

No. 23-01109

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

Federal Energy Regulatory Commission

v.

Holy Order of Mother Earth

And

Transnational Gas Pipelines, LLC

On appeal from Rehearing Order for the District of New Union in consolidated case nos. 23-01109 and 23-01110, Chief Judge Delilah Dolman

Brief of appellee, UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION

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## **STATEMENT OF JURISDICTION**

On May 19, 2023, the Federal Energy Regulatory Commission (FERC or the Commission) issued an Order denying rehearing on consolidated petitions No. 23-01109 and No. 23-01110 together pursuant to 15 U.S.C. § 717r(a), which gives the Commission power to grant or deny an aggrieved party's application for rehearing. On June 1, 2023, Transnational Gas Pipelines, LLC (TGP), and Holy Order of Mother Earth (HOME) filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under § 717r(b), which gives jurisdiction to courts of appeals of the United States when an aggrieved party seeks review of a rehearing order from the Commission. The Twelfth Circuit is proper because it is the circuit wherein the natural-gas company, TGP, is located.

## **STATEMENT OF ISSUES PRESENTED**

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

## STATEMENT OF THE CASE

### A. The Pipeline

The American Freedom Pipeline (AFP) is a 99-mile-long, 30-inch diameter interstate pipeline stretching from Jordan County, Old Union to Burden County, New Union. The pipeline will deliver up to 500,000 Dekatherms (Dth) per day of natural gas to the interconnection with the NUG terminal and the North Way pipeline. The AFP will provide natural gas to areas within New Union that are currently without access. To support construction of the pipeline, applicant TGP has executed binding precedent agreements with International Oil & Gas Corporation (International) and New Union Gas and Energy Services Company (NUG) which equal 100% of the design capacity for the pipeline. The AFP will pass through approximately two miles of HOME property and require the removal of roughly 2,200 trees and other vegetation along this strip. Most of these trees will be replaced by planting new trees in other locations due to safety reasons. In deciding the route of the AFP, TGP has made changes to over 30% of its proposed path and has made efforts to negotiate fair easement agreements with affected landowners and communities. TGP has also agreed to bury the pipeline throughout the entirety of the two-mile stretch over HOME's property and expedite a four-month construction period for minimal disruption. TGP considered an alternate route which avoids HOME property altogether, however it concluded that it would add \$51 million in costs and objectively cause more environmental harm by traveling additional mileage through sensitive mountain ecosystems.

### B. RFRA

HOME, organized in 1903, is a religious order that believes humans should promote natural preservation over all other interests. Twice a year, HOME members make a ceremonial journey called the Solstice Sojourn along a path on its property. HOME expresses concern about

the pipeline running underneath the Solstice Sojourn path, but it concedes that it will not be physically prevented from making the journey because the pipeline will be buried and construction will be expedited.

### **C. EIS and GHG Conditions**

The Greenhouse Gas (GHG) conditions are the result of extensive analysis in the Environmental Impact Statement (EIS) completed by TPG. The EIS estimates an average of 88,340 metric tons per year of CO<sub>2</sub> over the four-year duration of construction. The Commission does not characterize upstream or downstream impacts as significant or insignificant.

### **D. Major Questions and NEPA**

The National Environmental Policy Act (NEPA) requires that we take a “hard look” at potential impacts, and FERC has done so through the EIS. NEPA does not mandate any specific outcome or mitigation measures, and FERC concluded that the upstream and downstream impacts cannot be considered significant under NEPA.

## **SUMMARY OF THE ARGUMENT**

The Commission’s finding of public convenience and necessity for the AFP pursuant to Section 7 of the Natural Gas Act (NGA), where 90% of the gas transported is for export, was not arbitrary and capricious. TGP’s multiple binding precedent agreements equaling the full design capacity of the project demonstrates a market need. TGP’s export precedent agreements are relevant considerations to demonstrate market need because the AFP will provide several domestic benefits regardless of where the gas ultimately ends up. FERC properly considered these export precedent agreements because Section 7 of the NGA applies to this interstate pipeline.

The Commission's finding that the benefits from the AFP outweighed the environmental and social harms was also not arbitrary and capricious. The Commission took into account each of HOME's concerns regarding the potential adverse effects of the AFP and considered relevant alternatives in accordance with HOME's demands. The Commission also named several public benefits of the project such as meeting unserved demand and improving regional air quality. When weighing the mitigated adverse effects against the numerous public benefits, the Commission reasoned the benefits outweighed the potential harms. Therefore, because the Commission provided a satisfactory explanation for its decision, its finding was not arbitrary and capricious.

The Commission's decision to route the AFP over HOME property despite HOME's religious objections was not in violation of RFRA. In bringing a RFRA claim, HOME must initially prove that there has been a substantial burden on its religious exercise. HOME is unable to meet this burden because it fails to prove that it was actually prohibited from practicing its religion due to threat of government sanction or revocation of benefits.

The Commission has the authority to implement the GHG conditions under the NGA. Congress empowers the Commission to issue certificates of public convenience and necessity under 15 U.S.C. § 717. This is not a major question of economic or political concern because a one-time construction project of an interstate pipeline does not concern the types of economic or political questions the Major Questions Doctrine (MQD) refers to.

The Commission's decision not to impose any GHG conditions addressing downstream and upstream GHG impacts was not arbitrary and capricious because it was not unreasonable or outside of its authority. The Commission took the requisite "hard look" at TGP's EIS to determine whether to impose upstream or downstream conditions. Because the Commission took

these factors into consideration, they did not act arbitrarily or capriciously when denying HOME and TGP's petitions for rehearing.

### STANDARD OF REVIEW

An agency's denial of a rehearing order is reviewed under the arbitrary and capricious standard. *Midcoast Interstate Transmission v. FERC*, 198 F.3d 960, 967 (D.C. Cir. 2000). This is a highly deferential standard of review. *Id.*

### ARGUMENT

#### **I. FERC's finding of public convenience and necessity for the AFP where 90% of the gas transported was for export was not arbitrary and capricious.**

The Commission's finding of public convenience and necessity for the American Freedom Pipeline (AFP) sufficiently established a project need where 90% of the gas transported by the pipeline was for export. The Commission's award of a certificate of public convenience and necessity for a natural gas pipeline under Section 7 of the Natural Gas Act (NGA) is reviewed under the Administrative Procedure Act's (APA) arbitrary and capricious standard. 5 U.S.C. § 706(2)(A); Natural Gas Act § 7; 15 U.S.C. § 717f(c)(1)(A); *Envtl. Def. Fund v. FERC*, 2 F.4th 953, 967 (D.C. Cir. 2021); see *Minisink Residents for Env'tl. Pres. and Safety v. FERC*, 762 F.3d 97, 105-06 (D.C. Cir. 2014) (citations omitted).

The arbitrary and capricious standard is "highly deferential," and it "presumes the validity of agency action." *Nat'l Ass'n of Clear Air Agencies v. E.P.A.*, 489 F.3d 1221, 1228 (D.C. Cir. 2007); see *AT&T Corp. v. FCC*, 349 F.3d 692, 698 (D.C. Cir. 2003). The scope of review under the arbitrary and capricious standard is narrow, and a court does not substitute 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 (1963). Courts must uphold an agency's action when it has considered

the relevant factors and articulated a “rational connection between the facts found and the choice made.” *National Ass’n of Clear Air Agencies*, 489 F.3d at 1228. See *Allied Local & Reg’l Mfrs. Caucus v. E.P.A.*, 215 F.3d 61, 68 (D.C. Cir. 2000) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S.*, 463 U.S. at 43).

A. The AFP’s binding precedent agreements demonstrate sufficient market need.

The Commission outlines how it determines whether a proposed pipeline is or will be in the public convenience and necessity. *City of Oberlin v. FERC*, 39 F.4th 719, 722 (D.C. Cir. 2022). Congress has broadly instructed the Commission to consider “public convenience and necessity,” which has two components: (1) “market need” and (2) “balancing of harms and benefits.” *Sierra Club v. FERC*, 867 F.3d 1357, 1373, 1379 (D.C. Cir. 2017). When considering market need, the Commission initially determines whether the project can proceed without subsidies from the company's existing customers. Certificate Policy Statement. 88 FERC at 61,745. To ensure that existing customers will not subsidize a project, the applicant must show that there is a market need for the project. *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015). The project must stand on its own financially from investments by the applicant and support from new customers through pre-construction contracts. *Id.* The Certificate Policy Statement further provides that rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project, including but not limited to precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. *Envtl. Def. Fund*, 2 F.4th at 961-62.

For example, the court in *Myersville* held that the Commission’s finding of an applicant’s secured precedent agreements with three natural gas customers was supported by substantial

evidence and demonstrated market need. 783 F.3d at 1310-11. The court reasoned that the secured precedent agreements demonstrated that the project was fully subscribed. *Id.* The fact that customers testified that they subscribed to the company's proposed added capacity to its natural gas infrastructure was substantial evidence that the precedent agreements were consistent with the Commission's Certificate Policy Statement and adequately demonstrated market need. *Id.* Furthermore, the court in *Sierra Club v. FERC* clarified that the criterion is "market need"—whether the pipelines will be self-supporting—which the applicants in that case satisfied by showing that 93% of their capacity had already been contracted for. 867 F.3d at 1379.

Conversely, *Environmental Defense Fund v. FERC* held that the Commission's finding of market need was arbitrary and capricious because "the application was supported by only a single precedent agreement" with a shipper who "was a corporate affiliate of the applicant who was proposing to build the new pipeline." 2 F.4th at 973. That one precedent agreement with an affiliated shipper was questionable evidence of market need because that agreement was reached after the pipeline builder held an open season that produced no precedent agreements and because petitioners had "identified plausible evidence of self-dealing." *Id.* at 975.

Here, applicant Transnational Gas Pipelines, LLC (TGP) has executed binding precedent agreements with International Oil & Gas Corporation (International) for 450,000 dekatherms (Dth) per day of firm transportation service and New Union Gas and Energy Services Company (NUG) for 50,000 Dth per day of firm transportation service, which together equal to 100% of the design capacity of the AFP. R. at 6. These agreements exceed the 93% capacity the court approved in *Sierra Club*, showing that the project is self-supporting and fully subscribed. Analogous to the precedent agreements in *Myersville*, the agreements here adequately demonstrate market need and are consistent with the Commission's Certificate Policy Statement.

The current issue is distinguishable from *Environmental Defense Fund* because there is no indication or evidence of self-dealing, a single precedent agreement, or that any of these precedent agreements are with an affiliated shipper.

B. The Commission appropriately considered export precedent agreements to establish public convenience and necessity.

The City of Oberlin court found it was not arbitrary and capricious to consider export precedent agreements to establish public convenience and necessity under Section 7 of the NGA. Section 7 applies to natural gas companies engaged in the transportation of natural gas in interstate commerce. *City of Oberlin*, 39 F.4th at 381-82. The NGA excludes companies that import and export gas by defining interstate commerce to exclude foreign commerce. *Id.*; see *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 151 (D.C. Cir. 1948). Instead, Section 3 of the NGA governs import/export facilities. *City of Oberlin*, 39 F.4th at 382. However, the *City of Oberlin v. FERC* court held that the Commission properly treated the pipeline project as a Section 7 pipeline, even though some of the gas transported would ultimately be exported because the pipeline was indisputably transporting gas in interstate commerce. *Id.* at 385. The application included six precedent agreements to transport gas from Pennsylvania and Ohio for sale across state lines. *Id.* The company was, therefore, a “Natural Gas Company,” and the Commission was correct to analyze the application under Section 7 even though some of the gas was bound for export. *Id.*

Furthermore, in support of using the export precedent agreements as evidence of the project’s benefit in its Section 7 analysis, the Commission in *City of Oberlin* explained the myriad of benefits stemming from increased transportation services for gas shippers regardless of where the gas would ultimately be consumed *Id.* at 386. Specifically, the Commission reasoned

that adding “additional capacity to transport gas out of the Appalachian Basin” and supporting the production and sale of domestic gas would contribute to the growth of the economy and support domestic jobs irrespective of whether the gas ended up here or in Canada. *Id.* The fact that a portion of the gas was bound for export did not diminish the benefits of constructing the pipeline. *Id.* The Commission additionally considered that the export precedent agreements at issue demonstrated need for additional capacity to transport gas to the Dawn Hub which served as a trading point between the United States and Canada. *Id.* The Commission also pointed to Congress’s determination that natural gas exports to countries with which the United States has a free trade agreement are deemed in favor of the public interest. *Id.* The *City of Oberlin* court held that these explanations of how the export precedent agreements evidenced domestic benefits demonstrated a rational connection between the facts found and the choice made. *Id.*

Here, the AFP is indisputably an interstate pipeline with two precedent agreements to transport gas from Jordan County, Old Union, to Burden County, New Union, which triggers Section 7 of the NGA even though some of the gas is bound for export. R. at 4. The AFP will provide countless benefits regardless of where the gas ultimately ends up or is consumed, such as delivering up to 500,000 Dth per day of natural gas to the interconnection with the NUG terminal and the NorthWay Pipeline, providing natural gas service to areas without access within New Union, expanding access to sources of natural gas supply in the United States, optimizing the existing systems for the benefit of both current and new customers by creating a more competitive market, fulfilling capacity in the undersubscribed NorthWay Pipeline, and providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. R. at 8. As a result, the fact that a portion of the gas is bound for export does not diminish the benefits of constructing the AFP. While the United States does not have a free

trade agreement with Brazil, the port of New Union still serves as a valuable trading point for export similar to the Dawn Hub in *City of Oberlin*, and is currently without access to natural gas, which the AFP will provide. R. at 6.

The AFP's export precedent agreements equaling 100% of the design capacity of the project sufficiently illustrated a market need. The Commission's consideration of these precedent agreements was appropriate under Section 7 of the NGA because the AFP is an interstate pipeline that will provide countless domestic benefits regardless of where the gas is ultimately consumed. Therefore, the Commission properly examined the relevant factors and drew a rational connection between the facts of the AFP and the choice to grant TGP the certificate of public convenience and necessity. As a result, this Court must uphold the Commission's decision because it was not arbitrary and capricious.

## **II. The Commission's finding that the benefits from the AFP outweighed the environmental and social harms was not arbitrary and capricious.**

The Commission's finding that the benefits from the AFP outweighed the environmental and social harms was not arbitrary and capricious because the Commission addressed each of HOME's concerns and provided rational justification for its findings. According to 5 U.S.C. § 706(2)(A), the Commission's ruling is subject only to arbitrary and capricious review. *Transmission Access Pol'y Study Grp. v. FERC*, 225 F.3d 667, 689 (D.C. Cir. 2000). Under the arbitrary and capricious standard of review, the Commission's decisions will be upheld if it has "examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018). This is a highly deferential standard. *Washington Gas Light Co. v. FERC*, 532 F.3d 928, 930 (D.C. Cir. 2008).

The Commission has jurisdiction “to approve or deny the construction of interstate natural-gas pipelines.” *Sierra Club*, 867 F.3d at 1364 (citing 15 U.S.C. § 717f). For approval of a pipeline to take place, “FERC must grant the developer a ‘certificate of public convenience and necessity.’” *Id.* For this certificate, after considering market need, the Commission considers the harms and benefits of the project. *Id.* at 1373, 1379. For this second component, the Commission will balance “public benefits against the adverse effects of the project.” *Id.* at 1373. Such public benefits may 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.” *Myersville*, 783 F.3d at 1309 (citation omitted). Potential adverse effects “include increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property.” *Id.* (citation omitted).

In *Environmental Defense Fund*, the D.C. Circuit held that the Commission’s balancing of public benefits and adverse impacts was arbitrary and capricious because the Commission found public convenience and necessity for the construction of a new pipeline without regard for the opposing parties’ arguments. 2 F.4th at 975-76. For example, the opposing parties, namely the Environmental Defense Fund, argued that the proposed pipeline was not being built to serve increasing demand nor would it lead to cost savings. *Id.* at 975. In response, the Commission relied solely on its broad discretion to conclude that the benefits of the proposed pipeline outweighed any adverse effects. *Id.* The court found that the Commission “pointed to no concrete evidence to support these assertions,” so it “failed to adequately balance public benefits and adverse impacts.” *Id.* at 973. While the Commission did have broad discretion, it still “must provide a cogent explanation for how it reached its conclusions.” *Id.* at 975. The court also noted

that it is not enough for evidence of the pipeline's benefits to exist somewhere in the record; the evidence must be utilized by the Commission in its decision-making within its orders. *Id.* at 975 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943)). Therefore, because the Commission "declined to engage with EDF's arguments" and failed to analyze any concrete evidence, its balancing of harms and benefits was arbitrary and capricious. *Id.* at 976.

In *City of Oberlin*, the D.C. Circuit found that the Commission adequately balanced the adverse effects of a proposed pipeline against public benefits when it considered the existence of precedent agreements (including those for export) and potential alternate routes for the project. 39 F.4th at 723-24. When weighing the harms and benefits of the pipeline, the court noted that "[a] common method for applicants to demonstrate a public benefit is by showing demand for the project with precedent agreements." *Id.* at 722. The court also stated that adverse effects had been mitigated by "incorporating route variations" and analyzing pipeline alternatives. *Id.* at 724. Lastly, the court noted that land needed for completion of the pipeline was not of concern because Section 7 of the NGA "authorize[s] the use of eminent domain to construct approved facilities." *Id.* at 723. Therefore, given the benefits of the project and minimal adverse impacts on landowners, communities, etc., the court concluded that the public convenience and necessity required approval of the pipeline. *Id.* at 724.

The Commission's actions in *Environmental Defense Fund* are distinguishable from its actions here. While the Commission in *Environmental Defense Fund* failed to acknowledge opposing parties' concerns regarding public convenience and necessity, the Commission here has taken into consideration all of Holy Order of Mother Earth's (HOME) concerns, including those regarding the environment, the affected landowners/communities, and HOME's religious beliefs. R. at 10. First, the Commission addresses how many trees must be cut down from HOME's

property and explains that an equal number of trees will be planted in other locations for safety reasons. R. at 10. The Commission also explains that rerouting the AFP to avoid HOME property completely will actually lead to objectively more environmental harm by adding three miles through an environmentally sensitive ecosystem in the mountains. R. at 11. Second, the Commission notes that any concerns of the landowners/communities along the pipeline route are currently being addressed. R. at 10. In response to these concerns, TGP has since made changes to over 30% of the proposed route and is negotiating mutually acceptable easement agreements. R. at 10. TGP has agreed to bury the AFP underground for the entire two-mile stretch over HOME's property and expedite a four-month construction period. R. at 10. Third, for similar reasons as will be addressed in Section III of this argument, the Commission explains that it cannot afford preferential weight to HOME's religious beliefs when making its administrative decisions. R. at 12.

The Commission's actions here are more akin to its actions in *City of Oberlin* because in addition to addressing each of HOME's concerns about potential adverse effects, the Commission provides concrete evidence of public benefits of the pipeline that outweigh any adverse effects. For example, the Commission explains that the proposed pipeline will "provid[e] natural gas service to areas currently without access to natural gas within New Union," "expand[] access to sources of natural gas supply in the United States," "optimiz[e] the existing systems for the benefit of both current and new customers by creating a more competitive market," "fulfull[] capacity in the undersubscribed NorthWay Pipeline," and "provid[e] opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels." R. at 8. Just as the Commission in *City of Oberlin* was able to demonstrate public benefit by showing demand for precedent agreements, there is clear evidence of a public

benefit here because TGP has executed precedent agreements for 100% of the AFP's design capacity. 39 F.4th at 722; R. at 8. TGP has also mitigated adverse effects by incorporating route variations according to landowners' concerns. R. at 10. The Commission has considered these changes in addition to an alternative pipeline route, which was found to be both more costly and environmentally detrimental. R. at 11. And here, similar to the Section 7 pipeline in *City of Oberlin*, the AFP is an interstate gas pipeline that falls under Section 7 and is therefore able to "exercise eminent domain as needed to secure property for completing the project." 39 F.4th at 722; R. at 10-11. The court in *City of Oberlin* found the balancing of these factors to be sufficient to show public convenience and necessity, and the Commission here executes the same test utilizing many of the same factors.

Therefore, not only has the Commission acknowledged HOME's arguments against the pipeline, but it has also weighed those concerns against the benefits of the pipeline. Because the Commission has satisfied the requirements of reasoned decision-making, its finding that the benefits outweigh the harms is not arbitrary and capricious.

### **III. The Commission's decision to route the AFP over HOME property despite HOME's religious objections was not in violation of RFRA.**

The Commission's decision to route the AFP over HOME property is not in violation of the Religious Freedom Restoration Act (RFRA) because HOME fails to demonstrate a substantial burden on its religious exercise. In the alternative that the court does find the existence of a substantial burden, the AFP still does not violate RFRA because the route is the least restrictive means of fulfilling a compelling government interest. According to the Religious Freedom Restoration Act (RFRA), the "[g]overnment shall not substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the

person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling interest.” 42 U.S.C. §§ 2000bb-1(a), (b). However, a person bringing a challenge under RFRA has the initial burden of proving that (1) the government’s policy implicates his religious exercise, (2) the relevant exercise of religion is grounded in a sincerely held religious belief, and (3) the government’s policy substantially burdened that exercise of religion. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 238 F. Supp. 3d 77, 88 (D.C. Cir. 2017) (citing *Holt v. Hobbs*, 574 U.S. 352, 360-61 (2015)). Given that neither the Commission nor TGP questions the sincerity of HOME’s relevant religious beliefs, HOME simply has the burden of establishing that the route of the AFP through its land imposes a substantial burden on their religious exercise.

RFRA does not provide a precise definition of what constitutes a “substantial burden.” However, the United States Supreme Court has explained that the crucial word is “prohibit.” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988). For example, in *Sherbert v. Verner*, a member of the Seventh-day Adventist Church was deemed ineligible for unemployment benefits after she could not obtain employment due to her religious requirement that she attend Sabbath on Saturdays. 374 U.S. 398, 399-400. The Supreme Court concluded that such governmental action acted as a prohibition to her religious practice because it forced her to choose between foregoing that practice or forfeiting benefits. *Id.* at 404.

On the other hand, the Supreme Court in *Lyng v. Northwest Indian Cemetery Protective Ass’n* held that “[i]ncidental effects of government programs, . . . which have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require government to bring forward a compelling justification for its otherwise lawful actions.” 485 U.S. at 450-51. In, the U.S. Forest Service planned to build a paved road which included a segment through an

American Indian reservation used for religious purposes by several tribes. *Id.* at 442. After American Indians challenged the road-building and timber-harvesting involved in the project, arguing that these actions violated the Free Exercise Clause, the Supreme Court found that these governmental actions did not actually “prohibit” the American Indians’ free exercise of religion. *Id.* at 442-51. While the Court recognized that the Forest Service’s plans would gravely threaten some Indian religious practices, and could even “virtually destroy” their ability to practice their religion, it still found no basis for upholding their legal claims. *Id.* at 452. Unlike in *Sherbert*, the governmental action in *Lyng* did not coerce violation of any religious beliefs nor “penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.” *Id.* at 449. The Court went as far as to state that “government simply could not operate if it were required to satisfy every citizen's religious needs and desires.” *Id.* at 452.

Although both *Sherbert* and *Lyng* predate RFRA and mention only the Free Exercise Clause, the Ninth Circuit and D.C. Circuit have since clarified that *Lyng* is consistent with the *Sherbert* standard that is codified in RFRA, and *Lyng* is applicable to RFRA despite its sole mention of Free Exercise. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1073 (9th Cir. 2008); *Standing Rock*, 238 F. Supp. 3d at 93. Therefore, the analysis is transferable.

In *Navajo Nation v. U.S. Forest Service*, the Ninth Circuit held that the presence of artificial snow made of recycled wastewater on a sacred mountain did not place a substantial burden on American Indians’ religious exercise. 535 F.3d at 1063. The court explained that the “subjective spiritual experience” and/or “satisfaction with which a believer practices his religion is not what Congress has labeled a ‘substantial burden.’” *Id.* Therefore, the offensiveness of the presence of the wastewater may have decreased spiritual fulfillment, but it was not a substantial

burden on the free exercise of religion. *Id.* at 1070. For the same reasons, the D.C. Circuit in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* held that a domestic-oil pipeline routed under the lakebed of sacred native land did not substantially burden the native tribe's religious exercise. 239 F. Supp. 3d at 83. Citing *Sherbert* and *Lyng*, the court found that while the pipeline may have "devastating" and "extremely grave" effects on religious practice utilizing the lake, the pipeline's route would not coerce anyone to act contrary to their religion based on threat of government sanction or loss of benefits. *Id.* at 92 (citation omitted). Therefore, an easement to finish the pipeline would not violate RFRA. *Id.* at 93.

Here, HOME contends that its biannual Solstice Sojourn is a sacred religious ceremony that would lose all meaning if it were required to take place over the underground pipeline. R. at 11-12. HOME also points out that trees would need to be removed and could not be replaced, leaving a bare spot along the Solstice Sojourn path. R. at 13. However, HOME concedes that it will not be "physically prevented" from making the ceremonial journey, only that it would be "unimaginable" to walk over the pipeline. R. at 12. Therefore, there is no actual prohibition of HOME's religious practice like there was in *Sherbert*. HOME is not being forced to choose between its religion and "the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449. Like in *Lyng*, *Navajo Nation*, and *Standing Rock*, the governmental action of burying a pipeline on religious land simply affects HOME's subjective, emotional religious experience. *See Navajo Nation*, 535 F.3d at 1070. Just because HOME would be unsatisfied with its religious practice over a pipeline does not mean it constitutes a "substantial burden" to their religious exercise. *See id.* at 1063. In fact, the court could find that HOME's religious practice would be "virtually destroyed" by the pipeline, and this would still be insufficient to show substantial burden. *Lyng*, 485 U.S. at 452. In order for HOME to prove that the AFP's route

imposed a substantial burden, it would need to show that it was coerced into acting contrary to HOME's religious beliefs in some real way based on sanction, loss of a government benefit, or other collateral harm. *Standing Rock*, 239 F. Supp. 3d at 95. This is a burden that HOME fails to meet.

Because HOME does not establish that the route of the AFP substantially burdens its exercise of religion, the government need not show that the pipeline is in furtherance of a compelling government interest or that it is the least restrictive means of furthering that compelling interest. *See Navajo Nation*, 535 F.3d at 1070. However, it is worth briefly noting that even if HOME had proven a substantial burden, the government is still able to demonstrate that the AFP route satisfies the least-restrictive means of a compelling government interest. The compelling government interest lies in the benefits of the proposed pipeline. Such benefits are addressed in Part II of the argument and include providing natural gas to areas currently without access and creating a more competitive market. R. at 8. Also addressed in Part II are the measures that TGP has taken (and the Commission has considered) to ensure that the pipeline is as least restrictive as possible. This includes negotiating easements, altering the pipeline route, and expediting the construction on HOME's property. R. at 10. The Commission has also noted that the proposed alternative route is both \$51 million more expensive and more detrimental to the environment. R. at 11. Therefore, in the alternative that the court finds that HOME has identified a substantial burden to its religious exercise, the court should still find that the Commission was correct to conclude that the pipeline is both in furtherance of a compelling government interest and the least restrictive means of furthering that compelling interest. Therefore, the pipeline route is not in violation of RFRA.

**IV. The greenhouse gas conditions imposed by the Commission were not beyond its authority.**

The greenhouse gas (GHG) conditions imposed by the Commission were not beyond the Commission's authority under the NGA. Under 15 U.S.C. § 717f(c)(1)(A), "a natural gas pipeline company must obtain a Certificate of Public Convenience and Necessity from the Commission prior to undertaking the construction or extension of any natural gas facility for the transportation of natural gas in interstate commerce," and under § 717f(e) "FERC may place any reasonable conditions on the issuance of such a certificate as the public convenience and necessity may require." *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 392 (D.C. Cir. 2022). The Commission issued TGP a certificate of public convenience and necessity for the construction of an interstate pipeline subject to GHG conditions which would protect the climate from increased carbon emissions. R. at 4. This is within the Commission's authority as the GHG conditions are necessary for the health of the public and safety of the environment.

**A. The Commission has authority under the NGA.**

The GHG conditions imposed by the Commission were not beyond the Commission's authority under the NGA because the greenhouse gas conditions are reasonably based on quantifiably measured data and they are not extraordinary such that they address a nationwide major question of political or economic concern.

15 U.S.C. § 717f empowers federal agencies, such as the Commission, to consider "the public convenience and necessity" when authorizing applications and imposing mitigation measures of projects like interstate pipelines. R. at 13. "FERC is also empowered to attach 'reasonable terms and conditions' to the certificate, as necessary to protect the public." *Sierra Club*, 867 F.3d at 1364. The court in *Sierra Club* reasoned that GHG emissions are an effect of

pipeline project authorization, which the Commission could reasonably foresee and has the legal authority to mitigate. *Id.* Because the Commission failed to quantitatively estimate carbon emissions, the court held that their EIS was inadequate. *Id.*

Conversely, here the Commission estimates that, without the GHG conditions, the AFP would generate 104,100 metric tons of CO<sub>2</sub> per year but generate 88,340 metric tons of CO<sub>2</sub> per year in adherence to the GHG conditions, preventing 15,760 metric tons of emissions from entering the atmosphere per year. R. at 15. The standards that the Commission is imposing are reasonable because they address a quantitative estimate of GHG emissions, which is reported in the EIS. R. at 15. Because the GHG conditions are based on an empirical estimate, the conditions are reasonable. These conditions protect the public by granting pipeline construction while restricting the amount of pollutants being discharged during construction. The economic advantages that stem from pipeline development benefit the public while protecting against excess pollutants. The conditions imposed by the Commission strike a happy medium, allowing for economic development while limiting environmental pollution. This action is in accordance with the statutory authority granted to the Commission.

B. The Major Questions analysis does not apply to the present case.

The GHG conditions imposed by the Commission are not beyond the Commission's authority because they do not address a major question. Courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance. *West Virginia v. E.P.A.*, 142 S. Ct. 2587, 2605 (2022). Under the major questions doctrine, a clear statement was necessary to conclude that Congress intended to delegate authority. *Id.* The statute that authorizes the Commission to impose GHG standards on the construction of a pipeline states that the "Commission 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.

The Fourth Circuit has held that regulating bycatch in federal waters would vastly expand the EPA's regulatory authority in a way that would upset the federal-state balance by intruding on states' authority to manage fisheries. *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291 (2022). Because of the enormous impact on the fishing industry, the major questions doctrine precludes the EPA from regulating federal waters. *Id.*

*Sackett v. EPA* also addresses the major questions doctrine by applying it only when a vague term is used, not a broad term. 143 S. Ct. 1322, 1361 (Thomas, J., concurring). The concurring justices reasoned that a court may apply a clear-statement rule to deal with statutory vagueness, but a court cannot rewrite Congress's instructions because they go further than preferred. *Id.*

The GHG conditions the Commission has imposed are unlike the distinct regulatory scheme the EPA developed in *N.C. Coastal Fisheries Reform Group v. Capt. Gaston, LLC*, where a state environmental preservation group attempted to require that the EPA regulate bycatch, something the agency has never sought to do. 76 F.4th at 297. The EPA would have "power over a significant portion of the American economy" if they were to regulate bycatch and therefore vastly expand their authority beyond what Congress intended. *Id.* The interstate pipeline is subject to federal regulation, not state regulation like the waters being regulated in *N.C. Coastal. Id.* The AFP is a one-time construction project; the GHG conditions only govern the construction of this specific pipeline, not its operation. In creating these conditions, the Commission has not gone too far as to affect the natural gas sector of the economy, especially

since these conditions only apply to the construction of the AFP. Therefore, the GHG conditions are not a major question.

The major question doctrine is inapplicable to the present case because the language in 15 U.S.C. § 717f can be classified as broad, not vague under *Sackett*. 143 S. Ct. at 1361 (Thomas, J., concurring). Public convenience and necessity are broad terms, which the Commission has the discretion to interpret when reasonably creating standards like the GHG conditions. The broadness of the language does not take away from the clarity of the statute. The Commission is authorized to impose these conditions in the way it deems appropriate for public convenience and necessity. While this gives the Commission broad discretion to impose GHG conditions, the language is clear about what goal the conditions must exist to serve. The fact that the conditions imposed by the Commission go beyond what TGP would prefer does not give the courts authorization to change the statutory instructions written by Congress delegating this power to the Commission.

The GHG conditions imposed by the Commission were not beyond its authority under the NGA because they address traditional environmental harms that are of no economic or political significance such that the major questions doctrine precludes the Commission from imposing them. The Commission correctly denied rehearing on this issue.

**V. The Commission’s decision not to impose any GHG conditions addressing downstream and upstream GHG impacts was not arbitrary and capricious.**

The Commission’s decision not to impose any GHG conditions addressing downstream and upstream GHG impacts was not arbitrary and capricious because it was not unreasonable or outside of the Commission’s authority. “A reviewing court must uphold the Commission's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law.” *Midcoast Interstate Transmission*, 198 F.3d at 967. The Supreme Court has previously held that the Commission did not act arbitrarily or capriciously when its EA did not consider upstream impacts or calculate downstream impacts of two short pipelines because the Commission concluded it could not "reasonably quantify or foresee the [greenhouse-gas] emission impacts" associated with the pipeline. *Del. Riverkeeper Network*, 45 F.4th at 111. Given the deference owed to the Commission's technical judgments, the Court did not conclude failure to impose upstream and downstream conditions was unreasonable. *Id.*

Here, the Commission did not impose GHG conditions downstream and upstream because those impacts “cannot be considered ‘significant’ under the National Environmental Policy Act (NEPA).” R. at 19. Because it is unclear whether the TGP project will cause significant increases in emissions upstream or downstream, no mitigation is warranted until the Commission has drafted guidance to create a consistent policy. R. at 19. The Commission has authority to decide not to impose standards and make these decisions in accordance with NEPA. Because the Commission abided by the NEPA regulations in place, it did not act unreasonably and therefore did not act arbitrarily or capriciously when deciding not to impose upstream or downstream GHG conditions.

A. The Commission’s decision was not arbitrary or capricious.

The Commission’s decision not to impose GHG conditions addressing upstream impacts was not arbitrary and capricious. This "arbitrary and capricious" standard of review is highly deferential, which presumes the agency's action to be valid. *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). The D.C. Circuit has held that “[t]he discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice.” *Birckhead v. FERC*, 925 F.3d 510, 515 (D.C. Cir. 2019).

In that case, the court held the Commission did not act arbitrarily or capriciously or otherwise violate in declining to consider the environmental impacts of upstream gas production because the Commission adequately considered and disclosed the environmental impact of its actions. *Id.*

The Commission here was not arbitrary or capricious when declining to exercise its discretionary authority to impose upstream and downstream GHG mitigation measures until a uniform policy has been established. R. at 19. The Commission had the information sufficient to permit a reasoned choice because it considered the EIS TGP completed. R. at 15. The Commission has “concluded that, if constructed and operated in accordance with applicable laws and regulations, the project will result in some adverse environmental impacts, but that these impacts will be reduced to less-than-significant levels with the implementation of staff’s recommendations.” R. at 3. Because the implementation of the other GHG conditions will reduce the environmental impact, the Commission was not arbitrary or capricious when it declined to impose upstream mitigation efforts.

B. The Commission’s “hard look” at the effects of the AFP was sufficient.

The Commission was not arbitrary or capricious when deciding not to impose conditions on upstream and downstream impacts because they took a “hard look” at the effects of the pipeline, as required by the agency. “The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of ‘action-forcing’ procedures that require that agencies take a ‘hard look’ at environmental consequences.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

The D.C. Circuit denied a petition for review of an approved pipeline crossing a wildlife refuge and river, finding “the adverse impact of . . . [a] proposed pipeline to be limited, and that, with the adoption of the recommended mitigation measures, the project would be

environmentally acceptable.” *Midcoast Interstate Transmission*, 198 F.3d at 966. Having taken the required "hard look," the Commission concluded that other values outweighed what the FEIS described as the project's limited but nonetheless acceptable environmental costs if specified mitigation measures were taken. *Id.* It then conditioned the certificate on Southern's compliance with those measures. *Id.* This struck the court as “responsible agency decision making.” *Id.*

In the case at hand, the Commission has taken a “hard look” at the effects of the pipeline, evidenced by its use of TGP’s EIS to create and adopt other GHG conditions. R. at 15. The GHG conditions the Commission imposed show that the agency considered the environmental impacts to the extent of their potential environmental harm. While NEPA does not mandate specific mitigation measures, the Commission still complied with their “hard look” requirement by using the empirical estimates from the EIS to determine that the upstream and downstream impacts cannot be considered significant. R. at 19. The Commission’s imposition of GHG conditions on the project as a whole and its decision to not impose upstream and downstream conditions show the agency took a “hard look” at the consequences of the project, and critically determined which conditions were necessary. By doing this, the Commission met all of the statutory requirements of the “hard look” and therefore was not arbitrary or capricious when determining not to impose upstream or downstream conditions.

## **CONCLUSION**

For the foregoing reasons, this court should affirm the Commission’s decision to deny HOME and TGP’s petitions for rehearing.