline, LLC (TGP) for construction of the American Freedom Pipeline (AFP). TGP and Holy Order of Mother Earth (HOME) timely filed a Petition for Rehearing with the Commission for review, pursuant to 15 U.S.C. § 717r(a). TGP and HOME filed timely Petitions for Review with this Court after the Commission denied rehearing. *Id.* § 717r(b). The petitions are rightfully consolidated for purposes of judicial review.

STATEMENT OF ISSUES PRESENTED

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

STATEMENT OF THE CASE

I. TGP Project

On June 13, 2022, TGP filed an application for authorization to construct and operate a 99-mile-long, 30-inch interstate pipeline, known as the AFP and related facilities to carry liquefied natural gas (LNG). The proposed project extends from a receipt point in Jordan County,

Old Union, ton interconnection with an existing TGP transmission facility in Burden County, New Union. The project also includes a receipt meter station in Jordan County, Old Union; a receipt tap located in Jordan County, Old Union; a meter, regulation, and delivery station located in Burden County, New Union; mainline valve assemblies at eight locations along the TGP pipeline; pig launcher/receiver facilities and pig trap valves at the Main Road M&R Station and the Broadway Road M&R Station; and cathodic protection and other appurtenant facilities.

Prior to the filing of the application for this proposed project, TGP held an open season for service on the TGP Project. TGP then executed binding precedent agreements with: (1) International Oil & Gas Corporation (International) for 450,000 dekatherms (Dth) per day of firm transportation service and (2) New Union Gas and Energy Services Company (NUG) for 50,000 Dth per day of firm transportation service. These two agreements fulfill the project's capacity of 500,000 dekatherms (Dth) per day of firm transportation service.

The AFP is designed to transport LNG produced in the Hayes Fracking Field (HFF). Currently, the Southway Pipeline transports the full production LNG at HFF. The agreements do not contemplate additional production, and instead will reroute 35% of the production at HFF through the AFP. The LNG purchased by International will be diverted at the Burden Road M&R Station to the existing NorthWay Pipeline, which is not currently at full capacity. The NorthWay Pipeline will carry the LNG into New Union City M&R Station, located at the Port of New Union on Lake Williams. The LNG will then be loaded onto tankers and transported from Lake Williams to the White Industrial Canal, to the Atlantic Ocean, and then to Brazil.

II. Project Need

The Natural Gas Act (NGA) requires that proposed projects “be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). The AFP Project will export

90% of its capacity to Brazil, but TGP asserts that it will serve the following domestic needs:

(1) delivering up to 500,000 Dth per day of natural gas to the interconnection with the NUG terminal and the NorthWay Pipeline; (2) providing natural gas service to areas currently without access to natural gas within New Union; (3) expanding access to sources of natural gas supply in the United States; (4) optimizing the existing systems for the benefit of both current and new customers by creating a more competitive market; (5) fulfilling capacity and the undersubscribed NorthWay Pipeline; and (6) providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels.

Transnat'l Gas Pipelines, LLC, 199 FERC ¶ 72,201 P 8 (June 1, 2023) (“*Order*”).

On rehearing, the Commission determined that, “while exported gas may not directly benefit domestic needs for gas supply, the precedent agreements are nonetheless sufficient to demonstrate a public necessity here.” *Order*, P 9. Thus, the CPCN was affirmed.

III. Approval of the AFP and its Route

HOME is a religious order, established in 1903, grounded in the principle that humans should do everything in their power to promote natural preservation over all other interests. HOME was founded in response to the Industrial Revolution, and the subsequent harms to the environment from industrialization and capitalism. A key aspect of HOME’s religious beliefs is a ceremonial journey that occurs every summer and winter solstice. During this ceremony, called the Solstice Sojourn, members of HOME journey from a temple at the western border of the property to a sacred hill on the eastern border of the property, then a journey back along a different path. For HOME, the sacredness of their land and the Solstice Sojourn is dependent on the land not being used for the transportation of environmentally harmful LNG.

Unfortunately, the AFP Pipeline route approved by FERC will pass through two miles of HOME property and require the removal of approximately 2,200 trees and countless other vegetation from the property. TGP has agreed to bury the AFP through the entirety of HOME’s property and has agreed to expedite construction to the extent feasible across home property to

minimize disruption. TGP contends that it can complete the two-mile stretch over home property within a four-month period, avoiding construction during a Solstice Sojourn. However, the AFP will result in a permanent bare spot along the Solstice Sojourn, where trees will not be allowed to be replanted due to the underground pipeline. And even further, the AFP's presence on HOME's land will force them to support the production, transportation, and burning of fossil fuels in compelling it to be a part of the Solstice Sojourn. For HOME, this would truly be unimaginable and entirely destroy the meaning of the Solstice Sojourn, their most important religious practice.

More generally, TGP has not yet secured signed easement agreements with over 40% of landowners along the proposed route, including with HOME. TGP participated in the Commission's pre-filing process and has been working to address landowner's concerns and questions. TGP has made changes to over 30% off the proposed pipeline route to address concerns from landowners and to negotiate mutually acceptable easement agreements.

Regardless, on April 1, 2023, the Commission authorized the TGP Project, subject to certain conditions, by issuing a CPCN. The Commission found "that TGP has taken sufficient steps to minimize adverse economic impacts on landowners and surrounding communities." *Order*, P 10. Therefore, the Commission declined HOME's arguments and issued the CPCN, allowing the AFP to cross and disturb HOME's sacred land. FERC maintained this position in issuing the Order Denying Rehearing.

IV. Environmental Conditions

In granting TGP the CPCN for the AFP, FERC imposed environmental conditions to mitigate greenhouse gas (GHG) emissions. Specifically, FERC required that:

- (1) TGP shall plant or cause to be planted an equal number of trees as those removed in the construction of the TGP Project;
- (2) TGP shall utilize, wherever practicable, electric-powered equipment in the construction of the TGP Project, including, without limitation:

- (a) Electric chainsaws and other removal equipment, where available; and
- (b) Electric powered vehicles, where available;
- (3) TGP shall purchase only “green” steel pipeline segments produced by net-zero steel manufacturers; and
- (4) TGP shall purchase all electricity used in construction from renewable sources where such sources are available.

Order, P 14. These conditions are a result of the Environmental Impact Statement (EIS) completed by TGP in compliance with the National Environmental Policy Act (NEPA). The EIS found significant downstream GHG impacts, or those that result from the use of the LGN transported by the AFP. Assuming full capacity of the AFP were sent to combustion end uses, the analysis found downstream end-use could result in 9.7 million metric tons of CO₂e per year. Further, the analysis estimated annual emissions of 88,340 metric tons of CO₂e throughout the four years of construction, with the conditions in place. However, FERC declined to issue any conditions related to upstream emissions, or those that result from the production of LNG.

SUMMARY OF THE ARGUMENT

The Commission improperly granted TGP a CPCN for the AFP, despite contradictory evidence, a lack of well-reasoned and supported findings, a valid RFRA claim, and the consideration of necessary mitigation GHG measures. Therefore, this Court should vacate the granting of the CPCN and remand for proceedings consistent with this argument.

The Commission improperly granted TGP a CPCN for the AFP, despite the finding of project need not being supported by substantial evidence and despite the finding of public convenience and necessity failing to meet the arbitrary and capricious standard. A CPCN, required by the NGA, requires applications to “be supported by evidence showing their necessity ‘to present or future public convenience and necessity.’” *Atl. Refin. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959). This finding requires the applicant to show market need for the project, and the Commission must “consider all relevant factors.” *Certification of New Interstate*

Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,747 (1999). Here, the finding of project need is not supported by substantial evidence because the Commission failed to “look behind” TGP’s precedent agreements and establish a record of need, and even without “looking behind” the agreements, the Commission incorrectly found the exported LNG to Brazil from this project is in the public need. As the Commission failed to rely on substantial evidence, its decision was arbitrary and capricious, *see* 5 U.S.C. § 706(2)(A), and must be vacated by this Court.

Next, the Commission improperly found that the benefits from the AFP outweigh its environmental and social harms. Following the Commission’s finding of a project need, the Commission must “approve a project only ‘where the public benefits of the project outweigh the project’s adverse impacts.’” *Minisink Residents for Env’t Pres. & Safety v. FERC*, 762 F.3d 97, 102 (D.C. Cir. 2014). The Commission improperly found this balance weighed in favor of the AFP, as it improperly weighed the use of eminent domain, rejected environmental and social harms from its analysis, and failed to consider the burning of LNG. Therefore, this finding also fails the arbitrary and capricious standard, and must be vacated by this Court.

The Commission further erred in its decision to route the AFP over HOME’s property, despite HOME’s genuine religious beliefs, which constitutes a violation of the Religious Freedom Restoration Act (RFRA). 42 U.S.C. § 2000bb. First, this Circuit should adopt a plain meaning interpretation of “substantial burden” under RFRA, as it is supported by the legislative intent, history, and text of RFRA, as well as the Supreme Court’s treatment of RFRA and RLUIPA as sister statutes. *See* S. Rep. No. 103-111, at 8 (1993); 42 U.S.C. § 2000bb(b); *Holt v. Hobbs*, 574 U.S. 352, 356-58 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 714 (2014). Under this plain meaning interpretation, HOME has demonstrated that their religious exercise has been substantially burdened, and the Commission cannot meet its burden under the

strict scrutiny test to justify the burden. And, even if this Circuit adopts the Ninth Circuit's narrower interpretation of "substantial burden," HOME still succeeds in its RFRA claim.

However, the Commission correctly found that GHG Conditions are not beyond its authority under the NGA. GHG Conditions do not constitute a "major question," and the Commission should be afforded *Chevron* deference. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022). Under *Chevron* deference, the Commission's Conditions must be upheld, as the NGA is not ambiguous, and in the alternative, the Commission's interpretation was reasonable. And, even if imposing GHG Conditions does address a "major question," the Commission has clear congressional authority to impose the Conditions, so they must be upheld by this Court.

Finally, the Commission's decision to only impose GHG Conditions related to direct effects of the AFP, and not downstream and upstream GHG impacts was arbitrary and capricious. The EIS, prepared by the Commission pursuant to NEPA, was deficient because it failed to contain a "sufficient discussion of" all "the relevant issues." *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1367 (D.C. Cir. 2017). Further, the NGA requires the Commission to consider all relevant factors that affect the public interest, 15 U.S.C. § 717b(c), and the Commission regularly considers upstream and downstream benefits in the public interest analysis. *See* 88 FERC at 61,744. Thus, the Commission now choosing to ignore upstream and downstream costs is arbitrary, as it is not based on reasoned decision making.

STANDARD OF REVIEW

Courts review the Commission's award of a CPCN under the Administrative Procedure Act's (APA) "arbitrary and capricious" standard. *See Minisink*, 762 F.3d at 106; 5 U.S.C. § 706(2)(A). The Commission's factual findings are conclusive "if supported by substantial evidence." 15 U.S.C. § 717r(b). This Court considers "whether the decision was based on a

consideration of the relevant factors,” and “whether there has been a clear error of judgment.” *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002). Finally, courts “review the meaning of [Religious Freedom Restoration Act (RFRA)] de novo, including the definitions as to what constitutes a substantial burden,” “what constitutes a religious belief,” and “the ultimate determination as to whether the Act has been violated.” *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996).

ARGUMENT

I. The Commission’s finding of public convenience and necessity for the AFP was arbitrary and capricious because the Commission’s finding of project need is not supported by substantial evidence.

An entity seeking to sell or transport natural gas must obtain a CPCN from the Commission. 15 U.S.C. §§ 717f(c), (e). An applicant’s “proposals must be supported by evidence showing their necessity to ‘the present or future public convenience and necessity.’” *Atl. Refin. Co.*, 360 U.S. at 391. It must also “show that there is market need for the project.” *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015). The Commission must “consider all relevant factors” including, but not limited to “precedent agreements, demand projections, potential cost saving to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.” 88 FERC at 61,747.

A. The Commission’s finding of project need is not supported by substantial evidence.

The Commission erroneously found project need. By relying solely on precedent agreements, without considering their underlying facts, the Commission did not muster sufficient evidence to justify a finding of project need. Contradictory to its own policy, the Commission did not contemplate “all relevant factors” when determining project need. *Id.*

On judicial review, factual findings by the Commission are conclusive “if supported by

substantial evidence.” 15 U.S.C. § 717r(b). This standard requires “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938).

I. The Commission erred when it failed to “look behind” TGP’s precedent agreements in determining project need.

The Commission’s failure to “look behind” precedent agreements was at odds with the Commission’s own policy, as the Commission neither considered all relevant factors of project need nor collected enough evidence to constitute a complete record for review. Relying solely on contracts creates too narrow of an inquiry into a project’s need and is inconsistent with the Commission’s policies.¹ An inquiry into a project’s need is incomplete if it stops at the existence of precedent agreements. *See Env’t Def. Fund*, 2 F.4th at 975 (vacating a CPCN and holding that the Commission should have “looked behind” the proposed project’s single precedent agreement).

At its own concession, the Commission has stated that it is “difficult to articulate to landowners and community interests” the need for a project when relying “almost exclusively on contract standards” 88 FERC at 61,745. There is no reason it would be any easier to articulate the need for a project to a reviewing court using the same evidence, or lack thereof. After all, “[w]hatever probative weight that [precedent] agreement has, the Commission cannot simply point to the agreement’s existence and then ignore the evidence that undermines the agreement’s

¹ Traditionally, applicants for a CPCN demonstrated project need through precedent agreements (“long-term contracts with shippers”). *City of Oberlin v. FERC*, 39 F.4th 719, 722 (D.C. Cir. 2022). “[T]he test relying on the percent of capacity contracted does not reflect the reality of the natural gas industry’s structure” and “has become problematic,” 88 FERC at 61,749, because “evidence of market need is too easy to manipulate” when relying on solely the face value of precedent agreements. *Env’t Def. Fund v. FERC*, 2 F.4th 953, 973 (D.C. Cir. 2021), *cert. denied*, *Spire Missouri Inc. v. Env’t Def. Fund*, 142 S. Ct. 1668 (2022). The problematic nature of the contract test led to current agency guidance, as applied here. *See* 88 FERC ¶ 61,227 (1999).

probative value.” *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134, 62,002 (2019) (Glick, Comm’r, dissenting). Further, a reviewing court may set aside the Commission’s action when it has “entirely failed to consider an important aspect,” or for the purposes of this case, many important aspects. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Because the Commission relied solely on TGP’s two precedent agreements as the basis for awarding the AFP’s CPCN and did not inquire into all relevant factors, this Court should find there was insubstantial evidence of project need.

2. *“Looking behind” TGP’s precedent agreements does not provide sufficient evidence to show project need.*

The Commission will not find project need for the AFP when it “looks behind” TGP’s precedent agreements. Instead, the Commission will find that 90% of the AFP-transported LNG is destined for Brazil, and 100% of capacity is without a designated end user.

TGP’s contracts with LNG transporters are an unreliable depiction of market need. The “best test of a particular regional or subregional market” considers the degree to which gas distribution utilities will directly contract for the proffered gas supplies” because this captures the end user of the gas. *W. Virginia Pub. Servs. Comm’n v. U. S. Dep’t of Energy*, 681 F.2d 847, 860 (D.C. Cir. 1982). While the record does not identify who will ultimately burn the transported LNG, the record does identify that 90% of capacity is destined to be exported to Brazil.

Brazilian need does not constitute public need under the NGA. Section 7(c) explicitly deems export of LNG to countries with a free trade agreement as “consistent with the public interest.” 15 U.S.C. § 717b(c). Applying the canon of construction *expressio unius*,² the express mention of export to countries without a free trade agreement is not within the public interest

² Courts should interpret the express mention of one thing to imply the exclusion of unmentioned things. See *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017).

under the NGA. If this export does not fall within the NGA's public interest, it follows that export of LNG to Brazil is not within the same public's need. Accordingly, the Commission lacked substantial evidence to find project need for the AFP.

Contracts with transporters, not end users, do not accurately reflect project need. Plus, Congress did not intend to allow *Brazilian* need to constitute public need under the NGA. For these reasons, illuminated by "looking behind" TGP's precedent agreements, the Commission does not have sufficient evidence to find project need for the AFP.

3. *Even when taking the precedent agreements at face value, the Commission lacked substantial evidence.*

Even if this Court declines to "look behind" TGP's precedent agreements, there is insufficient evidence to support the Commission's declarations. The Commission's hollow statements—that AFP transports domestically produced LNG, provides for domestic customers, fills additional capacity, and will transport gas that may or may not have otherwise been purchased—and inconsistencies lack probative value and fail to articulate AFP's project need.

First, the Commission claimed that the AFP provided transportation for domestically produced LNG. The Commission's conclusion is not dispositive because without the AFP, this LNG remains in trade and is transported on the Southway Pipeline.

Second, the Commission claimed that the AFP provides gas to some domestic customers. This *may* be a sign of project need; however, the Commission's claim is unsupported by the record because the end user of the AFP-transported LNG is unidentified. The Commission said, "we do not put any significant weight on the end use of the LNG." *Order*, P 9. But the order is contradictory and inconsistent because in consecutive paragraphs, the Commission boasts about AFP's domestic customers after declaring the end user of the LNG is insignificant.

Third, the Commission claimed that the AFP fills additional capacity at the International

New Union City M&R Station, and while that is not contested, the AFP would leave behind empty capacity in the Southway Pipeline. Stating that the AFP fills additional capacity at the New Union City M&R Station is not probative of project need, but instead an illustrative example of how TGP plans to use the AFP to reshuffle their assets.

Fourth, the Commission reasoned that since gas demands served by the Southway Pipeline are diminishing, the AFP will transport gas that may or may not otherwise be purchased in the future. There is no dispute that gas demands in regions East of Old Union, served by the Southway Pipeline, are diminishing, but maintained rate of production coupled with an evidenced diminishing demand flies in the face of Congress's intent to have the Commission consider all relevant factors to the public interest. *See Env't Def. Fund*, 2 F.4th at 967 ("an action by the Commission may be set aside if the agency has relied on factors which Congress has not intended it to consider."); *see also Minisink*, 762 F.3d at 106 (stating conservation and environmental issues were subsidiary purposes behind the NGA's passage). Consequently, the Commission is at high risk of enabling "unnecessary disruption of the environment, and the unneeded exercise of eminent domain" for no reason other than private profit. 88 FERC 61,737.

Lastly, without a market study, the Commission lacked substantial evidence of project need. *See* 88 FERC at 61,784 ("evidence necessary to establish the need for the project will usually include a market study"). Neither the Commission nor TGP commissioned a market study; however, TGP could have "rel[ied] on generally available studies by EIA [U.S. Energy Information Administration] or GRI [Global Reporting Initiative]." *Id.* Relevant here, the Department of Energy commissioned EIA to evaluate the impact of LNG exports on domestic energy markets and related macroeconomic effects. *See Sierra Club v. U.S. Dep't of Energy*, 867

F.3d 189, 194 (D.C. Cir. 2017).³ The absence of a market study in the record, when one was readily available, further proves the Commission lacked substantial evidence.

TGP failed to produce evidence of project need and the Commission then erroneously found project need, despite its absence in the evidentiary record.

B. The Commission's finding of public convenience and necessity was arbitrary and capricious because it failed to make well-reasoned and supported findings.

The Commission's award of a CPCN is reviewed under the APA's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). Under this standard, the Commission must "fully articulate the basis for its decision." *Mo. Pub. Serv. Comm'n v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000). This Court must ask whether "the Commission's 'decision making [wa]s reasoned, principled, and based upon the record.'" *Myersville Citizens*, 783 F.3d at 1308 (*quoting Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)). Because the Commission acted contrary to Congress's intent, ignored its own policy, and relied on unsubstantial evidence, this Court must answer in the negative and hold that the Commission's decision making was not reasonable, principled, nor based upon the record, and thus, was arbitrary and capricious.

II. The Commission's finding that the benefits from the AFP outweigh its environmental and social harms was arbitrary and capricious.

Even if TGP has demonstrated the project's need, the adverse effects of the AFP outweigh its benefits. After the Commission has determined the proposed project has the requisite need, it will "approve a project only 'where the public benefits of the project outweigh the project's adverse impacts.'" *Minisink*, 762 F.3d at 102 (citing *Certification of New Interstate Nat. Gas Pipelines*, 90 FERC ¶ 61,128, 61,396 (2000) (weighing a project's benefits against its

³ The "EIA projected that increased LNG exports would lead to increased natural gas prices within the United States." See *Sierra Club*, 867 F.3d at 194. The potential cost increase on domestic consumers found in this readily available EIA study deviates away from project need.

adverse effects, including “both market- and environmentally-focused” effects).⁴ “The public benefits could 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.” 90 FERC at 61,396. Applicants “must submit evidence of the public benefits to be achieved by the proposed project.” 88 FERC at 61,750. “Vague assertions of public benefits will not be sufficient.” *Id.* at 61,748.⁵ On the other side of the scale, the Commission considers adverse effects on “existing customers of the applicant, the interests of existing pipelines and their captive customers, and the interests of landowners and the surrounding community, including environmental impact.” 90 FERC at 61,389. Effects on TGP’s existing customers, and existing pipelines and their captive customers are not in dispute.

A. The Commission erroneously balanced AFP’s evidenced public benefits against its adverse effects.

The Commission’s finding that the benefits from the AFP outweigh its harms was arbitrary and capricious because it ignored the use of eminent domain, which disallowed the proper application of the Commission’s proportional approach and rejected environmental and social harms as adverse environmental impacts.

⁴ Before balancing, the applicant should eliminate or minimize any adverse effects. Elimination and mitigation are “not intended to be a decisional step in the process for the Commission. Rather, this is a point where the Commission will review the efforts made by the applicant and could assist the applicant in finding ways to mitigate the effects, but the choice of how to structure the project at this stage is left to the applicant’s discretion.” 88 FERC at 61,745.

⁵ It is HOME’s positions that the Commission considered unsubstantiated public benefits in the balancing test. TGP “must submit evidence of the public benefits to be achieved by the proposed project.” 88 FERC at 61,750. As discussed at length previously, TGP’s precedent agreements lack probative value, and TGP forwent a market study. Ultimately, the record lacks evidence of public benefit to support a conclusive balancing test. Upon remand, the Commission will need to engage in further fact finding. Until then, the Commission does not have sufficient evidence to assess public benefit or weigh it against adverse effects, and thus, its finding is arbitrary.

First, the Commission improperly weighed the lack of easement agreements. The Commission uses a sliding scale approach to weigh benefits and impacts. 88 FERC at 61,749 (if applicant “minimize[s] the effect of the project on landowners by acquiring as much right-of-way as possible,” then “the benefits needed to be shown would be less than in a case where no land rights had been previously acquired by negotiation.”). The Commission’s guidance is clear: less easement agreements, i.e., more use of eminent domain, will require greater showing of the AFP’s public benefit. *Id.* TGP doubled down; first, it failed to sign easement agreements with 40% of affected landowners, and second, it didn’t consider this failure significant. As such, the Commission could not have allotted proper weight to the adverse economic effects suffered by landowners along the route of the AFP. By miscalculating these adverse effects weight, the commission’s entire balancing test is skewed, and its determination is arbitrary and capricious.

Second, the Commission failed to recognize that here, environmental impacts are synonymous with landowners’ interests. The “interests of the landowners and the surrounding community have been considered synonymous with the environmental impacts of a project.” 88 FERC at 61,748. This case is no exception. It is fundamental to HOME’s religious beliefs to preserve the Earth, especially against economic interests, such as destroying the land to obtain, transport and burn harmful fossil fuels. It is therefore impossible to separate the interests of the landowners and HOME’s religious beliefs. As such, it was arbitrary and capricious for the Commission to attempt this separation.

Finally, the Commission failed to consider the burning of LNG as an adverse impact when it has not replaced a dirtier fuel. When a LNG facility displaces fuels that are more harmful, the Commission considers it a “benefit[] to the environment,” and thus, a public benefit. 90 FERC at 61,398. When a natural gas facility uses fuel that is harmful to the environment, this

should be considered an adverse impact. Regularly considering the same factor as a benefit, but categorically excluding it as an adverse impact is arbitrary.

In conclusion, the Commission's finding that the benefits from the AFP outweigh its adverse effects is arbitrary and capricious.

III. The Commission's decision to route the AFP over HOME's property, despite HOME's religious objections, violates RFRA.

Congress' mandate under RFRA is clear; the "[g]overnment shall not substantially burden a person's exercise of religion" unless the burden "further[s a] compelling government interest" and "is the least restrictive means" to do so. 42 U.S.C. § 2000bb-1(a)-(b). In 1993, RFRA was enacted as a calculated move to overrule the Supreme Court's decision in *Smith*. *Id.* at § 2000bb; see *Emp. Div., Dept. Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 888 (1990) (holding the Free Exercise Clause does not require generally applicable laws to be justified by a compelling governmental interest). Congress failed to define "substantial burden," which has resulted in varying judicial interpretations. See 42 U.S.C. § 2000bb-2. Not speaking directly to the issue, the Supreme Court has left the definition open to circuit courts. Jonathan Knapp, Note, *Making Snow in the Desert: Defining a Substantial Burden under RFRA*, 36 Ecology L.Q. 259, 262 (2009).

In this case, the Commission incorrectly found that routing the AFP over HOME's property does not violate RFRA. Courts "review the meaning of [RFRA] de novo, including the definition[] as to what constitutes a substantial burden." *Thiry*, 78 F.3d at 1495. This Court should adopt a plain meaning interpretation of "substantial burden." Applying this interpretation, the Commission's decision to route the AFP over HOME's sacred, religious property violates RFRA. However, even under the contrary interpretation cited by the Commission, the route is still a substantial burden, and this Court should hold the Commission's decision violates RFRA.

A. This Court should adopt a plain meaning interpretation of a “substantial burden.”

A plain meaning interpretation of “substantial burden” is consistent with the text, intent, and legislative history of RFRA, and the Supreme Court’s treatment of RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA) as sister statutes.

1. A plain meaning interpretation is consistent with the legislative intent and history.

Prior to RFRA, cases pertaining to burdens on religion were decided under the Free Exercise Clause. *See Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (holding a law that denied unemployment benefits to those who would not work on Saturdays due to religious beliefs violates the Free Exercise Clause); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1971) (holding a law enforcing criminal penalties for parents that do not have their children attend school until age 16 violates the Free Exercise Clause); *see also Smith*, 494 U.S. at 889.

Before *Smith*, government actions were upheld when a “compelling government interest” that outweighed the “substantial burden” on religious exercise. *Burwell*, 573 U.S. at 693. In determining if a burden existed, the Supreme Court used broad reasoning, including if the action “gravely endanger[ed]” the ability to practice religion, *Yoder*, 406 U.S. at 219, or “force[d] her to choose between following precepts of her religion and forfeiting benefits.” *Sherbert*, 374 U.S. at 404. Neither opinion “suggested that religious exercise can be ‘burdened’ or ‘substantially burdened,’ *only* by the two types of resulting burdens considered in those cases.” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) (Fletcher, J., dissenting) (emphasis in original).

In 1990, the Supreme Court shifted course, and held that applying the “compelling interest” test “to all actions thought to be religiously commanded . . . would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.” *Smith*, 494 U.S. at 888. In a direct response, Congress enacted RFRA, “to provide very

broad protection for religious liberty” and require courts to apply the compelling interest test despite the Supreme Court’s concern. *Burwell*, 573 U.S. at 693. Legislative history directs the courts to “look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest.” S. Rep. No. 103-111, at 8 (1993).

Congress went further, codifying the purpose of RFRA as:

- (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; and
- (2) to provide a claim or defense to persons whose religious freedom is substantially burdened by government.

42 U.S.C. § 2000bb(b). In sum, Congress intended for substantial burden to be interpreted broadly, and not only in the exact circumstances of any previous Supreme Court cases.

And yet, incorrectly, the Ninth Circuit has narrowly interpreted RFRA to mean that a substantial burden is only triggered in the same instances of *Sherbert* and *Yoder*. See *Navajo Nation*, 535 F.3d at 1063. But Congress, as established, intended to restore the use of strict scrutiny in all cases of burdens on religious exercise. In using “substantial burden,” Congress intended for the courts to employ the same, case by case, reasoning that had been applied in finding a burden in *Sherbert* and *Yoder*, which used a plain meaning approach. Further, any contrary interpretation of “substantial burden” unduly narrows RFRA’s clear purpose of protecting religious exercise from undue government interference.

2. *RFRA’s text aligns with a plain meaning interpretation of “substantial burden.”*

Not only is a plain meaning approach consistent with the legislative intent and history, but with the text of the Act as well. Congress did not define “substantial burden” or specify when one could arise. See 42 U.S.C. § 2000bb-2. Thus, precedent requires courts to turn to statutory tools of interpretation, and first employ the ordinary meaning cannon. *HollyFrontier Cheyenne*

Ref., LLC v. Renewable Fuels Ass’n, 141 S. Ct. 2172, 2176 (2021) (“Where Congress does not furnish a definition of its own, we generally seek to afford a statutory term ‘its ordinary or natural meaning.’”). The Supreme Court has applied ordinary meaning to other undefined terms within RFRA, indicating this is the correct approach. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (applying ordinary meaning to “appropriate relief” in RFRA’s text).

Moving to the plain meaning of “substantial burden,” “burden” means “something that hinders or oppresses.” *Burden*, Black’s Law Dictionary (11th ed. 2019). Here, substantial is modifying burden, and means “large in amount, value, or importance.” *Substantial*, Oxford English Dictionary (2d ed. 1989). Applying these definitions, a claimant must show that the government has hindered or oppressed their exercise of religion in a large or important manner. This interpretation is also supported by the lack of narrowing language in RFRA. “Congress is quite capable of narrowing the scope of a statutory entitlement or affording a type of statutory exemption when it wants to.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1130 (10th Cir. 2013). Congress could have indicated that a substantial burden can *only* be met by the denial of government benefits or the threat of criminal sanctions. Choosing not to do so indicates that Congress intended for RFRA to establish broad protections for religion and invoke strict scrutiny to justify all substantial burdens placed on individuals’ religious exercise.

3. *The plain meaning interpretation is consistent with Supreme Court precedent in treating RFRA and RLUIPA as sister statutes.*

A plain meaning interpretation creates consistency between RFRA and RLUIPA, its sister statute. RLUIPA was enacted in 2000, in response to the Supreme Court holding RFRA unconstitutional as applied to the states. *See* 42 U.S.C. § 2000cc-1; *City of Boerne v. Flores*, 521

U.S. 507, 536 (1997). Since then, the Supreme Court, employing *in pari materia*,⁶ has used RLUIPA and RFRA to interpret one another. *See Holt*, 574 U.S. at 356-58 (using RFRA history and reasoning to decide a RLUIPA case); *Burwell*, 573 U.S. at 714 (attributing the same definition of “exercise of religion” to RFRA as is applied to RLUIPA). Relying on this precedent, we can attribute the same definition of “substantial burden” in RLUIPA to RFRA, which is defined by its plain meaning. *See Ramierz v. Collier*, 142 S. Ct. 1264, 1278 (2022) (finding a substantial burden under RLUIPA when a person was denied of his pastor praying aloud and placing his hands on him during his execution).

In conclusion, Congress was relying on the courts to return to the broad interpretation of “substantial burden” pre-*Smith*. A plain meaning interpretation is in line with the text, history, and legislative intent of RFRA, as well as the treatment of RFRA and RLUIPA as sister statutes.

B. Adopting the plain meaning interpretation of “substantial burden,” the Commission violated RFRA.

The Commission’s action constitutes a substantial burden and does not withstand strict scrutiny; accordingly, the Commission has acted unlawfully, as its action violates RFRA.

1. HOME has demonstrated a substantial burden.

Under the plain meaning interpretation, a substantial burden is established when the government has hindered or oppressed the exercise of religion in a large or important manner and certainly when “the affected individuals [are] coerced by the Government’s action into violating their religious beliefs.” *Lyng v. Nw. Indian Cemetery Protective Assn.*, 485 U.S. 439, 449 (1988) (holding tribes were not burdened by the building of a logging road on public land that the tribes considered sacred because they could meaningfully practice elsewhere, and the

⁶ “[A]ll acts *in pari materia* are to be taken together, as if they were one law.” *United States v. Stewart*, 311 U.S. 60, 64 (1940).

Government already owned the land). Our case is distinguishable from *Lyng*, as HOME cannot meaningfully practice the Solstice Sojourn elsewhere, as this exact route has been used since at least 1935. Further, unlike in *Lyng*, where the route was over public land, the AFP runs directly through HOME's property and over the path of the Solstice Sojourn.

Here, the Commission is effectively forcing HOME to act contrary to its own, sincere religious beliefs. The approved project will require the removal of 2,200 trees on HOME's property. Although many of these trees will be replanted elsewhere, the trees along the route of the buried pipeline cannot be replanted and will result in a bare spot along the route of the Solstice Sojourn, affirmatively and permanently modifying its ceremonial nature. The Commission's approval of this route will result in the entirety of HOME's sacred land being tainted and exploited for purposes against their beliefs—thus compelling them to support the production, transportation, and burning of fossil fuels. For members of HOME, this is unimaginable and will make their place of worship inaccessible, thus certainly rising to an important and large hinderance on their ability to practice their religion. In effect, the Commission's approval of the AFP through HOME's property will burden HOME's religious exercise substantially, and in a manner that prohibits their practice entirely.

In conclusion, applying a plain meaning of “substantial burden,” the Commission's approval of the AFP substantially burdens HOME's religious practices.

2. The Commission does not meet strict scrutiny.

As HOME established a substantial burden, the Commission has the burden to meet the strict scrutiny test. 42 U.S.C. § 2000bb-1(b). The Commission cannot do so.

First, RFRA requires the government's burdensome actions to be in furtherance of a compelling governmental interest, which must be “of the highest order,” *Yoder*, 406 U.S. at 215, and “only the gravest abuses, endangering paramount interest, give occasion for permissible

limitation.” *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The Commission did not identify a compelling governmental interest because it did not find a substantial burden and stopped the analysis. Regardless, there is not a compelling interest that will meet the “highest order” bar. TGP is only constructing this pipeline to re-route LNG for export to Brazil and does not involve any new production. Although TGP and the Commission will urge that they have a compelling interest in delivering energy to a country without a free trade agreement, this does not meet the “highest order” bar. Rather, this merely represents a private company reshuffling its assets.

And second, even if the Commission could establish a compelling government interest, the parties fail to demonstrate that the burden was done in the least restrictive means possible. The Commission erred in relying on non-binding district court precedent when it should have relied on the test in *Burwell. See Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957, 966 (E.D. Mich. 2014) (finding the least restrictive means possible requires “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” (internal quotes omitted)); *Cf. Burwell*, 573 U.S. at 709 (noting “[t]he least-restrictive-means standard is exceptionally demanding,” with no mention of an economic test). Whether or not this Circuit adopts the cost-based test, HOME still prevails.

The least restrictive test is not met. The record shows neither public necessity nor a compelling interest, and therefore, the least restrictive option was to deny the AFP outright. The alternative route is the next least restrictive option. Even employing the balancing test, the cost to the Commission is nothing and the cost to TGP is \$51 million more. Although this is not the Commission’s cost to bear, to TGP, a mere 8.5% increase in the cost of its project is insignificant. Contrastingly, the cost to HOME here is beyond significant – the approved route will permanently taint HOME’s own religious land and their most important religious ceremony.

TGP asserts that the cost to the Commission is creating a permitting system that bends unreasonably to the desire of any religion. This argument fails, however, because either interpretation of the substantial burden requirement acts as a threshold question to the strict scrutiny analysis that ensures that the Commission will never be forced to bend unreasonably to the desired expectations of any religion. Further, TGP argues that the alternative route will cause more environmental harm. Although the building of any pipeline represents a cost to HOME and its beliefs grounded in conserving the Earth, this cost is significantly less in comparison to the pipeline running through HOME's land. Further, TGP's sudden concern about the alternative route's excess environmental harm further strengthens HOME's argument that the entire application should have been denied in the first place because it is the least restrictive means.

In conclusion, TGP and the Commission cannot establish a compelling governmental interest to justify the burden on HOME's religious exercise, and even if they did, their claim fails to show the burden was done in the least restrictive mean possible.

C. Even if this Circuit adopts the Ninth Circuit Test from *Navajo Nation*, this Court should still find the Commission's actions violated RFRA.

Pursuant to the test in *Navajo Nation*, a substantial burden exists only where "there is [a] showing [that] the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiff's religious beliefs." *Navajo Nation*, 535 F.3d at 1063.

Here, HOME faces criminal sanctions if they continue to practice their religion. The burying of the AFP beneath the Solstice Sojourn route is not sufficient for HOME to practice their religion. For HOME, the thought of this is unbearable and runs contrary to their beliefs, including their fundamental core tenet which compels members to do everything in their power to promote the preservation of the Earth. But "damaging or destroying an interstate gas pipeline

facility” is a federal charge that carries a sentence of up to twenty years. 49 U.S.C. § 60123(b); *see also United States v. Long*, 1999 U.S. App. LEXIS 4780, at *2 (4th Cir. Mar. 19, 1999) (upholding conviction under 49 U.S.C. § 60123 of a man who attempted to intentionally excavate an interstate LNG pipeline running through his property). This charge applies even to “attempting or conspiring” to damage a pipeline. 49 U.S.C. § 60123(b). Members of HOME could face this charge even for replanting trees along the created bare spot of the Solstice Sojourn, as the roots of the trees are likely to damage the pipeline. However, the call to preserve the Earth, makes the pipeline existing on their property repulsive to their religious beliefs. Thus, just as in *Yoder*, members of HOME will be faced with damaging and removing the pipeline to practice their religion, or not being able to practice their religion at all.

In conclusion, even if this Court declines to adopt a plain meaning interpretation of a “substantial burden,” HOME must still prevail in its RFRA claim. HOME is being coerced to act contrary to its religious beliefs or face the threat of sanctions. And, as discussed, the Commission and TGP cannot succeed in meeting the strict scrutiny test to justify this burden on HOME.

IV. The GHG Conditions imposed by the Commission were not beyond the Commission’s authority under the NGA.

The Commission correctly decided that imposing GHG Conditions was not beyond its authority. This authority, however, includes mitigating construction impacts as well as upstream and downstream impacts. Under the major-questions doctrine, GHG Conditions do not address a “major question,” and therefore, the Commission’s decision should be afforded *Chevron* deference. Applying *Chevron*, the Commission has the authority to impose GHG Conditions. Even if GHG Conditions address a “major question,” the Commission has clear authority to impose the Conditions under the NGA. Therefore, this Court should uphold the Commission’s finding that imposing GHG Conditions was not beyond its authority.

A. Imposing GHG Conditions does not address a “major question;” therefore, the Commission should be afforded *Chevron* deference.

Courts afford *Chevron* deference when reviewing cases regarding a federal agency’s interpretation of a statute. *See generally Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court, however, applies the major-questions doctrine in cases where the question is “whether Congress in fact meant to confer the power the agency has asserted.” *West Virginia*, 142 S. Ct. at 2608. In these “extraordinary cases,” it may be said that the “history and the breadth of the authority” that the agency asserts, and the “economic and political significance of that assertion” give the Court “reason to hesitate before concluding that Congress meant to confer such authority.” *Id.* Courts “presume that Congress intends to make major policy decisions itself.” *Id.* at 2609. To overcome this presumption, “[t]he agency must point to ‘clear congressional authorization’ for the power it claims.” *Id.* (quoting *Utility Air Regul. Group v. EPA*, 573 U.S. 302, 324 (2014)).

The Commission distinguishes downstream and upstream impacts from construction impacts and only imposed GHG Conditions to mitigate impacts from construction. As discussed in Section V, this decision was arbitrary and capricious, and the Commission should have imposed Conditions to mitigate the downstream and upstream impacts. For the purposes of this argument, our use of the phrase “GHG Conditions” will encompass both the Conditions imposed as well as upstream and downstream Conditions the Commission should have imposed.

1. Imposing GHG Conditions does not address a “major question.”

The Supreme Court has applied the major-questions doctrine in five instances: (1) when the interpretation substantially restructured the economy, *see Ala. Assn. of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021); (2) when the interpretation addressed a question of “deep economic and political significance,” *Utility Air Regul. Group*, 573 U.S. at

324; (3) when the interpretation fundamentally transformed the regulatory scheme, *see West Virginia*, 142 S. Ct. 2587, 2609 (2022); (4) when the power to act was found in an “ancillary” provision of the statute, *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001); and (5) when the agency claimed a power that had been repeatedly denied to it, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 (2000). The major-questions doctrine does not apply to imposing GHG Conditions, as this case does not fall within one of these categories.

- i. GHG Conditions do not substantially restructure the economy or the natural gas industry.

The GHG Conditions imposed on the AFP are specific to targeting the GHG emissions from the AFP, not addressing climate impacts from other pipelines or the natural gas industry. First, a plain reading of the Conditions shows that the Commission only intended for the Conditions to be binding on TGP. Each condition begins with “TGP shall” instead of broader language such as “a party seeking to construct a LNG pipeline.” Second, *West Virginia* is distinguishable because unlike the Clean Power Plan (CPP) the Conditions do not mandate industry-wide mitigation. 142 S. Ct. at 2610. The CPP was an agency rule that applied to all power plants in the U.S. and compelled reduction in carbon emissions. *See generally* 40 C.F.R. § 60 (repealed Sept. 6, 2019). The GHG Conditions apply only to TGP. There is a stark contrast between the EPA’s inability to regulate under the CPP and the Commission’s ability to impose project-specific conditions.

Third, the narrow impact of this case would not restructure the natural gas industry, nor the economy, unlike other Supreme Court decisions decided on these grounds. *See Alabama Assn.*, 141 S. Ct. at 2487 (invalidating agency’s attempt to institute a nationwide eviction moratorium affecting 80% of the country); *Nat’l Fed’n of Indep. Bus. v Occupational Safety & Health Admin.*, 142 S. Ct 661, 665 (2022) (rejecting agency’s rule to require vaccination of 84

million Americans); *Utility Air Regul. Group*, 573 U.S. at 324 (rejecting agency’s interpretation when it subjected millions of previously unregulated sources to regulation under the Clean Air Act). Here, the Conditions do not affect a substantial portion of the population, they only affect the AFP. Further, TGP argues the GHG Conditions set a precedent mandating Conditions on all pipelines, but this argument fails to account for the fact that other pipelines are already regulated by the Commission and the AFP Conditions do not transfer to any other pipeline.

Because the Conditions are specific to reducing GHG emissions from the AFP alone, the Conditions do not substantially restructure the American economy or the natural gas industry. The Commission does not seek to impose broad, mandatory Conditions on other pipeline projects with these Conditions, it instead seeks to reduce the GHG impacts from the AFP only.

ii. GHG Conditions do not address a question of “deep economic and political significance.”

Because the Commission is not imposing broad, mandatory Conditions on the natural gas industry nor substantially restructuring the American economy, it follows that the Conditions are not of “deep economic and political significance.” In *Utility Air Regul. Group*, the EPA promulgated the tailpipe rule to address this nation’s contributions to the global climate crisis. 573 at 324. While it is true that the GHG Conditions are a response to climate change, it is not true that conditions on one pipeline are the equivalent to the EPA’s regulation of all tailpipes. Like the tailpipe rule, the Affordable Care Act (ACA) was a nationwide rule that was widely applicable and addressed a significant “economic and political” question. *See King v. Burwell*, 576 U.S. 473, 485-86 (2015). Both the tailpipe rule and the ACA are distinguishable from the GHG Conditions in this case because the Conditions are specific enough to minimize the political and economic effects.

iii. GHG Conditions do not fundamentally transform the regulatory scheme.

The Commission has long had the power to impose conditions to mitigate environmental impacts. *See Twp. of Bordentown v. FERC*, 903 F.3d 234, 261 n. 15 (3d Cir. 2018) (noting the Commission’s authority to impose conditions is supported by the NGA). Imposing GHG Conditions is an extension of this power. Unlike the EPA’s decision in *West Virginia*, the Commission does not come to this decision to impose GHG Conditions “based on a very different kind of policy judgment.” *West Virginia*, 142 S. Ct. at 2612. Instead, the decision is based on factual and scientific considerations from the EIS and grounded in the Commission’s explicit mandate to impose conditions when granting a CPCN. *See* 15 U.S.C. § 717f(e).

iv. Imposing GHG Conditions is not “ancillary” to the NGA.

Congress explicitly and intentionally granted the Commission the regulatory authority to attach “reasonable terms and conditions as the public convenience and necessity may require” to LNG pipelines. *Id.* Congress’ delegation was neither “modest,” “vague,” nor “subtle.” *Whitman*, 531 U.S. at 468. The Supreme Court rejected agency interpretations based on powers found in “ancillary provisions” reasoning that Congress “does not . . . hide elephants in mouseholes.” *Id.* If anything, this was a mere mouse in a pipeline. There is no ancillary provision from which the Commission’s power to impose GHG Conditions could have originated. Instead, the Commission used the same congressional authorization it has been using since the inception of the NGA in 1938, to act in the public interest by attaching conditions to a CPCN.

v. The Commission is not claiming a power that Congress has repeatedly denied to it.

The Commission’s longstanding authority has never been denied by Congress, further indicating that imposing GHG Conditions is not a “major-question.” *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (rejecting agency’s attempt to regulate

the tobacco industry despite Congress's repeated denial to extend authority). In almost a century of imposing Conditions on pipelines within their explicitly delegated power, and without a reaction from Congress, it is evident the Commission is not claiming a power denied to it.

As demonstrated above, this case does not fall within one of the five categories that invokes the major-question doctrine. Although the issue of climate change as a whole is undoubtedly a "major question," imposing GHG Conditions for a specific project is not.

B. Applying *Chevron* deference, the Commission has the authority to impose GHG Conditions.

Because the major-questions doctrine does not apply, this Court should apply *Chevron* deference. Under *Chevron*, courts give latitude to agencies when a statute is ambiguous, and the agency's interpretation is reasonable. *See Chevron*, 467 U.S. at 843-44.

1. The NGA is not ambiguous.

The NGA is not ambiguous in its grant of authority to impose GHG Conditions on LNG pipelines. "If the intent of Congress is clear, that is the end of matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* Here, Congress granted the Commission authority to attach "reasonable terms and conditions as the public convenience and necessity may require" to CPCNs for LNG pipelines. 15 U.S.C. § 717f(e); *see also* 15 U.S.C. § 717b(a). Although Congress did not define the public interest, it clearly intended for the Commission to consider environmental issues relating to pipeline construction and operation as these issues are at odds with the public interest. Further, the Supreme Court has acknowledged this authority. *See NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 n.6 (1976) ("the Commission has authority to consider conservation, environmental, and antitrust questions"). If this Court finds that the NGA is unambiguous, the *Chevron* analysis will stop and leave the Commission with the delegation from Congress to impose GHG Conditions.

2. *Even if the NGA is ambiguous, the Commission's interpretation is reasonable.*

Should this Court find the NGA is ambiguous, *Chevron* step two asks whether the Commission's interpretation of the ambiguous statute is "reasonable." *Chevron*, 467 U.S. at 844. The D.C. Circuit has routinely found that the Commission has broad discretion in determining what conditions to attach to CPCNs. *Sabal Trail*, 867 F.3d at 1373 (finding the Commission had authority to mitigate GHG emissions under the NGA's "broad" delegation "to consider 'the public convenience and necessity'" when issuing a CPCN); *see also Twp. of Bordentown*, 903 F.3d at 261 n.15 (concluding that the Commission's authority to enforce any required remediation is amply supported by the NGA). The Commission's interpretation is reasonable.

C. Even if imposing GHG Conditions does address a "major question," the Commission had clear Congressional authority to impose the Conditions.

Even if the GHG Conditions address a "major question," as stated above, the Commission has sufficient authority under the NGA impose the Conditions. Section seven clearly authorizes the Commission to impose conditions considering the "public convenience and necessity," including environmental mitigation measures. 15 U.S.C. § 717f(e).

In conclusion, the major questions doctrine has evolved to "address[] a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia*, 142 S. Ct. at 2609. As discussed at length, that is not the case here. Applying *Chevron* deference, the Commission has authority to impose GHG Conditions. Even if the major-questions doctrine applies, the Commission has sufficient authority under section seven of the NGA to impose GHG Conditions.

V. The Commission's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts was arbitrary and capricious.

NEPA requires federal agencies to "consider fully the environmental effects of their proposed actions." *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 497, 503 (D.C.

Cir. 2011). Because LNG pipelines are a “major Federal action” that “significantly affect the quality of the human environment,” 42 U.S.C. § 4332(2)(C), the Commission was required to conduct an EIS considering the project’s “direct,” “indirect,” and “cumulative effects” on the human environment. *See* 40 C.F.R. § 1502.16; *see also id.* at § 1508.1(g). NEPA is a procedural statute and “does not mandate particular results, but simply prescribes the necessary process.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). However, the EIS becomes the basis for the Commission’s decision whether to, and to what extent, impose conditions on a CPCN. *See* 15 U.S.C. § 717f(e).

On review, the Commission’s EIS and subsequent decisions about mitigation are reviewed under the arbitrary and capricious standard. 5 U.S.C. § 706(2)(A); *see Sabal Trail*, 867 F.3d at 1367 (“An EIS is deficient, and the agency action it undergirds is arbitrary and capricious, if the EIS does not contain sufficient discussion of the relevant issues . . . or if it does not demonstrate reasoned decisionmaking.”) (internal quotations omitted). Under this standard, the Commission must “examine the relevant data and articulate a satisfactory explanation for its action.” *Motor Vehicles*, 463 U.S. at 43. The Commission’s decision not to impose Conditions addressing downstream and upstream impacts was arbitrary and capricious.

A. Failing to fully consider upstream and downstream GHG emissions, the Commission’s CPCN is a product of arbitrary and capricious decision making.

NEPA requires the Commission to take a “hard look at environmental consequences” of its actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976). Here, this “hard look” requires a discussion of “[t]he environmental impacts of the proposed action,” 40 C.F.R. § 1502.16(a), and the “[m]eans to mitigate adverse environmental impacts.” *Id.* § 1502.16(a)(9). These impacts include “indirect” effects. *Id.* § 1508.1(g)(2) (defining “[i]ndirect effects” as “reasonably foreseeable” and “later in time or farther removed in distance” than direct effects).

Courts have repeatedly found that NEPA requires the Commission to consider upstream and downstream impacts from pipelines as indirect effects. *See, e.g. Sabal Trail*, 867 F.3d at 1372; *San Juan Citizens All. v. BLM*, 326 F.Supp.3d 1227, 1243-44 (D.N.M. 2018); *W. Org. of Res. Councils v. BLM*, No. CV-16-21-GF-BMM, 2018 WL 1475470 at *13 (D. Mont. 2018). Whereas downstream impacts arise from fuel combustion, upstream impacts arise from increased production due to new transportation capacity. *See* 40 C.F.R. § 1508.1(g)(2) (“[i]ndirect effects” include “growth inducing effects and other effects related to induced changes”).

In the AFP’s EIS, the Commission properly considered and estimated upstream and downstream GHG impacts. While the Commission correctly quantified downstream GHG emissions, the Commission erroneously reasoned that because the AFP does not increase production at HFF, the upstream emissions are not consequential, and forwent their quantification. Additionally, the Commission neither analyzed the significance of indirect impacts, including both upstream and downstream, nor discussed means to mitigate such adverse impacts. Thus, the EIS is incomplete, cannot foster informed decision making, and any agency action on which it is based cannot satisfy this Court’s arbitrary and capricious standard.

1. The Commission failed to fully quantify and calculate the significance of indirect effects.

The Commission must quantify indirect GHG emissions from a project in its EIS except in narrow circumstances when “quantification may not be feasible.” *Sabal Trail*, 867 F.3d at 1374-75. Without quantification or explanation as to why it could not do so “it is difficult to see how FERC could engage in informed decisionmaking.” *Id.* at 1374. The Commission is required “to include a discussion of the significance of [these] indirect effect[s],” *id.*, and “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013).

The Commission correctly quantified the downstream GHG effects in the EIS, concluding that the upper bound of downstream effects is approximately 9.7 million metric tons of CO₂e per year. The Commission stopped here and failed to discuss the significance of these impacts or any incremental impacts. Alleged lack of internal policy to determine significance does not allow the Commission to ignore or sidestep the procedural mandates of NEPA.⁷ Thus, the Commission's obligations under NEPA remain unsatisfied as the AFP's EIS is incomplete.

As for the AFP's upstream effects, the Commission neither quantified these impacts nor analyzed their significance. The Commission urges that quantification of upstream GHG emissions can be difficult due to unknown factors, such as the location of the supply source; sometimes "quantification may not be feasible." *Sabal Trail*, 867 F.3d at 1374.⁸ But, this is not one of those times. As discussed, increased production from an increase in export is a reasonably foreseeable upstream effect.⁹ The Commission should not have any difficulty quantifying upstream impacts because it knows the LNG originates from existing production in the HFF. The quantification should have accounted for a future increase in production at HFF due to new

⁷ The Commission "should use tools that reflect the best available science and data," such as the GHG accounting tools that are widely available, including on CEQ's website, and already in use by the private sector, state and local governments, and other federal agencies. *National Env't Pol'y Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196, 1201-02 (2023). These "tool[s], however imprecise [they] might be, would contribute to a more informed assessment of the impacts than if it were simply ignored." *High Country Conservation Advocs. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1193 (D. Colo. 2014).

⁸ When the Commission finds quantifying upstream impacts infeasible, the Commission must "provide[] a satisfactory explanation for why this is such a case." *Sabal Trail*, 867 F.3d at 1374.

⁹ The Commission fails to account for the future increase of LNG demand due to its export to Brazil. *Sierra Club*, 867 F.3d at 194 (discussing EIA market study showing U.S. markets would increase gas production if exporting LNG); *See, e.g., Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (holding that the agency could not approve project without examining the upstream effects from increased coal consumption as it is "reasonably foreseeable—indeed, it is almost certainly true—that the proposed project will increase long-term demand for coal and any adverse effects that result from burning coal.").

capacity in the Southway Pipeline. The Commission must “at least attempt to obtain the information necessary to fulfill its statutory responsibilities,” including the increased demand that the exporting of LNG will create. *Birckhead v. FERC*, 925 F.3d 510, 520 (D.C. Cir. 2019).

2. *The Commission failed to discuss mitigation measures.*

NEPA’s procedure requires an EIS to include a discussion on the “[m]eans to mitigate adverse environmental impacts.” 40 C.F.R. § 1502.16(a)(9). Thus, the Commission was required to include a discussion of potential mitigation measures regarding both upstream and downstream GHG impacts in the EIS. However, the Commission did not do so, and instead suggested it could choose to “not characterize upstream or downstream impacts as significant or insignificant” and stop the analysis without any consideration of mitigation. *Order*, P 19. Pursuant to NEPA requirements, this is clearly erroneous, and thus, arbitrary and capricious.

In conclusion, by failing to fully consider, quantify, and discuss mitigation of all GHG emissions, the Commission’s approval is a product of arbitrary and capricious decision making.

B. The Commission’s failure to impose upstream and downstream GHG conditions under the NGA was arbitrary and capricious.

A “reasonably complete discussion of possible mitigation measures is an important ingredient of an EIS;” however, as a strictly procedural statute, NEPA does not require “a complete mitigation plan [to] be actually formulated and adopted.” *Robertson*, 490 U.S. at 333. This does not excuse the Commission from mitigating adverse environmental impacts. In fact, the NGA deems the Commission “the guardian of the public interest.” *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961). A CPCN may only be granted if the Commission finds it would be “necessary or desirable in the public interest,” 15 U.S.C. § 717f(a), and the Commission maintains the power to attach “reasonable terms and conditions as the public convenience and necessity may require.” *Id.* § 717f(e). As discussed, regardless of

whether this is a “major question,” the Commission maintains this power. Thus, to the extent that upstream and downstream GHG emissions affect the public interest, their impact and mitigation must be considered in a CPCN.

This is supported by the CEQ Climate Guidance which implores “agencies to mitigate GHG emissions associated with their proposed actions to the *greatest* extent possible.” 88 Fed. Reg. 1196, 1197 (emphasis added). The “United States faces a profound climate crisis and there is little time left to avoid a dangerous—potentially catastrophic—climate trajectory.” *Id.* The “guardian of the public interest” could not possibly be acting in an informed and well-reasoned manner by avoiding and refusing to mitigate the effects causing this exact crisis.

If the Commission had properly crafted the AFP’s EIS, it would have found severe upstream and downstream adverse environmental effects fueling the impending climate catastrophe. As the “guardian of the public interest” under the NGA, and with instruction from the CEQ, the Commission is required to act only in the public interest and based on a complete and adequate EIS. Worse than arbitrary and capricious, it would be egregious to ignore these adverse impacts. Approving the AFP without proper mitigation is contrary to the public interest and leaves society squarely in the path of a “dangerous—potentially catastrophic—climate trajectory.” This approval does not demonstrate reasoned decision making, and so it follows that the Commission’s CPCN approval was arbitrary and capricious and must be vacated.

CONCLUSION

For the foregoing reasons, this Court should vacate the Commission’s granting of the CPCN to TGP to construct the AFP.

