TEAM #20 NON-MEASURING

THIRTY-SIXTH ANNUAL
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MOOT COURT COMPETITION

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 23-01109
CONSOLIDATED WITH
No. 23-01110

The Holy Order of Mother Earth,
Petitioner,

and

Transnational Gas Pipelines, LLC,
Petitioner,

v.

Federal Energy Regulatory Commission,
Respondent.

ON PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL ENERGY
REGULATORY COMMISSION

Brief for FEDERAL ENERGY REGULATORY COMMISSION, Respondent

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STATEMENT OF JURISDICTION

This case concerns questions of the Natural Gas Act ("NGA") found in Chapter 15B of Title 15 within the United States Code, and the Federal Energy Regulatory Commission's ("FERC") decision to two final orders; first, the Order granting a Certificate of Public Convenience and Necessity (the "CPCN") to a natural-gas company and second, the Order denying petitions for rehearing and affirming the CPCN as originally issued (the "Rehearing Order") (collectively, the "FERC Orders"). FERC exercised subject-matter jurisdiction over the CPCN order under 15 U.S.C. § 717f and the Rehearing Order under 15 U.S.C. § 717r(a). This Court has original jurisdiction over these timely filed petitions for review of the FERC Orders under 15 U.S.C. § 717r(a)–(b), which provides that "[a]ny party to a proceeding under [the NGA] aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located," provided that they first seek rehearing before FERC.

STATEMENT OF THE ISSUES PRESENTED

I. Whether FERC's finding of public convenience and necessity for the AFP was reasonable and supported by substantial evidence insofar as FERC found the project needed where 90% of the gas transported by that pipeline was for export.

II. Whether FERC's finding that the benefits from the AFP outweighed the environmental impacts was reasonable and consistent with FERC's Certificate Policy Statement.

III. Whether it is a RFRA violation to route the AFP underneath HOME's property when HOME objects to the pipeline based on its religious beliefs.

IV. Whether FERC had authority under the NGA to impose the GHG conditions.

V. Whether FERC's decision not to impose any GHG conditions addressing downstream and upstream GHG impacts was reasonable.

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

Transnational Gas Pipelines, LLC ("TGP") is a limited liability company and exists under New Union state law. R. at 5. The Holy Order of Mother Earth ("HOME") is a not-for-profit religious order organized in 1903 under the laws of New Union and headquartered on the western end of Burden County, New Union on 15,500 acres, which HOME directly owns. R. at 5. HOME was formed in response to the "industrial revolution and harmful effects from industrialization and capitalism." R. at 11.

TGP plans to commence a project involving the construction of several facilities, particularly, the construction of an approximately 99-mile-long, 30-inch diameter interstate pipeline called the American Freedom Pipeline ("AFP"). R. at 4–5. The whole proposed project is estimated to cost $599 million. R. at 6. Between February 21 and March 12, 2020, TGP held an open season for service on the project. R. at 6. By the end of the open season, TGP 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, which together equal to the full design capacity of the TGP Project." R. at 6.

The AFP will transport liquified natural gas ("LNG") produced in the Hayes Fracking Field ("HFF") located in Old Union, where the gas is extracted. R. at 6. This project will not lead to additional production at HFF but will instead re-route around thirty-five percent of the LNG transported through the pre-existing Southway Pipeline to the new AFP. R. at 6.

This project commenced based on the evidence TGP found showing demands for LNG in Old Union have been "steadily declining due to population shift, efficiency improvements, and increasing electrification of heating in those states." R. at 6. As a result, "market needs are better served by routing the LNG through the AFP." R. at 6. Importantly, although there will be a reduction in transportation on the Southway Pipeline, the reduction will not lead to gas shortages. R. at 6. Because of the diminishing demand for gas by the Southway Pipeline, the AFP "will transmit gas that may or may not otherwise be purchased in the future." R. at 9.

TGP can fund this project "without subsidization from its existing customers or that there are no adverse impacts on TGP's existing customers, existing pipelines in the market and their captive customers." R. at 7. Further, TGP provided a "strong showing of public benefit" because TGP executed binding precedent agreements for firm service using 100 percent of the "design capacity of the pipeline project." R. at 8. Additionally, the AFP "serves multiple domestic needs."[1] Moreover, the AFP "provides transportation for domestically produced gas, provides gas to some domestic customers, and fills additional capacity at the International New Union City M&R Station." R. at 9.

Further, the AFP route will pass through roughly two miles of HOME's property. R. at 10. Consequently, the AFP will require the permanent removal of 2,200 trees and various types of vegetation on HOME's property that cannot be replaced for safety reasons. R. at 10. TGP

[1] *See* R. at 8.

> (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 in 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.

anticipated concerns from landowners like HOME and "has been working to address landowner's concerns and questions" by negotiating and agreeing to make changes to over thirty percent of the proposed AFP route in hopes of creating mutually acceptable easement agreements. R. at 10.

Specifically, to eliminate HOME's concerns, TGP agreed to bury the AFP under HOME's property and complete construction across HOME's property between the winter and summer solstices to avoid disrupting HOME's bi-annual religious ceremony—the Solstice Sojourn. R. at 10. For context, the Solstice Sojourn is a journey from a temple at the western border of HOME's property to a sacred hill on the eastern border in the foothills of the Misty Top Mountains where all children who recently turned fifteen participate in a sacred religious ceremony, concluding with a journey along a different path. R. at 10–11. Although TGP has been unable to sign easement agreements with over forty percent of landowners along the route, FERC found that TGP took "sufficient steps to minimize adverse economic impacts on landowners and surrounding communities." R. at 10.

Because of HOME's religious beliefs, HOME proposed an alternate route. R. at 11. HOME's alternate route would avoid interfering with HOME's property but would require going through the Misty Top Mountains and adding over $51 million in construction costs. R. at 11. In addition to exponential economic costs, the alternate route "would necessarily cause more objective environmental harm by traveling an additional three miles and running through more environmentally sensitive ecosystems in the mountains." R. at 11.

HOME's "fundamental core tenet is that humans should do everything in their power to promote natural preservation over all other interests." R. at 11. Thus, HOME argues the AFP will go against HOME's religious beliefs and practices to allow its land to be used for the transport of LNG through the AFP route. R. at 11.

FERC not only required TGP to build the pipeline beneath HOME's property as a condition for approval, but also required TGP "to take certain steps to mitigate the GHG emission impacts of the construction of the AFP" ("GHG conditions"). R. at 14.[2] FERC imposed the GHG conditions based on an extensive analysis in an Environmental Impact Statement ("EIS"), which included "a lengthy evaluation of GHG impacts" of the AFP. R. at 15. Although FERC imposed conditions requiring TGP to mitigate the impacts of construction emissions, it did not impose conditions requiring mitigation of upstream and downstream GHG emission impacts. R. at 16.

PROCEDURAL HISTORY

On June 12, 2022, TGP filed an application pursuant to 15 U.S.C. § 717f(c) for authorization to construct and operate the AFP. R. at 4. On April 1, 2023, FERC issued an Order granting the CPCN to TGP for construction of the AFP—including certain conditions on the approval. R. at 2. On April 20, 2023, HOME filed for a rehearing from FERC on certain issues in the CPCN. R. at 2. On April 22, 2023, TGP also filed for a rehearing from FERC on certain conditions imposed in the CPCN. R. at 2. However, on May 19, 2023, FERC issued the Rehearing Order—denying the petitions for rehearing and affirming the CPCN as originally issued. R. at 2. Consequently, on June 1, 2023, both HOME and TGP filed Petitions for Review FERC Orders with this Court. R. at 2.

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[2] *See* R. at 14.

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

SUMMARY OF THE ARGUMENT

First, FERC's finding of public convenience and necessity for the AFP was reasonable and supported by substantial evidence insofar as FERC found the project needed where 90% of the gas transported by that pipeline was for export. It was lawful for FERC to consider the export agreement in its analysis of public convenience and necessity under NGA § 7 because the NGA requires FERC to consider all factors bearing on the public interest, and courts have held that export agreements are such a factor. Additionally, FERC's explanation of the domestic benefits that would be achieved by the export agreement provided substantial evidence of the project's necessity.

Second, FERC's finding that the benefits of the AFP outweighed the environmental and social harms was reasonable because it was consistent with the agency's Certificate Policy Statement. The Certificate Policy Statement outlines the criteria FERC considers when determining whether to grant a CPCN. FERC adequately considered and correctly evaluated all factors as required by the Certificate Policy Statement, thus supporting its finding that the benefits outweighed the harms.

Third, FERC did not violate RFRA in its decision to route the AFP beneath HOME's property. In order for HOME to establish a prima facie case under RFRA, HOME has the burden of showing that FERC is substantially burdening HOME's exercise of religion—the Solstice Sojourn. HOME cannot meet this burden because HOME members are still able to partake in the Solstice Sojourn. Although the AFP will be beneath HOME's property, nothing in FERC's order is forcing HOME members to act contrary to their religious beliefs. Accordingly, FERC has not substantially burdened HOME's exercise of religion. Even if this Court determines that FERC has substantially burdened HOME's exercise of religion, FERC has a compelling governmental

interest in meeting the market demands of LNG. Further, FERC's decision to route the AFP under HOME's property is fulfilling its specific compelling governmental interest in the least restrictive manner because it will be more harmful to the environment and contradict HOME's core beliefs to route the AFP on HOME's proposed alternate route.

Fourth, FERC's imposition of the GHG conditions is supported by the authority granted to it under the NGA. The NGA allows FERC to exercise discretion when imposing mitigation conditions alongside the issuance of a CPCN, and because using discretion to impose environmentally conscious conditions is reasonable, FERC's interpretation of the NGA is owed deference under the *Chevron* doctrine. The specific conditions imposed do not address "major questions" because they are the result of a binding order issued during an adjudicatory proceeding involving only TGP—not the entire natural gas industry.

Fifth, FERC acted rationally when it determined that only construction GHG emissions warranted mitigation conditions. The National Environmental Policy Act (NEPA), which FERC is bound by, requires the federal government to make an informed decision before acting in a manner that may significantly affect the environment. In compliance with NEPA, FERC sufficiently considered and properly disclosed the environmental impacts related to the authorization of constructing the AFP, and adequately explained why it determined mitigation conditions for construction alone were the only conditions that were necessary. Thus, FERC's decision not to impose conditions addressing upstream and downstream impacts was not arbitrary and capricious.

ARGUMENT

I. FERC'S FINDING OF PUBLIC CONVENIENCE AND NECESSITY FOR THE AFP WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

FERC's finding of public convenience and necessity for the AFP in CPCN Order is to be evaluated under familiar and highly deferential standards of review. *B&J Oil & Gas v. FERC*, 353

F.3d 71, 75 (D.C. Cir. 2004). Under the Administrative Procedure Act ("APA"), a court reviewing an order by FERC must sustain FERC's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 75–76 (citing 5 U.S.C. § 706(2)(A) (2000)). Further, the FERC's findings of fact are deemed conclusive if they are supported by substantial evidence. *Id.* at 76 (citing 15 U.S.C. § 717r(b)).

In general, judicial scrutiny under the NGA is limited to assuring that the FERC's decisionmaking is reasoned, principled, and based upon the record. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (internal quotations and citations omitted). The reviewing court must consider whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment," and, importantly, the court cannot substitute its judgment for that of FERC. *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). This is because, as an expert agency, FERC is "vested with wide discretion to balance competing equities," and the exercise of that discretion cannot be overturned unless FERC's action lacks a rational basis. *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1979).

A. FERC's Consideration of the Export Agreements was Lawful Because the Export Agreements are a Factor Bearing on the Public Interest for Purposes of a Section 7 Analysis.

Through the NGA, Congress gave FERC jurisdiction over the transportation and wholesale of natural gas in interstate commerce. 15 U.S.C. §§ 717(b), (c). Section 7(e) of the NGA provides that FERC shall grant a certificate to construct a new pipeline where such a project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). Separate from its § 7 authority, § 3 of the NGA provides FERC with the authority to issue orders enabling

the construction and operation of natural gas export facilities. *See* 15 U.S.C. § 717b.[3] The NGA commands FERC to issue such an order under § 3 unless it finds that "the proposed exportation… will not be consistent with the public interest." 15 U.S.C. § 717b(a).

In *City of Oberlin v. FERC*, the court found that the Nexus Project was to be treated as a § 7 pipeline, as opposed to a § 3 export facility, even though some of the gas transported in it would ultimately be exported. *City of Oberlin v. FERC*, 39 F.4th 719, 726 (D.C. Cir. 2022). Section 2 of the NGA defines a "natural-gas company," which FERC has the authority to grant a CPCN, as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6). The Nexus Project would be using its proposed pipeline to transport gas from Pennsylvania to Ohio for sale across state lines, and therefore, it was a § 7 pipeline. *City of Oberlin*, 39 F.4th at 726. Nonetheless, the court found that "[n]othing in Section 7 prohibits considering export precedent agreements in the public convenience and necessity analysis." *Id.* In fact, as the Supreme Court has explained, the broad language of § 7 "requires [FERC] to evaluate all factors bearing on the public interest," and courts have already approved FERC's crediting precedent agreements as evidence of a benefit for this purpose. *Id.* at 725–26 (quoting *Atl. Refining Co. v. PSC of New York*, 360 U.S. 378, 391 (1959)). Thus, the court held that FERC lawfully considered the export precedent agreements in its § 7 analysis. *Id.*

Likewise, in this case, the TGP Project is a § 7 pipeline under the NGA. The TGP Project involves the transportation of LNG from the HFF in Old Union to states east of Old Union via the

[3] As explained in *Sierra Club v. FERC*, FERC has the authority to decide whether to approve the construction and operation of facilities used for the export of natural gas because the Secretary of the DOE has delegated this authority to the Commission. *Sierra Club v. FERC*, 827 F.3d 59, 63 (D.C. Cir. 2016) (internal citations omitted). However, FERC does not have the power to authorize the actual export of natural gas. *Id.* (internal citations omitted).

Southway Pipeline and to the state of New Union via the Northway Pipeline. R. at 6. Although some of the LNG transported to New Union will be used for international export to Brazil, the TGP Project still includes interstate LNG transportation for use in states east of Old Union and in New Union. R. at 6. Because TGP will be "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale," it is a "natural-gas company" for which FERC may grant a CPCN under 15 U.S.C. § 717a(6).

Accordingly, this Court should apply the analysis used by the court in *City of Oberlin* to find that FERC lawfully considered the export agreement with International in its § 7 analysis. Section 7 does not preclude FERC from considering the export agreements; to the contrary, the Supreme Court has found that its broad language requires FERC to evaluate all factors bearing on the public interest, and courts have already approved FERC's crediting of precedent agreements as evidence of a benefit for this analysis. *City of Oberlin*, 39 F.4th at 725–26. Thus, this Court should find that FERC's consideration of the export agreement in its decision to grant the CPCN to TGP was not arbitrary, capricious, or otherwise not in accordance with the law.

B. FERC's Explanation of the Domestic Benefits Achieved by the Export Agreement Provided Substantial Evidence of the Project's Necessity.

Section 3 of the NGA requires FERC to authorize the construction or operation of an export facility unless it finds the proposed exportation "will not be consistent with the public interest." 15 U.S.C. § 717b(a). Section 3 thus sets out a general presumption in favor of approving such applications. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C. Cir. 2016). FERC has, for nearly 70 years, considered § 3's 'public interest' standard and § 7's 'public convenience and necessity' standard to be "substantially equivalent." *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1065 (D.C. Cir. 1974). FERC has determined that precedent agreements will always show significant evidence that a project is needed; thus, in light of § 3 and § 7 of the NGA, this is true even when the precedent

agreements are for the exportation of natural gas. *See Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,748 (Sept. 15, 1999) (stating "contracts or precedent agreements will always be important evidence of the demand for a project").

FERC's longstanding policy approach was upheld in *City of Oberlin*, wherein the court found that § 3 justified FERC giving "precedent agreements for the transportation of gas destined for export the same weight ... it gives to other precedent agreements" in a § 7 analysis of public convenience and necessity. *City of Oberlin*, 39 F.4th at 727. Additionally, FERC explained that many domestic benefits would stem from increasing transportation services for gas shippers, regardless of where the gas is ultimately consumed. *Id.* For example, the court reasoned that the Nexus Project would add additional capacity to transport gas out of the Appalachian Basin, the precedent agreements were evidence of a need for the capacity provided by the pipeline, and the agreements would contribute to the growth of the economy and support domestic jobs. *Id.* Ultimately, the court held that FERC's explanation of how the export precedent agreements evidenced domestic benefits demonstrated a rational connection between the facts found and the choice made. *Id.* (internal quotations and citations omitted).

Similarly, in this case, FERC found that export precedent agreements are a valid consideration in determining the need for the AFP. Also, FERC recognized that the AFP would have several domestic benefits: it would provide transportation for domestically produced gas, provide gas to some domestic customers, and fill additional capacity at the International New Union City M&R Station. R. at 9. Further, because the gas demands served by the Southway Pipeline are diminishing, the Project will transmit gas that may not otherwise be purchased in the future. R. at 9.

Applying the rationale used by the court in *City of Oberlin*, this Court should find that the export precedent agreement evidenced domestic benefits and that FERC demonstrated a rational connection between the facts found and the choice to issue the CPCN. FERC correctly treated the export precedent agreement as an input into assessing present and future public convenience and necessity, consistent with longstanding agency precedent. R. at 9 (citing *City of Oberlin*, 39 F.4th at 727). As further support for its decision, FERC identified several domestic benefits the foreign export agreements would achieve. Accordingly, FERC's finding of public convenience and necessity based on the export agreement was supported by substantial evidence.

In conclusion, FERC's finding of public convenience and necessity for the TGP Project was lawful because it correctly treated the export agreement as a factor bearing on the public interest. Additionally, FERC's finding was supported by substantial evidence because it determined that multiple domestic benefits would stem from the export agreement, therefore demonstrating a project need.

II. FERC'S FINDING THAT THE BENEFITS FROM THE AFP OUTWEIGHED THE ENVIRONMENTAL AND SOCIAL HARMS WAS REASONABLE BECAUSE IT WAS CONSISTENT WITH THE CERTIFICATE POLICY STATEMENT.

FERC's orders, including those granting CPCNs, are reviewed under the arbitrary and capricious standard. *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 105–106 (D.C. Cir. 2014) (internal citations omitted). The reviewing court's role is limited to assuring that FERC's decisionmaking is reasoned, principled, and based upon the record. *Id.* at 106 (internal quotations and citations omitted). Further, the reviewing court must remain mindful that the "granting… of a [CPCN] is a matter peculiarly within the discretion of [FERC]." *Id.* (citing *Okla. Natural Gas Co. v. Fed. Power Comm'n*, 257 F.2d 634, 639 (D.C. Cir. 1958); *accord Cal. Gas Producers Ass'n v. Fed. Power Comm'n*, 383 F.2d 645, 648 (9th Cir. 1967).

FERC has specified the criteria it considers when determining whether to grant a CPCN in a policy statement. *See Certification of New Interstate Nat. Gas Pipeline Facilities* ("Certificate Policy Statement"), 88 FERC ¶ 61,227 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000)). Pursuant to the Certificate Policy Statement, the threshold question before FERC is whether the applicant can proceed with the project without subsidies from its existing customers. 88 FERC at 61,745. If the threshold question is answered in the affirmative, FERC must then decide "whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline." *Id.* If any adverse effects are identified, FERC then balances those effects with the public benefits of the project, as measured by an "economic test." *Id.*

A. The Commission Correctly Determined that TGP Made Efforts to Minimize the Project's Adverse Effects on Landowners and Communities.

It is undisputed that TGP can financially support the project without subsidization from its existing customers and that there are no adverse impacts on TGP's existing customers, existing pipelines in the market, and their captive customers. R. at 7. Thus, FERC was then required to decide whether TGP made efforts to minimize the adverse effects the project might have on landowners and communities. FERC correctly determined that TGP made sufficient efforts to minimize the impacts the project will have on landowners and HOME, a religious order that considers the natural world to be sacred. R. at 10.

The Certificate Policy Statement recognizes that, in most cases, it will not be possible to acquire all the necessary right-of-way by negotiation with landowners. 88 FERC at 61,749. However, the company might minimize the project's effect on landowners by acquiring as much

right-of-way as possible. *Id.* In that case, the applicant may be called upon to present some evidence of market demand, but under the balancing test, the benefits required to be shown would be less than in a case where no land rights had been previously acquired by negotiation. *Id.* The Policy Statement provides, as an example, that if an applicant had precedent agreements with multiple parties for most of the new capacity, that would show strong evidence of market demand and potential public benefits that could outweigh the inability to negotiate right-of-way agreements with some landowners. *Id.*

Here, TGP actively participated in FERC's pre-filing process and has been working to address landowners' concerns and questions. R. at 10. Specifically, TGP has made changes to over thirty percent of the proposed pipeline route to address landowners' concerns and negotiate mutually acceptable easement agreements. R. at 10. Although TGP has not yet signed easement agreements with around forty percent of the landowners on the route, including HOME, the Policy Statement anticipates that reaching agreements with all affected landowners is rarely possible. R. at 10; 88 FERC at 61,749. TGP executed binding precedent agreements for firm service using 100 percent of the design capacity of the pipeline project, which shows strong evidence of market demand and public benefits that ultimately outweigh TGP's inability to work out agreements with some of the landowners affected by the route. R. at 8.

Additionally, as it relates to HOME specifically, TGP has agreed to bury the AFP under the entirety of its passage across HOME's property and to expedite construction "to the extent feasible" to minimize disruption. R. at 10. TGP also estimates that it can complete the two-mile stretch over HOME's property within four months, meaning that it would be possible for the construction to be completed without interfering with HOME's ceremonial journey that occurs twice a year. R. at 10–11. TGP's easement agreements with some of the landowners, changes to

the proposed pipeline route to address landowners' concerns, and expedited construction process to avoid interfering with HOME's religious ceremony collectively show that TGP made sufficient efforts to minimize adverse impacts on landowners. These facts must be considered in evaluating the amount of market demand and public benefit TGP must show to overcome the adverse impacts for purposes of the balancing test. 88 FERC at 61,479.

B. FERC Correctly Evaluated the Adverse Impacts on Landowners and the Environment.

The Policy Statement further provides that, for purposes of the balancing test, a project should be designed "so as to avoid unnecessary environmental and community impacts while serving increased demands for natural gas." 88 FERC at 61,743. Traditionally, the interests of the landowners and the surrounding community have been considered synonymous with the environmental impacts of a project; however, these interests can be distinct. *Id.*

Here, the AFP will pass through approximately two miles of HOME property, which will require the removal of around 2,200 trees and other forms of vegetation from HOME property. R. at 10. For safety reasons, most of these trees cannot be replaced with new trees along the route, but an equal number of new trees will be planted in other locations. R. at 10. Additionally, based on the EIS, FERC concluded that the project would result in some adverse environmental impacts, but "these impacts will be reduced to less-than-significant levels with the implementation of staff's recommendations (adopted as conditions in the CPCN Order)." R. at 4. These facts support FERC's finding that the relatively insignificant environmental impacts do not outweigh the public benefits the AFP will achieve.

Further, FERC considered the proposed alternate route that circumvents HOME property by routing through the Misty Top Mountain range. R. at 10. However, it is undisputed that this alternate route would add over $51 million in construction costs and would cause more objective

environmental harm by "traveling an additional three miles and running through more environmentally sensitive ecosystems in the mountains." R. at 11. FERC supported its decision not to implement the alternate route because, although this route would avoid interference with HOME property, it "cannot treat every landowner in a subjective manner, as it would be unjust and may well show a preference to certain religions." R. at 12. This is consistent with the well-established principle of neutrality, which provides that the "[t]he [federal] government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause." *McCreary County v. ACLU*, 545 U.S. 844, 875-76 (2005) (holding that the Free Exercise Clause was intended not only to protect the integrity of individual conscience in religious matters, but also to guard against the civic divisiveness that follows when the government weighs in on one side of a religious debate). Thus, FERC's decision not to use the alternate route is supported by the Certificate Policy Statement's goal of avoiding unnecessary environmental and community impacts, and the principle of neutrality, which applies to federal agencies, including FERC.

C. FERC Correctly Determined That the Strong Public Benefits of the AFP Outweigh any Environmental and Social Costs for Purposes of the Balancing Test.

Comparatively, FERC found a strong showing of public benefit given that TGP had executed binding precedent agreements for firm service using 100 percent of the AFP's design capacity. R. at 8. FERC also noted several domestic benefits of the AFP, including:

> (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 in 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.

R. at 8. Thus, the AFP would provide public benefits by maximizing its design capacity with export precedent agreements, expanding access to natural gas domestically, and utilizing a more environmentally conscious approach to energy production.

In sum, FERC identified a multitude of project benefits and market demands that far outweigh the environmental and social costs. It is a well-settled principle that FERC "enjoys broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines." *Minisink*, 762 F.3d at 111 (internal citations omitted). Thus, under the narrow scope of the arbitrary and capricious standard of review, this Court should find that FERC's application of the balancing test was reasonable because it was consistent with the procedure outlined in the agency's Certificate Policy Statement.

III. FERC'S DECISION TO ROUTE THE AFP BENEATH HOME'S PROPERTY DOES NOT VIOLATE RFRA DESPITE HOME'S OBJECTIONS.

"In order to ensure broad protection for religious liberty," the "[g]overnment shall not substantially burden a person's exercise of religion." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 (2014) (citing 42 U.S.C § 2000bb-1(a) [4]). However, Congress allows the government to substantially burden a group's practice of religion to further "a compelling governmental interest" that is accomplished by the "least restrictive means." § 2000bb-1(b). Accordingly, for a

[4] The Supreme Court held RFRA was constitutional for federal government actions but an unconstitutional exercise of Congress's power when applied to the states to enforce the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 511, 536 (1997) (superseded by statute as stated in *Ramirez v. Collier*, 595 U.S. 411, 424 (2022)). However, "Congress responded to *City of Boerne* by enacting RLUIPA, which applies to the states and their subdivisions and invokes congressional authority under the Spending and Commerce Clauses." *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) (holding RFRA's compelling governmental interest test is still required for any federal law as well as a regulation that would "substantially burden a sincerely held religious practice").

religious group to establish a prima facie claim under RFRA, the religious group has the burden of establishing (1) the "activities the plaintiff claims are burdened by the government action must be an 'exercise of religion'" and (2) "the government action must 'substantially burden' the plaintiff's exercise of religion." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (citing § 2000bb-1(a)). Critically, if the group is unable to prove either element, the RFRA claim must fail. *Id*. RFRA applies here because FERC is an agency within the Department of Energy, and HOME is a "not-for-profit religious organization." R. at 5; *see Burwell*, 573 U.S. at 716 n. 27 ("There is no dispute that RFRA protects religious nonprofit corporations.").

A. FERC's Decision to Allow the AFP Route to go Beneath HOME's Property Does not Substantially Burden HOME's Exercise of Religion During the Solstice Sojourn.

Under RFRA, the government imposes a substantial burden "only when individuals are 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*, 535 F.3d at 1070 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963) (abrogated by *Holt v. Hobbs*, 574 U.S. 352 (2015) in a RLUIPA context).[5] Any burden imposed—short of that—is not a substantial burden. *Id.*[6] Here, there is no

[5] Congress enacted RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." § 2000bb. This was in response to the Supreme Court decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) holding the strict scrutiny standard was not applicable to neutral laws of general applicability under the Free Exercise Clause of the First Amendment. *See id.* Accordingly, pre-*Smith* cases applying strict scrutiny are useful and instructive in analyzing RFRA claims. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77, 93 (D.D.C. 2017).

[6] FERC does not contest that HOME's beliefs are a sincerely held religious belief. *See United States v. Ward*, 989 F.2d 1015, 1018 (9th Cir. 1992) ("Religious beliefs, then, are those that stem from a person's moral, ethical, or religious beliefs about what is right and wrong" and are "held

threat of HOME members participating in the Solstice Sojourn receiving civil or criminal sanctions and FERC is not forcing HOME members to choose between following the tenets of their religion and receiving a government benefit. Accordingly, the crux of HOME's RFRA violation argument is that the AFP route is causing HOME members to act contrary to their religious beliefs.

Although HOME argues the mere existence of the AFP would significantly impact the Solstice Sojourn, R. at 12, FERC is not substantially burdening HOME's exercise of religious practice because the AFP is beneath the path. Because the AFP is beneath the path of the Solstice Sojourn, HOME members can partake in the Solstice Sojourn and are not forced to act contrary to their religious beliefs. In *Standing Rock Sioux Tribe*, the court held the government's decision to allow an easement enabling oil to flow beneath Lake Oahe did not substantially burden a tribe from its religious exercise. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77, 91 (D.D.C. 2017). Similarly, the AFP will be buried beneath the "entire span where it would cross HOME's property, including the two intersections with the path of the Solstice Sojourn." R. at 12. Accordingly, HOME members can complete the Solstice Sojourn and are not forced to act contrary to their religious beliefs.

The facts of this case are also analogous to the facts in *Lyng v. NW Indian Cemetery Protective Ass'n*.[7] In *Lyng*, the U.S. Forest Service approved a project to build a road between two towns which required paving land on a religious site for some American Indian tribes. *Lyng v. NW Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442 (1988). Although the agency determined

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with the strength of traditional religious convictions." (internal citations omitted)); *see also United States v. Hoffman*, 436 F. Supp. 3d 1272, 1285 (D. Ariz. 2020) (finding the volunteers of a charitable organization affiliated with a church to be a sincerely held religious belief).

[7] Although *Lyng* was a Free Exercise case, rather than a RFRA case, *Lyng* is still applicable in this case because when Congress enacted RFRA, Congress restored the compelling-interest test set forth in pre-*Smith* cases. *Standing Rock Sioux Tribe*, 239 F. Supp. at 93. Further, many circuit courts cite to *Lyng* to resolve a RFRA claim. *Id.*

building these paved roads would interfere with the tribes' religious practice and "cause significant damage to sacred areas in the forest," the Court nonetheless concluded the governmental action did not force the tribes to violate their core religious beliefs or punish them for their religious activity. *Id.* at 450. Further, the Court acknowledged the harms were "incidental effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.*

Consequently, although HOME argues the "bare spot" along the Solstice Sojourn will impact HOME's ability to freely exercise its religious beliefs in violation of RFRA, R. at 13, HOME's argument is in direct collision with court precedent. The AFP will create no physical barrier for members to partake in the Solstice Sojourn because the AFP will be underground. R. at 13; *see Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 82 (rejecting the Tribe's argument that the "mere existence" of the underground pipeline would "desecrate those waters and render them unsuitable for use in their religious sacraments"). Accordingly, the mere existence of the AFP will not create a substantial burden on HOME members from partaking in the Solstice Sojourn.

Because the AFP will be under HOME's property and not physically prevent HOME members from participating in the bi-annual Solstice Sojourn and the "bare spot" will not coerce HOME into violating its religious beliefs, HOME does not and cannot establish a prima facie claim of a RFRA violation.

B. Even if this Court Finds FERC Substantially Burdened HOME's Exercise of Religion, it has a Compelling Governmental Interest Accomplished by the Least Restrictive Means.

For the government to establish a compelling interest, the government "must demonstrate an interest beyond broadly framed justifications." *Sch. of the Ozarks, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 86 F. Supp. 3d 1066, 1074 (W.D. Mo. 2015); *see Burwell,* 573 U.S. at 726 ("[the]

[g]overnment [must] demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened." (citation and internal marks omitted)).

Here, FERC and TGP have a specific compelling governmental interest in creating the AFP. Because TGP presented convincing evidence showing a steady decline of LNG demand in Old Union "due to population shift, efficiency improvements, and increasing electrification of heating in those states," FERC has a compelling interest to better serve market demands by routing the LNG through the AFP. R. at 6. Accordingly, FERC's decision to allow the AFP route to go beneath HOME's property serves a compelling governmental interest. Thus, although FERC has not created a substantial burden on HOME's religious exercise, FERC also has a compelling governmental interest to meet the market demands.

Additionally, the AFP's proposed route is formed by the least restrictive means. Under RFRA, the government must show that there are no other means "of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Holt*, 574 U.S. at 364–65; *United States v. Grady*, 18 F.4th 1275, 1286 (11th Cir. 2021), cert. denied, 142 S. Ct. 2871 (2022). Further, RFRA does not require the TGP to abandon its compelling interests, but only to minimize the burden on the religious practice. *See* § 2000bb-1(b)

Because HOME believes all "the natural world to be sacred," and "its fundamental core tenet is that humans should do everything in their power to promote natural preservation over all other interests," R. at 11, re-routing the AFP would contradict HOME's core tenants. Further, HOME does not dispute that this alternate route would "necessarily cause more objective environmental harm by traveling an additional three miles and running through more environmentally sensitive ecosystems in the mountains. R. at 11. Here, there is no other available

option of furthering the government's compelling interests that is less restrictive of HOME's religious practice because HOME's fundamental religious belief is centered on reducing environmental damage. Accordingly, because the current AFP route has fewer negative environmental impacts, FERC is accomplishing its compelling interest by the least restrictive means.

Further, TGP agreeing to complete the AFP route under HOME's property between the winter and summer solstices is achieving the government's compelling interest by the least restrictive means. Consequently, the AFP will not impact HOME's religious practices and HOME will not be prohibited from partaking in the bi-annual Solstice Sojourn. *See Lyng*, 485 U.S. 439, 451 ("The crucial word in the constitutional text is 'prohibit': For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." (internal citations omitted)).

In conclusion, HOME cannot establish a prima facie claim under RFRA. However, even if this Court found that the AFP route substantially burdens HOME's exercise of religion during the Solstice Sojourn, FERC has a compelling interest that is accomplished by the least restrictive means. Thus, there is no RFRA violation despite HOME's religious objections.

IV. THE GHG CONDITIONS IMPOSED BY FERC WERE CONSISTENT WITH THE AUTHORITY GRANTED TO IT UNDER THE NGA.

When an agency is challenged for its interpretation of a statute that it administers, a reviewing court must afford the agency's interpretation deference, as required by the standard set out in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The principle behind *Chevron* deference is that if a statute is silent or ambiguous regarding a specific question at issue before a reviewing court, then the court should not "impose its own construction on the statute[;]" rather, it should determine whether the agency's answer to the question about the

statute is "based on a permissible construction." *Id.* at 843. Whether an agency construction of a statue is permissible depends on if its interpretation is reasonable in the context of both the specific provision and the whole statutory scheme. *Util. Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 321 (2014).

TGP takes issue with the conditions attached to the CPCN requiring it to mitigate the impacts of GHG emissions resulting from the construction of the AFP on the ground that imposing such conditions is beyond the scope of FERC's authority under the NGA. R. at 14. TGP further asserts that imposing conditions of this nature is prohibited by the Supreme Court's recently developed "major questions doctrine." R. at 15. Not only is the foundation of TGP's argument erroneously asserted, but the extent to which TGP characterizes the imposition of conditions as a "major question" is misconstrued. The text of the NGA authorizes FERC to make discretionary decisions about what conditions to impose when approving an application for a CPCN on a case-by-case basis, and such discretion was not unintended by Congress to be exercised.

A. The NGA Gives FERC Authority to Impose Conditions Upon Approval of a Natural Gas Project and its Interpretation of the NGA Regarding the Type of Conditions it may Impose is Reasonable.

The text of § 7 of the NGA, which grants FERC authority to impose conditions upon approval of a CPCN, states that "[FERC] shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). A similar statement is found in § 3, which permits FERC to approve an application to construct an LNG terminal with conditions that it finds necessary or appropriate. 15 U.S.C. § 717b(e)(3)(A). Furthermore, § 16 outlines FERC's authority pertaining to rules, regulations, and orders, stating that it "shall have power to perform any and all acts . . . as it may find necessary or appropriate to carry out the

provisions of this chapter." 15 U.S.C. § 717o. In essence, these statutory provisions indicate that Congress conferred authority upon FERC to use discretion to determine whether to impose conditions with the approval of applications to construct natural gas facilities and channels, as well as the type of conditions.

FERC's interpretation of the discretionary authority granted to it in § 7 has been viewed as reasonable in numerous cases that deal with the same question at issue here—whether FERC has the power to impose environmentally conscious conditions under § 7. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (holding because greenhouse-gas emissions are an indirect effect of authorizing a project to build a natural gas pipeline and are a reasonably foreseeable consequence of the construction, FERC had legal authority to mitigate such effects under § 7 of the NGA); *see also Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 261 n.15 (3d Cir. 2018) (concluding FERC's ability to compel an entity to mitigate the adverse environmental impacts of its pipeline on the water quality and yield of nearby private wells has ample support in §§ 16, 7, and 22 of the NGA).

Here, FERC interpreted the statutory mandate in § 7 of the NGA to mean that it can and should impose conditions that safeguard the public from environmental harms during the construction of the AFP. R. at 14. This interpretation is reasonable because similar to the interpretations of the NGA upheld in *Twp. of Bordentown* and *Sierra Club*, the emission of GHGs during construction of the AFP are a reasonably foreseeable consequence of the construction, and FERC can impose environmentally conscious conditions to mitigate the impacts of the emissions.

Therefore, because FERC's interpretation of how it is permitted to exercise its discretionary authority under § 7 is reasonable, this Court must afford that interpretation deference under the *Chevron* doctrine.

B. The Conditions at Issue Here do not Implicate The Major Questions Doctrine Because They are the Product of an Individualized Adjudicatory Proceeding.

In *W. Virginia v. Envtl. Prot. Agency* the Court announced a new method for analyzing an agency's authority to act under the statute it administers. 142 S. Ct. 2587 (2022). The method employs a far more restrictive approach to statutory interpretation, which deviates from the longstanding practice of employing the *Chevron* doctrine to ambiguous statutory provisions. The major questions doctrine asserts:

> [T]here are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.

Id. at 2608 (internal citations omitted). When using this approach, an agency must identify a clear statement in the statute that demonstrates "congressional authorization for the power it claims." *Id.* at 2609.

The Court did not precisely define what is considered a "major question" in *W. Virginia v. EPA*. However, the Court did find that a major question arose when the EPA promulgated a regulation that would have had sweeping effect on the entire American energy industry. *Id.* at 2610. On the other hand, the events giving rise to the issue before this Court in the instant case starkly contrast in one important way: FERC did not promulgate a regulation that has a sweeping impact on the entire natural gas sector. Rather, FERC imposed conditions alongside the grant of the CPCN—during a standard adjudicatory proceeding—that were contingent on *one* application, to build *one* pipeline, and to mitigate *one* category of greenhouse gas emissions. R. at 14.

Although the Court did not specify whether the major questions doctrine only applies to agencies acting in their rulemaking capacity, there are compelling reasons to refrain from applying the doctrine when analyzing an agency's authority within adjudicatory proceedings. Most

importantly, regulations promulgated by an agency have a much broader scope compared to an adjudicatory order, which is given power and effect after a series of individualized decisions are made on a case-by-case basis. This is indicated in § 7 of the NGA, which illustrates that conditions attached to a CPCN should be tailored to be relevant to a specific project. *See* 15 U.S.C. § 717f(e) ("The Commission shall have the power to attach . . . such reasonable terms and conditions."). It would be nearly impossible for Congress to predict and expressly state all possible mitigation conditions that may be necessary in any given situation within the NGA. This is exactly why Congress gave FERC—an expert agency—discretion in the first place: to impose conditions it deems necessary depending on the nature of the application it is presented with.

Furthermore, the consideration of significant adverse environmental impacts resulting from a major federal action is mandated by NEPA. 42 U.S.C. § 4332(2)(C). The entire federal government is bound by NEPA, and FERC is no exception in this regard. 42 U.S.C. § 4331(b). On the other hand, the major questions doctrine only pertains to an agency's powers under the statute it administers. *W. Virginia*, 142 S. Ct. at 2607–08. Here, FERC's issuance of a CPCN to build a pipeline is considered a "major federal action" and is accordingly subject to the requirements of NEPA. *Sierra Club*, 867 F.3d at 1364. Consequently, if TGP takes issue with FERC's consideration of the environment by asserting that FERC cannot stray into that realm, its qualm is with NEPA, not the NGA. Accordingly, TGP's assertion that the imposition of environmentally conscious conditions involves a major question is improper and unsupported.

In conclusion, adjudications are individualized processes, and the decisions FERC makes during those proceedings cannot be characterized as major questions. Further, the NGA gives FERC discretion to impose conditions as is necessary to effectuate the statute. Congress enacted both the NGA and NEPA. FERC is bound by NEPA, and administers the NGA with discretion.

Thus, it is a reasonable interpretation of the NGA to find that FERC has discretion to impose environmental conditions in light of the congressional goals established in NEPA.

V. FERC ACTED RATIONALLY WHEN IT ELECTED TO EXCLUDE GHG CONDITIONS ADDRESSING DOWNSTREAM AND UPSTREAM IMPACTS.

Under the APA, a court reviewing an agency action must "hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law…." 5 U.S.C. § 706(2)(A). Under this standard of review, the court should employ a narrow scope so as to avoid "substitut[ing] its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Notwithstanding this restrained scope of review, agencies are still obligated to examine data that is pertinent to the proposed action and "articulate a satisfactory explanation" for the action that incorporates a "rational connection between the facts found and the choice made." *Id.* (internal quotations and citations omitted). When a court assesses an agency's explanation, it must determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id*.

FERC's issuance of a CPCN to construct the AFP implicates NEPA because it is a "major Federal action[ ] significantly affecting the quality of the human environment." *Sierra Club*, 867 F.3d at 1364 (citing 42 U.S.C. § 4332(2)(C)). Consequently, FERC is required to prepare a "'detailed statement' discussing and disclosing the environmental impact of the action," otherwise known as an EIS. *Sierra Club*, 867 F.3d at 1367 (citing § 4332(2)(C)). In consideration of the context surrounding this issue on appeal, it is critical to note a distinct feature of NEPA: it is a procedural statute aimed at proscribing *uninformed* agency actions or decisions—not *unwise* actions—and it does so by requiring agencies to analyze and communicate any information

relevant to a proposed action. *Delaware Dept. of Nat. Res. & Envtl. Control v. U.S. Army Corps of Engineers*, 685 F.3d 259, 269 (3d Cir. 2012).

NEPA does not require agencies to take any particular action beyond the consideration of environmental impacts. *Sierra Club*, 867 F.3d at 1367. When courts are charged with reviewing an agency action under NEPA, the court must do two things: make sure the agency "adequately considered and disclosed the environmental impact of its actions" and ensure the decision was neither arbitrary nor capricious. *City of Olmsted Falls, OH v. F.A.A.*, 292 F.3d 261, 269 (D.C. Cir. 2002). As for the first step, courts must ensure that the agency took a "hard look" at the environmental consequences of the proposed action in an EIS. *Id.* And for the second step, courts review the decision to act under the aforementioned deferential standard of review as mandated by the APA.

FERC did not act arbitrarily when it made the decision to refrain from imposing upstream and downstream GHG conditions because it sufficiently considered and disclosed all relevant data regarding the adverse environmental effects of the AFP, and FERC adequately explained why, based on the relevant facts, it did not find upstream or downstream impacts significant enough to warrant imposing conditions mitigating such impacts.

A. FERC Sufficiently Considered and Disclosed all Relevant Data About the Environmental Effects of Constructing the AFP, the Upstream Impacts, and the Downstream Impacts When Deciding to Issue the CPCN.

In essence, HOME is challenging the policy decision made by FERC to exercise its discretionary authority in imposing mitigation GHG conditions. R. at 18–19. As previously stated, NEPA simply requires FERC to take a "hard look" at the environmental impacts of an LNG project. *Sierra Club* 867 F.3d at 1367. In the specific context of mitigation, while NEPA does compel

"consideration of mitigation, it does not mandate the form or adoption of any mitigation." 40 C.F.R. § 1508.1(s).

In *Robertson v. Methow Valley Citizens Council*, the Supreme Court evaluated an EIS for the construction of a ski resort after a special use permit had been issued. 490 U.S. 332 (1989). The Court concluded that the lower court erred in finding that NEPA *requires* agencies to take steps mitigating any adverse effects of major federal actions. *Id.* at 353. The Court explained that NEPA "does not mandate particular results, but simply prescribes the necessary process[;]" thus, so long as adverse effects are adequately identified and assessed, "[an] agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id*. Given that discussion of mitigation is an important part of any EIS, the Court reasoned that an additional "substantive requirement that a complete mitigation plan be actually formulated and adopted . . . would be inconsistent with NEPA's reliance on procedural mechanisms." *Id*. at 352–53. In light of this reasoning, the Court held that the agency's consideration of adverse environmental impacts and potential mitigation measures sufficiently complied with NEPA requirements.

Additionally, the Supreme Court has upheld an agency's determination that an environmental impact may be outweighed by another interest, like a public need. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980). In *Strycker's*, the agency was planning to construct a low and middle-income housing project in Manhattan. *Id.* On appeal, the appellant challenged the agency's consideration of alternative courses of action, as required by NEPA. *Id.* at 224–25. The agency included data in a report illustrating that it had considered nine alternative locations for the project before ultimately concluding that the problems raised regarding social environmental impacts at the initially proposed location were not serious enough to render it unacceptable. *Id.* at 226. This conclusion was justified on the grounds that delaying construction

of highly desired low-income housing by at least two years in order to relocate the project was not compelling when weighed against the environmental costs. *Id.* In condemning the appellate court's finding, the Supreme Court stated that the principle behind its pinnacle holding in *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978) directly contradicted the appellate court's holding that an agency is required to "elevate environmental concerns over other appropriate considerations." *Strycker's*, 444 U.S. at 227.[8]

Here, when FERC decided to grant a CPCN for the construction of the AFP, it complied with the procedural requirements of NEPA by taking a hard look at the environmental consequences of the authorization, including the upstream, downstream, and construction GHG impacts. R. at 15–16. After considering and properly disclosing such impacts, FERC used its discretionary authority to impose mitigation conditions and ultimately determined that it was reasonable to impose conditions mitigating construction GHG impacts only. R. at 14. Even though FERC did impose some conditions, consistent with its discretionary authority under § 7 of the NGA, it was not required to do so in order to comply with NEPA. As the Supreme Court highlighted in *Robertson*, demanding that a mitigation plan be formulated *and* adopted is inconsistent with NEPA's procedurally conscious requirements—FERC's consideration of adverse effects on the environment was sufficient. Thus, a requirement forcing FERC to impose mitigation conditions for all potential impacts has no basis in NEPA nor the NGA.

Just as the agency decided that there were compelling reasons against relocation of the project despite environmental concerns in *Strycker's*, here, FERC concluded that although there

[8] The Court referenced its *Vermont Yankee* holding by stating that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to ensure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Strycker's*, 444 U.S. at 227–28 (internal quotation and citations omitted).

were some adverse environmental impacts, there were compelling reasons against imposing conditions to mitigate the upstream and downstream GHG impacts. R. at 15, 19. Regardless of FERC's reasoning for not imposing the conditions, it is not the place of a court to substitute its opinions with the agency's when reviewing a challenge under NEPA when the agency has complied with the procedural mandates. Thus, because FERC complied with NEPA's requirements, this Court should defer to the discretionary decisions that were subsequently made.

B. FERC Adequately Explained Why, Based on the Relevant Facts, it did not Find Upstream or Downstream Impacts Significant Enough to Impose GHG Conditions.

As previously mentioned, when a court reviews an agency's decision under the arbitrary and capricious standard, it should approach the review narrowly. *State Farm*, 463 U.S. at 43. Hence, a court should not attempt to make up for any deficiencies in the agency's explanation "that the agency itself has not given." *Id.* In particular, when an agency decision involving highly technical or scientific matters within its realm of expertise is challenged, deference to the agency regarding such matters is particularly strong. *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 824 (10th Cir. 2008) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989)).

According to the landmark Supreme Court case employing the arbitrary and capricious standard of review to agency policy decisions, an agency acts arbitrarily if it . . .

> [H]as relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, 463 U.S. at 43. Put differently, an agency explanation for its decision cannot be irrelevant, silent, or irrational. However, courts should sustain "a decision of less than ideal clarity" so long as the agency's path to that decision can be reasonably observed. *Id.*

First, FERC didn't rely on factors that Congress had not intend for it to consider. Congress unquestionably intended for agencies to contemplate other factors alongside the environment under NEPA. This is evidenced in NEPA § 101(b), which states that the federal government should "use all practicable means, consistent with *other essential considerations of national policy*" in carrying out the national environmental policy goals declared in NEPA. 42 U.S.C. § 4331(b) (emphasis added). This inherently softens the requirement of the federal government to consider the environment if there are other more compelling national priorities. It is a relatively recent national priority to expand pipeline systems in order to ensure to individuals can access LNG as an energy source given the increased demand for it nationwide. *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107, 61,676 (Feb. 18, 2022). Accordingly, the increased demand for LNG in New Union is a relevant factor.

Second, FERC did not fail to consider any important aspects of the project. FERC has sufficiently considered the environmental concerns and aptly balanced them against other compelling interests. One of FERC's primary reasons for not imposing mitigation conditions for upstream and downstream GHG impacts was the fact that it does not currently have guidance on how to conduct significance determinations for GHG emissions. R. at 16. This explanation is not so implausible that it cannot be attributed to agency expertise or differing views. Due to the lack of guidance, FERC prioritized acting with caution during the interim before it has clear standards in place to fairly assess applications and render consistently systematic and predictable conditions for subsequent LNG pipeline applications. Otherwise, If FERC were to impose mitigation conditions in the absence of guidance on proper standards to utilize when delineating conditions that are appropriate to impose therein, it is far more likely that the specific conditions imposed in any particular CPCN order would be deemed arbitrary if challenged.

Lastly, FERC's explanation for its decision did not contradict the evidence before the agency because there was a rational connection to the facts found. The EIS shows that HFF is currently an active fracking facility that extracts crude oil, liquifies it on site, and then transports the LNG to Old Union via the pre-existing Southway Pipeline. R. at 12. Thus, the production of LNG at HFF and the emission of GHG's therein are not contingent upon FERC's approval of the AFP—regardless of whether TGP had been issued a CPCN for the AFP, the emissions at HFF would have persisted. Therefore, there is a rational connection between the reality of HFF's existence and FERC's explanation for declining to impose associated upstream GHG conditions, especially in light of the absence of standardized guidance.

In conclusion, FERC contemplated and disclosed the pertinent information about the adverse environmental effects of the AFP when deciding to permit its construction, and FERC's explanation for its decision to refrain from imposing certain GHG conditions addressed relevant factors, was comprehensive, and was rational. Thus, FERC did not act arbitrarily when it made the decision to abstain from imposing upstream and downstream GHG conditions.

CONCLUSION

For the reasons stated, the consolidated petitions for review should be denied and the challenged FERC Orders should be affirmed as originally issued.