

Case No. 23-01109 (consolidated)

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH

Petitioner

-and-

TRANSNATIONAL GAS PIPELINES

Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION

Respondent

On Petition for Review of an Order by the Federal Regulatory Commission.

Brief of Appellant, TRANSNATIONAL GAS PIPELINES

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STATEMENT OF JURISDICTION

The issuance of the Order granting a Certificate of Public Convenience and Necessity (“CPCN”) by the Federal Energy Regulatory Commission (“FERC”) for the construction of the American Freedom Pipeline (“AFP”) was petitioned for rehearing by the Holy Order of Mother Earth (“HOME”), a religious organization, and Transnational Gas Pipelines, LLC (“TGP”), the operator of the proposed pipeline. Pursuant to 15 U.S.C. § 717r(a), the authority to review the Order was reserved to FERC, which denied both petitions for rehearing. A notice of appeal was timely filed by both parties seeking rehearing under this Court’s jurisdiction pursuant to 15 U.S.C. § 717r(b). The petitions have been rightfully consolidated by this Court for review.

ISSUES PRESENTED

- I. FERC considered precedent agreements, 90% of which are for export, in determining that there is a project need. Was it arbitrary and capricious or not supported by substantial evidence for FERC to consider the export precedent agreements?
- II. FERC determined that the benefits of the AFP outweigh possible social and environmental harms. Was it arbitrary and capricious for FERC to reach this conclusion?
- III. FERC routed the AFP over HOME land, despite HOME’s religious objections. Does FERC’s decision violate the Religious Freedom and Restoration Act (“RFRA”)?
- IV. FERC imposed Greenhouse Gas (“GHG”) Conditions on the AFP project. Was this beyond FERC’s authority under the Natural Gas Act (“NGA”)?
- V. FERC did not impose GHG Conditions addressing potential downstream or upstream emissions from the AFP. Was FERC’s decision not to impose such conditions arbitrary and capricious?

STATEMENT OF THE CASE

I. Legal Background

The NGA, passed in 1938, delegates to FERC certain regulatory powers over the interstate transmission of natural gas. Under the NGA, FERC may grant CPCNs allowing construction and operation of interstate pipelines like the AFP. In addition, the NGA empowers FERC to attach “reasonable terms and conditions as the public convenience and necessity may require” to approved CPCNs. 15 U.S.C. § 717f(e).

II. Factual Background

This case concerns the construction of the AFP. The AFP would extend from Jordan County, Old Union, to Burden County, New Union, and provide up to 500,000 Dth per day of Liquefied Natural Gas (“LNG”). R. ¶ 1. The LNG transported by the AFP will be produced and liquified in the Hayes Fracking Field (“HFF”) of Old Union and constitute roughly 35% of the production of HFF. *Id.* ¶ 12. While the full production of natural gas at HFF is already transported via the Southway Pipeline, the market served by the Southway Pipeline is shrinking, and the market that would be served by the AFP is growing. *Id.* ¶ 13.

TGP will be the operator of the AFP and will become a natural gas company subject to FERC jurisdiction under the NGA. *Id.* ¶ 8. TGP filed an application for authorization to construct the AFP on June 13, 2022. *Id.* ¶ 1. Constructing the AFP will involve installing approximately ninety-nine miles of thirty-inch pipeline along the proposed AFP route. *Id.* ¶ 10. This will require the removal of trees and other forms of vegetation, and much of this vegetation cannot be replaced for safety reasons. *Id.* ¶ 38. As the result of an open season for service on the AFP, TGP has executed binding precedent agreements with: (1) International Oil & Gas Corporation (International) for 450,000 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. *Id.* ¶ 11. These precedent agreements do not contemplate additional production at HFF. *Id.* ¶ 12. The LNG purchased by International will be exported to Brazil. *Id.* ¶ 14.

HOME is a nonprofit religious organization in New Union that considers the natural world to be sacred. *Id.* ¶¶ 9, 46. One of HOME's religious beliefs is that humans should promote natural preservation over economic interests, and one of HOME's religious practices involves a ceremonial journey across HOME's property. *Id.* ¶ 48. HOME's headquarters are located on the western end of this 15,500-acre property, which HOME owns outright, and which overlaps with the proposed AFP route. *Id.* ¶ 9. HOME objects to the AFP and sought rehearing on three aspects of the CPCN order. *Id.* ¶ 5.

FERC is required to balance the public benefits of a project against its potential adverse consequences, with FERC's goal being to consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction. *Id.* ¶ 18. FERC found a strong showing of the AFP's public benefit, in part because TGP has executed binding precedent agreements for firm service using 100% of the AFP project, and because the AFP will serve multiple domestic needs. *Id.* ¶¶ 26, 27. TGP has also worked to address landowner concerns related to the construction of the AFP and has made changes to over 30% of the proposed route to address these concerns. *Id.* ¶ 41. Relevant examples of such changes are TGP's agreement to bury the AFP through its entire passage through HOME property, and to expedite construction to the extent feasible across HOME property. *Id.*

TGP objects to the GHG Conditions imposed on the AFP project by FERC. *Id.* ¶ 76. The GHG Conditions require TGP to (1) plant an equal number of trees as those removed in the

construction of the TGP, (2) utilize electric-powered equipment during construction, (3) purchase only “green” steel pipeline segments produced by net-zero steel manufacturers, and (4) purchase all electricity used in construction from renewable sources when available. *Id.* ¶ 67. FERC did not impose these conditions in reliance on an internally promulgated rule because no such rule on mitigating greenhouse gas impacts exists. *Id.* ¶ 69. Rather, FERC largely relied on guidance from the Council on Environmental Quality (“CEQ”), a source of authority that FERC is not required to follow. *Id.* ¶¶ 69, 70. FERC has recently imposed similar conditions at a rate of 80% of proposed projects. *Id.* ¶ 84. The GHG Conditions imposed here are the result of the Environmental Impact Statement completed by TGP, which FERC concedes amounts to an over-estimation of the likely carbon dioxide emissions. *Id.* ¶ 72. Specifically, FERC estimates that the construction of the AFP may result in roughly 104,000 metric tons of carbon dioxide per year, for four years. *Id.* ¶ 73. FERC estimates that, with the GHG Conditions imposed, this total will only be reduced to roughly 88,000 metric tons of carbon dioxide per year. *Id.* ¶ 73. FERC decided not to impose conditions related to upstream or downstream greenhouse gas impacts, declining to reach a finding of significance. *Id.* ¶¶ 74, 99.

III. Procedural History

FERC issued an Order granting, subject to certain conditions, a CPCN to TGP for construction of the AFP on April 1, 2023. On April 20, 2023, HOME sought rehearing from FERC. On April 22, 2023, TGP also sought rehearing from FERC. On May 19, 2023, FERC issued an Order denying the petitions for rehearing and affirming the CPCN as originally issued. On June 1, 2023, both HOME and TGP filed Petitions for Review of the CPCN Order and Rehearing Order with this Court. Both the HOME and TGP’s Petitions for Review were consolidated into this case.

SUMMARY OF THE ARGUMENT

FERC was correct to consider the export agreements as evidence of a project need. FERC's Certificate Policy Statement notes that despite changes in the permitting process, precedent agreements will *always* be significant evidence of a project need. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at p. 61,748 (1999), *clarified* 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000). Furthermore, in both *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015), and *Minisink Residents for Environmental Preservation & Safety v. FERC*, 762 F.3d 97, 116 n.10 (D.C. Cir. 2014), the court noted that the Certificate Policy Statement does not require FERC to look beyond precedent agreements to find market need. Here, there is incontrovertible evidence of market need—FERC has precedent agreements for the entirety of the gas transported by the AFP. The fact that 90% of these agreements are for export does not diminish their value in demonstrating market need. The NGA explicitly states that the exportation of natural gas is within the public interest when the U.S. has a free trade agreement with the export country, 15 U.S.C. § 717b(c), and export agreements were expressly considered in *City of Oberlin v. FERC*, 39 F.4th 719, 725 (D.C. Cir. 2022). Neither of these authorities suggests any limit as to what extent export precedent agreements may be considered, and thus the consideration of the agreements here, which also directly result in domestic benefits, was not arbitrary and capricious.

Furthermore, FERC properly determined that the AFP was in the “public convenience and necessity.” In making this determination, the Certificate Policy Statement instructs FERC to balance a project's expected benefits with its potential harms. 88 FERC ¶ 61,227, at p. 61,396. Furthermore, the Certificate Policy Statement describes possible benefits as meeting unserved demand and advancing clean air objectives. *Id.* The AFP provides these benefits. Potential harms include both social and environmental harms, each of which is at issue here. However, FERC has

made changes to nearly a third of the AFP's route to minimize these impacts, and with these changes any harm is minor. Moreover, the proposed AFP route is superior to the Alternate Route, which would severely impact the environment. Under *Minisink*, which grants FERC significant discretion in balancing harms and benefits, 762 F.3d at 105-06, FERC's decision to grant the CPCN was not arbitrary and capricious.

Additionally, FERC's decision to route the AFP across HOME's land did not violate RFRA. To establish a RFRA violation, claimants must show that the government imposed a "substantial burden" on their free exercise of religion. *See* 42 U.S.C. § 2000bb-1(a). This Court should limit the "substantial burden" analysis to situations involving the denial of government benefits or the imposition of civil or criminal penalties as a result of religious exercise, as RFRA explicitly mentions *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *see* § 2000bb(b)(1), encompassing only those circumstances—an approach which aligns with Supreme Court precedent. Under this standard, the impacts to HOME land are not a substantial burden. This is analogous to *Navajo Nation v. U.S. Forest Service*, which held that government action diminishing spiritual fulfillment does not pose a substantial burden. 535 F.3d 1058, 1070 (9th Cir. 2008). Still, even if this Court does consider the routing of the AFP a substantial burden under RFRA, the pipeline serves a compelling government interest by improving pipeline connectivity and increasing the accessibility of natural gas, and the proposed route is the least restrictive means because the Alternate Route would result in far more environmental harm and economic costs. *See* § 2000bb-1(b).

Turning to the GHG Conditions, FERC's imposition of Conditions in the CPCN addressing the mitigation of greenhouse gas impacts is beyond FERC's authority under the NGA. *West Virginia v. EPA* states that the Major Questions Doctrine is triggered when an

agency acts regarding a question of political and economic significance without a clear statutory directive. 142 S. Ct. 2587, 2609 (2022). Here, FERC is acting to regulate climate change, which is of great political and economic significance, despite no indication from Congress that FERC should venture into this area. Further evidence that FERC's actions are impermissible under the Major Questions Doctrine is provided by FERC's waffling as to whether it can impose greenhouse gas conditions, which under *FDA v. Brown & Williamson Tobacco Corp.* indicates that FERC lacks authority to regulate greenhouse gases. 529 U.S. 120, 144 (2000).

If this Court determines FERC does have authority to impose conditions addressing the mitigation of greenhouse gas impacts, then FERC's decision not to impose conditions for upstream and downstream impacts was a proper exercise of its discretion. The NGA gives FERC the power to issue conditions in granting a CPCN, but the NGA does not mandate the FERC impose such conditions. *See* 15 U.S.C. § 717f(e). NEPA, which FERC must follow in issuing a CPCN, is a purely procedural statute, thus allowing FERC broad discretion in deciding to impose such conditions. *See Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017). Here, FERC properly exercised this discretion because no internal guidance directed that conditions should be imposed, and agencies should hesitate to act in the absence of guidance. *See, e.g., Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Furthermore, under *Center for Biological Diversity v. FERC*, stating that indirect emissions are not reasonably foreseeable when the end user of natural gas is unknown, 67 F.4th 1176, 1185 (D.C. Cir. 2023), FERC reasonably decided and explained its decision not to impose conditions for upstream or downstream emissions. Thus, FERC's decision not to impose conditions for the upstream and downstream impacts was not arbitrary and capricious.

ARGUMENT

I. FERC properly relied on the export precedent agreements in finding a project need.

FERC's decision to rely on the export precedent agreements is reviewed under both the arbitrary and capricious and substantial evidence standards. The arbitrary and capricious standard is "narrow" and under this standard, a court may not "substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). An agency decision is not arbitrary and capricious so long as the agency has provided a "rational connection between the facts found and the choice made." *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The substantial evidence standard requires an agency to base its decision on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938). An agency's decision may be arbitrary and capricious if it is not supported by substantial evidence. *Safe Extensions, Inc. v. F.A.A.*, 509 F.3d 593, 604 (D.C. Cir. 2007).

The NGA states that FERC shall issue a certificate for the construction of a new pipeline whenever the project "will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). In evaluating whether a project is within the public convenience and necessity, the finding of a "project need" is analogous to a finding of "market need." *See, e.g., Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015). Both the NGA, 15 U.S.C. § 717b(c), and *City of Oberlin v. FERC*, 39 F.4th 719, 725 (D.C. Cir. 2022), state that FERC can consider export agreements in assessing market need, and thus the "market" is defined broadly.

Thus, so long as FERC rationally considered the undisputed evidence in the record—that export precedent agreements accounted for 90% of the gas transported by the AFP and that the AFP would result in numerous domestic benefits—and concluded that the export agreements

could demonstrate a project need, FERC's decision cannot be arbitrary and capricious or unsupported by substantial evidence.

A. Precedent agreements are evidence of a market need, and the substantial number of precedent agreements here was sufficient to establish a market need.

Precedent agreements are evidence of a project need. On September 15, 1999, FERC issued a Certificate Policy Statement, noting that due to changes in the natural gas marketplace, traditional tools for establishing a project need, such as precedent agreements, may no longer be sufficient to show that a project is in the public convenience and necessity. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at p. 61,390 (1999), *clarified* 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000). To remedy this, FERC established the threshold requirement that the pipeline operator must be prepared to financially support the construction without subsidization from existing customers. *Id.*

Cases after the Certificate Policy Statement indicate that FERC should still rely on precedent agreements as evidence of market need. For example, in *Minisink Residents for Environmental Preservation & Safety v. FERC*, the court noted that precedent agreements will “always be important evidence of demand for a project.” 762 F.3d 97, 116 n.10 (D.C. Cir. 2014) (citing 88 FERC ¶ 61,227, at p. 61,748). This point was further explained in *Myersville Citizens for a Rural Community, Inc. v. FERC*, where the court accepted FERC's position that the Certificate Policy Statement permits, but does not require, FERC to assess a project's benefits by looking beyond the market need as evidenced by precedent agreements. 783 F.3d 1301, 1311 (D.C. Cir. 2015). Precedent agreements alone are rarely insufficient to show market demand.¹

¹ See *Env't Def. Fund v. FERC*, 2 F.4th 953, 964 (D.C. Cir. 2012) (“where a proposed project does not have precedent agreements for all of the capacity of the project and the project's only precedent agreement is with a single affiliated shipper with predominantly captive retail customers, the mere existence of such a precedent agreement is insufficient to show adequate market demand”).

In the present case, it was not arbitrary and capricious for FERC to rely on precedent agreements. FERC's Certificate Policy Statement, as well as the decisions in *Minisink* and *Myersville*, encourage the consideration of precedent agreements. Here, TGP has secured precedent agreements for 100% of the gas to be transported by the AFP pipeline, as was the case in *Myersville*. Furthermore, this is distinguishable from *Environmental Defense Fund*, as the court in that case refused to credit a precedent agreement because it was with a single affiliated shipper and thus was not evidence of market demand, which is not the case for the AFP.

B. The value of the precedent agreements in demonstrating market need for the AFP is not diminished merely because a large majority of the agreements are for export.

Export precedent agreements are consistent with the public interest and are evidence of a market need. The NGA explicitly states that “the exportation of natural gas to a nation with which there is in effect a free trade agreement . . . shall be deemed to be consistent with the public interest” 15 U.S.C. § 717b(c). In *City of Oberlin v. FERC*, the court detailed the value of export agreements in assessing project need, noting that domestic benefits may result from the pipeline regardless of where the gas is consumed and that the export agreements demonstrated a need for additional capacity. *See* 39 F.4th 719, 725 (D.C. Cir. 2022) (finding project need where a quarter of the precedent agreements were for export).²

The export precedent agreements here can, and should, be examined in light of the domestic benefits provided by the AFP. In *City of Oberlin*, the court accepted FERC's finding that “export precedent agreements evidenced domestic benefits” where the proposed pipeline would support the production and sale of domestic gas and the growth of domestic jobs. 39 F.4th

² *See also Allegheny Def. Project v. FERC*, 964 F.3d 1, 19 (D.C. Cir. 2020) (finding project need when there were export precedent agreements).

719, 727 (D.C. Cir. 2022). The AFP will result in similar domestic benefits, as it “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. ¶ 34. These benefits, like those in *City of Oberlin*, are not diminished merely because a portion of the gas is destined for Brazil. Furthermore, it is inconsequential that a larger portion of the precedent agreements here are for export. In *City of Oberlin*, a quarter of the precedent agreements were for export, and here 90% are for export. However, neither *City of Oberlin* nor the NGA contemplate a cap on the number of precedent agreements that may be for export, and instead focus on the domestic benefits a pipeline will provide through export agreements. Given FERC’s thorough explanation in the Order Denying Rehearing as to the domestic benefits that will accrue, FERC’s decision to consider export agreements is not arbitrary and capricious. FERC properly relied on the export precedent agreements in finding a project need.

II. FERC properly weighed the benefits of the AFP against the potential environmental and social harms in finding public convenience and necessity.

FERC’s finding of public convenience and necessity is reviewed under the arbitrary and capricious standard, detailed above. *See Minisink Residents for Env’t Pres. & Safety v. FERC*, 762 F.3d 97, 105–06 (D.C. Cir. 2014). Under this standard, the Court is limited to deciding whether FERC’s decision was “reasonable, principled, and based upon the record.” *Id.* (quoting *Am. Gas Ass’n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)). In undertaking this analysis, the Court should note that “[t]he grant [] or denial of a [CPCN] is a matter peculiarly within the discretion of the Commission.” *Id.* (quoting *Okla. Nat. Gas Co. v. Fed. Power Comm’n*, 257 F.2d 634, 639 (D.C. Cir. 1958)).

Once the threshold requirement of no subsidization by existing customers is met, FERC determines whether the project is in the public convenience and necessity by balancing a

project's expected benefits with its potential harms. *Certification of New Interstate Natural Gas Pipeline Facilities*, 90 FERC ¶ 61,128, at p. 61,396, *clarified*, 92 FERC ¶ 61,094 (2000).

According to FERC's Certificate Policy Statement, possible benefits include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives." *Id.* at 61,397. In assessing potential adverse impacts, FERC may consider "effects on existing customers of the applicant, the interests of existing pipelines and their captive customers, and the interests of landowners and the surrounding community, including environmental impacts." *Id.* at 61,398. When the public benefits outweigh the potential adverse impacts, FERC must approve the project. *Id.* at 61,396.

A. The AFP provides public benefits by meeting unserved demand and advancing clean air objectives and these benefits outweigh the mitigated environmental and social harms.

A pipeline provides benefits when it meets unserved demand and enhances domestic production. For example, in *Minisink Residents for Environmental Preservation & Safety v. FERC*, the court found that the proposed pipeline provided a benefit by increasing capacity to customers in a high-demand market. 762 F.3d 97, 104 (D.C. Cir. 2014). Similarly, in *City of Oberlin v. FERC*, the court found that numerous benefits, including additional capacity and increased production and sale of natural gas, would accrue from increasing transportation services for gas shippers. 39 F.4th 719, 727 (D.C. Cir. 2022).

Courts consider the interests of the surrounding community, including both social and environmental factors, in evaluating adverse impacts. In determining the significance of adverse impacts, FERC considers mitigation measures undertaken by the pipeline operator. *See id.* at 724 (crediting the operator's rerouting of the pipeline as a step taken to minimize adverse impacts).

For example, in *Minisink*, the court upheld FERC's granting of a CPCN where mitigation measures reduced the "site's potential obtrusiveness." 762 F.3d at 113.

The AFP provides benefits by transporting domestic gas, increasing capacity to New Union, and advancing clean air objectives. As was the case in both *Minisink* and *City of Oberlin*, by transporting domestically produced gas, the AFP is allowing customers to access natural gas who previously could not. As noted in *City of Oberlin*, selling domestically produced natural gas also provides economic benefits, which is applicable here. Finally, the Certificate Policy Statement considers advancing clean air objectives a benefit, and the AFP "improv[es] regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels." R. ¶ 27.

Here, FERC has also taken significant steps to minimize both harm to the environment and harm to HOME's religious practices. As was the case in *City of Oberlin*, HOME has rerouted over 30% of the AFP route due to landowner concerns, thus significantly mitigating potential harm to the surrounding community. HOME contends that its members are harmed due to the removal of trees on their land, the impact on their Solstice Sojourn, and the use of their land to transport natural gas. However, like in *Minisink*, TGP minimizes potential obtrusiveness by burying the AFP through the entirety of HOME's property and expediting construction. Given TGP's mitigation measures, the AFP will have merely a minor impact both on the environment and HOME's subjective religious fulfillment.

The Order Denying Rehearing evinces FERC's consideration of the AFP's benefits and gives due weight to the possible adverse impacts. The Order acknowledges that TGP worked to minimize such impacts, and that in light of these mitigation measures the benefits of the pipeline outweigh the harms. This careful consideration is all that is required of FERC in issuing a CPCN.

B. The Alternate Route would result in substantial harm to the environment, and FERC properly rejected it.

In issuing a CPCN, FERC does have to consider any logical alternatives. *See Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 107 (D.C. Cir. 2014). In *Minisink*, the court held that FERC met this obligation by comparing an alternative to the proposed project before ultimately deciding that the alternative would result in more environmental harm because it would require a segment of pipeline to be updated. *Id.* at 103. Even though the alternative posed some environmental advantages, on balance, the alternative was rejected. *Id.* at 105 (stating that so long as the proposed site was acceptable and produced minimal environmental impacts, it should be approved). Furthermore, in *Myersville Citizens for a Rural Community, Inc. v. FERC*, the court found that FERC properly rejected a “looping” alternative where it “would require a significantly greater amount of land than the compressor station, and would adversely affect the environment in other significant ways” 783 F.3d 1301, 1324 (D.C. Cir. 2015).

FERC gave due consideration to the Alternate Route and was not arbitrary and capricious in rejecting the alternative. The Alternate Route is analogous to the “looping” alternative in *Myersville*, as both alternatives require using a significant amount of additional land, and thus result in more environmental harm. This makes the alternatives undesirable. As was the case in *Minisink*, FERC reasonably concluded that the Alternate Route would result in more environmental harm, as the route would require running three additional miles of pipeline and would run through the Misty Top Mountains, objectively resulting in more environmental harm. Though the Alternate Route poses fewer social harms, FERC reasonably concluded that this does not outweigh the extensive environmental damage that the Alternate Route would cause. *Minisink* instructs that even when an alternative may pose some environmental advantages, as

long as FERC reasonably balances the alternative with the proposed route, FERC's conclusion should be accepted. *Minisink* requires accepting FERC's analysis here.

FERC properly weighed the benefits and possible adverse impacts of the AFP, and thus its decision was not arbitrary and capricious. FERC took a hard look at the evidence—which demonstrated significant, tangible benefits to the energy market and minimized harms to HOME and the environment.

III. FERC's decision to route the AFP over HOME's property despite HOME's religious objections did not violate RFRA.

FERC properly denied rehearing on the issue of routing the AFP over HOME's property as a violation of RFRA. Whether FERC's approval of the construction of the AFP on HOME property violated RFRA is a question of law, which this Court reviews *de novo*. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006).

RFRA's stated purpose is "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." 42 U.S.C. § 2000bb(b)(1). Congress explicitly stated that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests," § 2000bb(a)(5), in response to the decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).³ Congress then enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), which imposes the same compelling interest balancing test as RFRA but for a more limited category of government actions. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695

³ *Smith* held that neutral, generally applicable laws may apply to religious practices, even without a compelling government interest. 494 U.S. 872, 889 (1990).

(2014). RLUIPA also amended RFRA’s definition of “religious exercise” to be “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” § 2000cc-5(7)(A); *see Hobby Lobby*, 573 U.S. at 696.

Under RFRA, the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).” § 2000bb-1(a). Under subsection (b), the “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that the 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 government interest.” § 2000bb-1(b).

Therefore, to establish a *prima facie* RFRA claim, a claimant must first present evidence that the government has imposed a “substantial burden” on “a person’s exercise of religion.” *See* § 2000bb-1(a).⁴ Once a “substantial burden” is established, the burden shifts to the government to show that the “substantial burden” was (1) “in furtherance of a compelling government interest” and was (2) “the least restrictive means of furthering that . . . interest.” *See* § 2000bb-1(b).

The parties here do not dispute the sincerity of HOME’s religious beliefs, and TGP does not seek to address the reasonableness of those beliefs. *See Hobby Lobby*, 573 U.S. at 724.⁵ However, regardless of HOME’s beliefs, the construction of the AFP does not substantially burden HOME’s religious practice, and even if it did, the CPCN should still be upheld as there is a compelling government interest using the least restrictive means of furthering that interest.

⁴ This exercise of religion must be based on a sincere religious belief and not some other motivation. *Holt v. Hobbs*, 574 U.S. 352, 360–61 (2015) (citing *Hobby Lobby*, 573 U.S. at 717, n. 28).

⁵ *Hobby Lobby* stated that addressing “whether the religious belief asserted in a RFRA case is reasonable” is “a . . . question that the federal courts have no business addressing.” 573 U.S. at 724.

A. The construction of the AFP does not substantially burden HOME's exercise of religion by diminishing members' spiritual fulfillment under the Sherbert and Yoder framework.

RFRA does not explicitly define “substantial burden,” and as a result, various interpretations have emerged among federal courts. The Supreme Court has yet to address a case with precisely analogous facts to this one, but existing precedent supports a narrow interpretation of “substantial burden,” only including the denial of a government benefit or the imposition of a criminal or civil penalty.

Looking first to the cases explicitly mentioned in the relevant statute, a “substantial burden” under RFRA is either the (1) denial of a government benefit as a result of religious exercise or (2) imposition of civil or criminal penalties as a result of religious exercise. *See* 42 U.S.C. § 2000bb(b)(1). In *Sherbert v. Verner*, the denial of unemployment benefits because of plaintiff exercising her faith resulted in a choice “between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other.” 374 U.S. 398, 404 (1963). Thus, forcing a choice between violating religious tenets and receiving a government benefit is clearly a “substantial burden” under the statute. *See id.* at 408. In *Wisconsin v. Yoder*, state truancy law “affirmatively compel[led] [Amish families], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.” 406 U.S. 205, 218 (1972). As a result, forcing a choice between violating religion and receiving criminal or civil sanctions is another “substantial burden” under the statute. *See id.* at 234–35.

The diminishment of spiritual fulfillment does not fit into this clear framework. In *Navajo Nation v. U.S. Forest Service*, the Ninth Circuit found that the U.S. Forest Service’s approval of the use of recycled wastewater on federally owned public land did not substantially burden the religious exercise of indigenous tribes which held the land sacred. 535 F.3d 1058, 1070 (9th Cir.

2008). The court emphasized that the religious practitioners would not lose physical access to the land, and that “under Supreme Court precedent, the diminishment of spiritual fulfillment—serious as though it may be—is not a ‘substantial burden’ on the free exercise of religion.” *Id.* Other Ninth Circuit cases have also discounted this “diminished spiritual fulfillment” argument under RFRA.⁶

The Ninth Circuit correctly applied Supreme Court precedent to arrive at this conclusion. The court emphasized that in *Yoder* and *Sherbert*, the “undue burden[s]” were the denial of benefits and imposition of criminal sanctions, both tangible and objective harms, *not* the laws’ adverse impact on the religious exercise itself. *Id.* at 1071, n. 12. The Supreme Court’s decision in *Lyng* also discounts reliance on the diminishment of spiritual fulfillment. *Id.* at 1071 (citing *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (holding that the subjective impact of disturbing a sacred area was not a substantial burden)). Using the same test, the Court in *Bowen* rejected the argument that assigning a Social Security Number to a child would “prevent her from attaining greater spiritual power” under the Free Exercise Clause. *Id.* at 1073 (quoting *Bowen v. Roy*, 476 U.S. 693, 696 (1986) (holding that the government could not be compelled to alter its internal affairs to diminish the subjective effect on plaintiffs’ spiritual fulfillment)).

The Supreme Court’s most recent and relevant cases addressing what is considered a “substantial burden” align with the Ninth Circuit’s interpretation. In *Burwell v. Hobby Lobby*

⁶ See, e.g., *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008) (finding no substantial burden on an indigenous tribe where a hydroelectric project deprived them of access to sacred falls, eliminated the mist necessary for their religious experiences, and altered the sacred cycle of water flow); *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep’t of the Interior*, 2013 WL 4500572 (C.D. Cal. Aug. 16, 2013), *aff’d*, 603 Fed. Appx. 651 (9th Cir. 2015) (citing *Snoqualmie* and *Navajo Nation* to conclude that limited access to sacred trails to accommodate the construction of a power plant was not a substantial burden on religious exercise).

Stores, Inc., the Court found that government insurance mandates imposed a substantial burden on corporations forced to choose between providing contraceptives to employees via insurance or paying financial penalties. 573 U.S. 682, 726 (2014). Their substantial burden analysis rested heavily on the fact that sanctions would result from the exercise of religion. *Id.* at 720. The Court similarly held that putting a prisoner to a choice between exercising his religion by growing a beard and receiving “serious disciplinary action” constituted a “substantial burden” under the statute. *Holt v. Hobbs*, 574 U.S. 352, 361 (2015). Similarly, the Court found a “substantial burden” where a religious sect was threatened with prosecution under Controlled Substances Act after seeking to use hoasca in religious ceremonies. *See Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 428 (2009).

The D.C. District Court in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* agreed that the diminishment of spiritual fulfillment did not amount to a “substantial burden” under Supreme Court precedent. 239 F. Supp. 3d 77, 94 (D.D.C. 2017). In that case, plaintiffs sought to enjoin the flow of oil through a pipeline under a waterway because they claimed that the existence of the pipeline would “substantially burden” their performance of water-based ceremonies. *Id.* at 91. Citing *Navajo Nation* favorably, the court held that enabling the flow of oil neither sanctioned plaintiffs for exercising their religious beliefs nor pressured them to choose between beliefs and a government benefit. *Id.* at 94.

Other courts incorrectly apply the definition of “substantial burden” more broadly and interpret the threat of penalty or denial of benefits as merely an illustrative list of potential substantial burdens. In *Yellowbear v. Lampert*, the Tenth Circuit expanded upon the definition of

“substantial burden.” 741 F.3d 48, 55 (10th Cir. 2014).⁷ Similarly, in an earlier case, the Tenth Circuit defined “substantial burden” as a “government action . . . which . . . must ‘significantly inhibit or constrain conduct or expression’ or ‘deny reasonable opportunities to engage in’ religious activities.” *Comanche Nation v. U.S.*, 2008 WL 4426621, at *3 (W.D. Okla. Sept. 23, 2008) (citing *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (citation omitted)).⁸ These circuits inappropriately expand the framework outlined in the statute itself. They tend to interpret language in *Hobby Lobby* and *Holt* as reaching beyond the *Sherbert* and *Yoder* framework. This view ignores clear Congressional directive and case precedent.

B. The Twelfth Circuit should follow Congressional directive under the RFRA statute and adopt the narrow interpretation of “substantial burden.”

First, looking to RFRA itself, the statute explicitly intended to re-establish the compelling interest test set forth in pre-*Smith* case law, 42 U.S.C. § 2000bb(b)(5), and explicitly cites *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), § 2000bb(b)(1). It is therefore those cases that control the “substantial burden” analysis and those cases which Congress intended to guide the RFRA analysis.

⁷ *Yellowbear v. Lampert* held that a “substantial burden” exists where “the government (1) requires the plaintiff to participate in an activity prohibited by a sincerely held belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief” including “an illusory or Hobson’s choice where the only realistically possible course of action available to the plaintiff trenches on sincere religious exercise.” 741 F.3d 48, 55 (10th Cir. 2014) (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)) (holding that prison authorities declining to provide an escort to a sweat lodge as part of a sincerely held religious belief was a substantial burden under RLUIPA); *see also Lyng*, 485 U.S. at 450; *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 716–18 (1981)).

⁸ *Comanche Nation* held that under the preliminary injunction inquiry of substantial likelihood on the merits, the construction of a warehouse obstructing plaintiffs’ view of mountain range combined with increased traffic in the area was a substantial burden on religious practices. 2008 WL 4426621, at *3.

Second, Congress elected not to define “substantial burden” within the statutory text, likely because the phrase already had a depth of explanation available in pre-*Smith* case law. The Supreme Court stated that when Congress uses a term in a statute does not expressly define it, “courts interpreting the statute ‘must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of th[at] ter[m].’” *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (quoting *Nationwide Mut. Ins. Co. v. Darden*, *supra*, 503 U.S. 318, 322 (1992) (citation omitted)); *see Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1074 (9th Cir. 2008).

The Senate Committee Report on RFRA also supports this interpretation. The Report explains that “[t]he committee expects that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened.” S. Rep. No. 103-111 at 8 (1993). Although the committee stressed that “the act does not express approval or disapproval of the result reached in any particular court decision involving the free exercise of religion, including those cited in the act itself,” it restores “the legal standard that was applied in those decisions.” *Id.* at 9. Additionally, “the compelling interest test generally should not be construed more stringently or *more leniently* than it was prior to *Smith*.” *Id.* (emphasis added).

Third, this narrow interpretation of “substantial burden” aligns with Supreme Court precedent. As discussed above, the Supreme Court has only ever held that a “substantial burden” exists when the burden being addressed in those cases *does* fall within the *Sherbert* and *Yoder* framework. The Court has never held that diminishing spiritual fulfillment constitutes a “substantial burden” under RFRA.

Fourth, the adoption of this narrow interpretation of “substantial burden” is the most straightforward application of the statute and prevents absurd results from religious complaints. As *Navajo Nation* noted, with a broader application of RFRA, “any action the federal government were to take . . . would be subjected to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs.” 535 F.3d at 1063. In the interest of balancing the free exercise of religion with the government’s right to conduct its own affairs for the benefit of the public, there must be a limit. Because the definition of “religious exercise” under RFRA is so broad, determining whether or that exercise is “substantially burdened” must be narrower to avoid absurd results.

C. The impacts to HOME land fall outside the definition of a “substantial burden” under RFRA, negating the need for strict scrutiny.

In this case, the construction of the AFP does not amount to a “substantial burden” on HOME’s religious exercise. The existence of the AFP on HOME’s land does not deny any government benefit nor create a choice between practicing their religion and the imposition of civil or criminal sanctions. Rather, HOME claims that their spiritual fulfillment is diminished by the AFP—a failing claim under Supreme Court and other federal court precedent.

HOME considers the entire natural world to be sacred and believes that the presence of the underground pipeline will substantially burden their ceremonial Solstice Sojourn by diminishing their spiritual fulfillment. They claim that construction of the AFP will create a spot along their journey barren of trees and compel them to support the use of fossil fuels, contrary to their beliefs.

Like plaintiffs in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008)., *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), *Snoqualmie*

Indian Tribe v. FERC, 545 F.3d 1207 (9th Cir. 2008), and *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77, 94 (D.D.C. 2017), HOME’s argument primarily relies on the diminishment of their spiritual fulfillment. Although plaintiffs here own the land which is being used to construct the pipeline, the impacts on their religious exercise are analogous to those cases. HOME is not being threatened with civil or criminal penalties like the prevailing appellants in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) and *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2009). Nor are HOME members confined in any prison which is depriving them of exercising their religion through prison policy as in *Holt v. Hobbs*, 574 U.S. 352 (2015). FERC properly applied “substantial burden” to HOME’s RFRA claim, and thus the denial to apply strict scrutiny analysis should be upheld.

D. Even if HOME’s religious beliefs are substantially burdened, the compelling government interest and least restrictive means analysis demand that the CPCN be upheld.

Greater environmental harm and ballooning economic costs would result from exempting HOME land from the CPCN and using the Alternate Route to accomplish the compelling interest of improving pipeline connectivity. As stated above, once a substantial burden on an exercise of religion has been established, the burden of persuasion shifts to the government to show that the “substantial burden” was (1) “in furtherance of a compelling government interest” and was (2) “the least restrictive means of furthering that . . . interest.” 42 U.S.C. § 2000bb-1(b). If this Court declines to adopt TGP’s urged interpretation of “substantial burden,” the proposed construction of the AFP is still the least restrictive means of furthering a compelling government interest.

1. The AFP serves a compelling government interest which would be compromised by FERC's denial of the CPCN.

The government's compelling interest in maintaining and expanding natural gas infrastructure would be impeded by FERC's denial of the CPCN. The "compelling government interest" inquiry is "more focused" and "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law . . . [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006)). This analysis requires the court to "look beyond broadly formulated interests" and "scrutiniz[e] the asserted harm of granting specific exemptions to religious claimants." *Hobby Lobby*, 573 U.S. at 726–27 (quoting *O Centro*, *supra*, 546 U.S. at 431).⁹

The government recognizes an interest in supporting the infrastructure which provides essential energy services across America. *See Directive on Critical Infrastructure Security and Resilience*, 1 Pub. Papers 106 (February 12, 2013) ("The Nation's critical infrastructure provides the essential services that underpin American society [E]nergy and communications systems [are] uniquely critical due to the enabling functions they provide across all critical infrastructure sectors."). In this case, the government's compelling interest is maintaining a coherent natural gas pipeline permitting system to better serve market needs, avoid gas shortages, and provide an opportunity for cleaner-burning natural gas. Even if HOME proves that they are substantially

⁹ Successful examples of compelling government interests under RFRA include preventing fraud, *Bowen v. Roy*, 476 U.S. 693, 709 (1986), preventing the diversion of drugs used for religious purposes to recreational users, *United States v. Christie*, 825 F.3d 1048, 1058 (9th Cir. 2016), and accurately solving past and future crimes, *Kaemmerling v. Lappin*, 553 F.3d 669, 680 (D.C. Cir. 2008). In contrast, the Court found that the dangerous nature of Schedule I substances and the necessity of uniformity in the statutory scheme fell short of the more focused inquiry necessary under RFRA. *O Centro*, 546 U.S. at 432, 434–35.

burdened by the construction of the AFP on their land, the least restrictive means analysis below demonstrates that the AFP project could not be completed in another way without significantly worse environmental and economic impacts.

2. The current proposed route for the AFP is the least restrictive means of implementing a coherent natural gas pipeline.

The current proposed pipeline route is the least restrictive means of furthering the compelling government interest. In deciding whether the means used to further that interest are the “least restrictive,” the government, under this “exceptionally demanding” standard, must demonstrate that it “lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (citing 42 U.S.C. §§ 2000bb-1(a), (b)). This inquiry “involves ‘comparing the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity.’” *Ave Maria Found. v. Sebelius*, 991 F.2d 957, 967 (E.D. Mich. 2014) (quoting *S. Ridge Baptist Church v. Indus. Comm’n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990)).

In this case, it is undisputed that the Alternate Route, the only pipeline route that avoids HOME property, would add \$52 million in construction costs and cause more environmental harm “by traveling an additional three miles and running through more environmentally sensitive ecosystems in the mountains.” R. ¶ 44. Although the Alternate Route would not directly impede HOME’s religious exercise, its construction would no doubt violate HOME’s broader religious tenets. Objective economic and environmental costs to reroute the pipeline are far greater than the proposed route, which subjectively and incidentally impairs religious activity.

The construction of the AFP does not substantially burden HOME’s religious practice, and if there was a substantial burden, the CPCN should still be upheld as there is a compelling

government interest using the least restrictive means of furthering that interest. Thus, this Court should affirm FERC's granting of a CPCN.

IV. The GHG Conditions imposed by FERC transcend FERC's authority under the NGA.

The Major Questions Doctrine serves as a check on unfounded assertions of agency authority. This doctrine is triggered when an agency attempts to supersede the management of important problems that duly elected officials ought to control. *NFIB v. OSHA*, 595 U.S. 109, 121–123 (2022) (Gorsuch, J., concurring). Application of the Major Questions Doctrine is a question of law, and therefore subject to *de novo* review. FERC's annexation of the question of how best to mitigate the climate impacts of pipeline constructions is certainly such a trigger. Accordingly, and in light of the NGA's utter lack of support for FERC's power here, the Major Questions Doctrine requires that FERC be prevented from imposing these GHG conditions.

A. *The Major Questions Doctrine applies to FERC's decision to impose GHG Conditions.*

The Major Questions Doctrine prevents agencies from improperly asserting authority over matters which are the prerogative of elected officials. Congress rarely delegates policy decisions of such vast political or economic importance as the existential threat of climate change, and no historical examples of Congress doing so without saying as much exist. FERC characterizes this doctrine as one that “may apply ‘in ‘extraordinary cases’ when the ‘history and breadth’ and ‘economic and political significance’ of the action at issue gives us ‘reason to hesitate before concluding that Congress’ meant to confer such authority to act on the agency.’” R. ¶ 16 (quoting *West Virginia v. EPA*, 142 S. Ct. 2587 (2022)). In doing so, the agency accurately quotes *West Virginia* while understating the doctrine itself. Proper examination of the Doctrine reveals that situations like this one, where an agency has attempted to impose regulations aimed at addressing climate change, always require clear Congressional approval to

be legitimate. If such a clarification is absent from the statutory text, this is a hint that Congress did not write the law in such a broad context. *UARG v. EPA*, 573 U.S. 302, 324 (2014).

The NGA makes no mention of greenhouse gas conditions, and FERC’s historically contradictory stances on the issue of greenhouse gas conditions shows that the text of the NGA is unclear in this context. FERC’s current interpretation of the NGA is overly broad, amounting to an improper annexation of agency power over an issue of national significance best resolved by Congress. Accordingly, the Major Questions Doctrine applies here.

1. The NGA does not authorize FERC to levy greenhouse gas conditions.

No provision of the Natural Gas Act supports FERC’s authority to levy the conditions it has here. Section 7 of NGA authorizes FERC to impose environmental mitigation conditions in its CPCN Orders. 15 U.S.C. § 717f(e). After citing this section, FERC claims both Congress and the courts have supported the level of discretion the agency is exercising now. R. ¶ 87. Section 7 states, in relevant part, that “[FERC] shall have the power to attach ... such *reasonable* terms and conditions as the public convenience and necessity may *require*.” 15 U.S.C. § 717f(e) (emphasis added). By pigeon-holing Section 7 and decades of case law into the word “discretion,” FERC avoids the reality that its statutory authority to impose conditions is certainly limited. This lack of clear statutory support for FERC’s claimed authority should not come as a surprise; the NGA was simply not written by Congress to include such a delegation of power.¹⁰

FERC has flipped its position on its statutory authority to impose greenhouse gas conditions, further supporting the application of the Major Questions Doctrine here. FERC relies

¹⁰ *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n of Ind.*, 332 U.S. 507, 516 (1947) (“three things, and three things only Congress drew within its own regulatory power, delegated by the [Natural Gas] Act to its agent, the Federal Power Commission. These were: (1) The transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.”).

on *Sierra Club* in its present argument, a case in which the agency maintained that it did not have the authority to impose greenhouse gas-specific conditions; now, FERC is attempting to make the opposite argument. FERC’s current position directly contradicts its previous decision not to consider project-related greenhouse gases in the context of climate change.¹¹ In other words, FERC is arguing that the text of the NGA “unambiguously empowers the Commission” to set the kind of conditions it has here, despite the reality that FERC has come to the opposite conclusion twice in the last six years. R. ¶ 87. In previous cases that involve the Major Questions Doctrine, the Supreme Court has cited administrative flip-flops like this as an indicator of statutory ambiguity.¹²

FERC’s sudden change of direction on the issue of greenhouse gas conditions was not prompted by any direction from Congress, nor has it ever been endorsed by the NGA; the agency’s current position finds no clear authorization in relevant law.

2. FERC asserts power over a major question by claiming that it may levy greenhouse gas conditions.

The scope of FERC’s interpretation of the NGA here shows that the agency has overstepped its authority. The Major Questions Doctrine ensures that agencies do not take it upon themselves to address issues that fall under Congress’ prerogative. *NFIB v. OSHA*, 595 U.S. 109, 122 (Gorsuch, J., concurring) (“Not only must the federal government properly invoke

¹¹ *Alaska Gasline Dev. Corp.*, 171 FERC ¶ 61,134 (2020) (“As the Commission has previously concluded, we have neither the tools nor the expertise to determine whether project-related GHG emissions will have a significant impact on climate change.”).

¹² *See Massachusetts v. EPA*, 549 U.S. 497, 531 (2007) (in holding that EPA must decide on how the impact of greenhouse gases on climate change, the Court noted that “[p]rior to [EPA’s] decision not to regulate GHGs from motor vehicles, EPA had never disavowed the authority to regulate greenhouse gases, and [previously] it in fact affirmed that it had such authority.”); *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) (in holding that the FDA may not regulate tobacco, the Court noted “the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco.”).

a constitutionally enumerated source of authority to regulate in this area or any other, it must also act consistently with the Constitution's separation of powers.”). This approach reflects the democratic principle that Congress should be the ultimate authority for issues of a certain scale, and that Congress should “speak clearly when authorizing an agency exercise” powers at that scale. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). Balance between how efficiently and how democratically a government functions is vital to the legitimacy of that government itself; the Major Questions Doctrine ensures this balance.

Here, the principles protected by the Major Questions Doctrine are implicated by FERC’s attempt to declare itself the proper body to decide how the natural gas industry can best address climate change. In doing so, the agency tries to empower itself to address a major question. The agency is asserting this authority not only in a way that it never has before, but in a way that it has previously argued it may not. Both today and in those previous positions, FERC maintained that its reasoning was grounded in the text of the NGA. It does not matter whether FERC was right back then or today, because the agency’s inconsistent position on the issue of whether FERC may levy greenhouse gas conditions shows that its resolution is unclear in the NGA itself. The importance of how best to address climate change in the natural gas industry cannot be overstated; this is a major question that Congress must address before FERC.

B. The Major Questions Doctrine prevents FERC from imposing the GHG Conditions.

Because the NGA does not clearly authorize FERC to impose greenhouse gas conditions, and FERC’s decision to do so addresses a major question, FERC must be prevented from imposing the GHG Conditions under the Major Questions Doctrine. We agree with FERC that “the issue of how to address climate change as a whole is undoubtedly a major question.” R. ¶ 88. FERC attempts to separate from this reality the conditions it has imposed on the construction

of the AFP, conditions which are all aimed at the issue of how to address climate change. This is exactly the kind of annexation of power that the Major Questions Doctrine is designed to prevent.¹³

FERC downplays the significance of its conditions by painting them as merely relevant to “the core of [FERC’s] authority—the construction of LNG pipelines.” Of course, the Clean Power Plan struck down in *West Virginia* was also relevant to the core of EPA’s authority—the regulation of certain emissions. Nevertheless, the Court struck down the Clean Power Plan in part because EPA misinterpreted the scope of that authority by deciding to regulate “how Americans will get their energy.” *West Virginia*, 142 S. Ct. at 2612. Here, FERC misinterprets the scope of its authority over the construction of LNG pipelines to include how the construction of these pipelines can be regulated to account for climate change. FERC also characterizes its conditions as merely “project-specific” to the AFP. However, FERC has imposed greenhouse gas conditions on 80% of CPCNs since the AFP’s; the agency has clearly taken it upon itself to decide that greenhouse gas conditions must be added to the construction of LNG pipelines to address climate change.

Thus, FERC has undoubtedly answered a major question. The agency has decided that the best way to limit emissions related to the construction of a pipeline is through these imposed conditions. These conditions may not be the best, or even a reasonable, way to reduce the impact of a pipeline; but, more importantly, there is no evidence that FERC is authorized to decide whether they are. Nothing in the NGA proves otherwise, and the agency itself has not even

¹³ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (“[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there. To convince us otherwise ... [t]he agency ... must point to ‘clear congressional authorization’ for the power it claims.” (quoting *UARG v. EPA*, 573 U.S. 302, 324 (2014))).

promulgated its own rule on greenhouse gas conditions. Instead, FERC points to guidance from the CEQ, which calls for “GHG reduction policies established to avoid the worst impacts of climate change,” as its only clearly written authority for imposing greenhouse gas conditions. Congress has never directed the agency to tailor its actions in accordance with the CEQ. FERC decided, absent any real authority, that it was up to it to decide what kind of construction conditions will best address climate change, and then FERC imposed them. The issue of how to supply infrastructure that satisfies the energy needs of our nation while addressing the existential threat of climate change must be recognized for the major question that it undoubtedly is and must be treated accordingly by FERC and this Court. The GHG Conditions must be struck down under the Major Questions Doctrine.

V. FERC properly decided not to impose GHG Conditions addressing downstream and upstream impacts.

FERC’s decision not to impose conditions relating to upstream and downstream emissions is reviewed under the arbitrary and capricious standard. Under this standard of review, FERC only needs to take a “hard look” at the record and provide a reasonable and well-explained analysis. *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In the NEPA context, an agency action is not arbitrary and capricious so long as an EIS “contains sufficient discussion of the relevant issues and opposing viewpoints and the agency’s decision is fully informed and well-considered.” *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1181 (D.C. Cir. 2023).

The NGA authorizes FERC to attach “such reasonable terms and conditions as the public convenience and necessity may require” to the issuance of a CPCN. 15 U.S.C. § 717f(e). In 2022, FERC issued an Order on Draft Policy Statements, which stated that FERC is considering project impacts on climate change in its NEPA and NGA reviews. *Certification of New Interstate*

Natural Gas Facilities, 178 FERC ¶ 61,197 at 61,678 (2022). In the past, FERC had been inconsistent in estimating greenhouse gas impacts, and FERC’s proposed guidance seeks to provide clarity. *Id.* ¶ 61,678. However, FERC has yet to finalize guidance as to how it may regulate upstream and downstream impacts.

A. FERC lacks the authority to regulate upstream or downstream greenhouse gas emissions, because FERC’s regulation is a major question and FERC has not been authorized to regulate by Congress.

As noted in Section IV, FERC lacks the authority to regulate greenhouse gas emissions through conditions placed in the issuance of a CPCN. Neither the NGA nor FERC’s own internal guidance discuss conditions of this kind. The imposition of these conditions constitutes an agency attempting to address the important question of how to address climate change through changes in the construction of energy infrastructure, without explicit authorization from Congress to do so, contrary to the Court’s decision in *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

B. Alternatively, if FERC can regulate upstream and downstream greenhouse gas emissions, their authority is discretionary and was properly exercised.

Even if this Court does find that FERC has authority to regulate greenhouse gas emissions through conditions, it is at most a discretionary authority. The NGA states that FERC “shall have the power” to issue conditions in granting CPCNs. 15 U.S.C. § 717f(e). This language does not mandate any action by FERC. Furthermore, NEPA is a procedural statute, which “directs agencies only to look hard at the environmental effects of their decisions, and not to take one type of action or another.”¹⁴ Additionally, since 90% of the gas transported by AFP is

¹⁴ *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991)); *see also Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (“[p]reparation of an environmental impact statement will never ‘force’ an agency to change the course of action it proposes”).

export-bound, the court should note that there is “no NEPA obligation stemming from th[e] effects’ of export-bound natural gas.” *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1185 (D.C. Cir. 2023) (quoting *Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017)).

The notice from the CEQ addressing climate change in the context of NEPA, published in 2023, which “encourages agencies to mitigate greenhouse gas emissions associated with their proposed actions to the greatest extent possible” does not alter the procedural nature of NEPA. *See National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196, 1206 (Jan. 9, 2023). The guidance itself notes that it is “not legally enforceable” and simply “describes CEQ policies and recommendations.” *Id.* at 1212. Thus, FERC was able to exercise its discretion and decline to impose greenhouse gas conditions on upstream and downstream impacts.

1. FERC has no internal guidance as to how conditions should be imposed, which should cause the agency to hesitate to act.

An agency’s interpretation of its own guidance is entitled to deference. In *Auer v. Robbins*, the Supreme Court held that an agency’s interpretation of its own regulations gets heavy deference, unless it is “plainly erroneous or inconsistent with the regulation. 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). While such rules do not have the force of law, they do “advise the public of the agency’s construction of the statutes and rules which it administers.” *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 88 (1995). Deference to agency guidance, which is intended to provide additional information to the public, thus “reinforces . . . the ideas of fairness and informed decisionmaking at the core of the APA.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 242 (2019).

Here, FERC rightfully withheld action on imposing emissions for upstream and downstream greenhouse gas impacts given the lack of agency guidance. As noted in *Shalala*,

FERC's guidance will advise the public of the agency's approach to regulating greenhouse gas impacts. Without such guidance, pipeline operators, like TGP, are unfairly surprised by the agency's new approach. Additionally, TGP lacks the assurance that FERC's decision was fully informed, a value espoused by the *Kisor* Court, because FERC has not yet fully evaluated how to impose greenhouse gas conditions for upstream and downstream impacts. Thus, while FERC finalizes its draft guidance, it was not arbitrary and capricious for the agency to not act.

2. FERC properly declined to reach a significance finding for the upstream and downstream impacts.

Conditions need not be imposed for upstream and downstream greenhouse gas emissions where the end-users are unknown, because such impacts are not reasonably foreseeable. In *Center for Biological Diversity v. FERC*, the court noted that “indirect emissions are not reasonably foreseeable if the Commission cannot identify the end users of the gas” and FERC need only consider reasonably foreseeable effects. 67 F.4th 1176, 1185 (D.C. Cir. 2023) (citing *Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 110 (D.C. Cir. 2022) (approving FERC's decision not “to estimate emissions associated with . . . volumes of gas” bound for “an unknown destination and for an unknown end use”)).

FERC was correct to not reach a finding of significance as to upstream and downstream impacts. FERC stated in the Order that “there is no reasonably foreseeable significant upstream consequence of our approval of the [AFP],” as the natural gas to be transported is already in production. R. ¶ 74. As to the downstream impacts, again, FERC notes that the gas is already being used, and thus it is unlikely there will be a significant increase in emissions. However, since 90% of the gas is for export and the end user is largely unknown, any possible increase is not even reasonably foreseeable under *Center for Biological Diversity* and *Delaware*

Riverkeeper. Since an increase in upstream or downstream emissions is not reasonably foreseeable, FERC properly declined to impose conditions.

FERC never should have imposed GHG Conditions in the CPCN, as it was not given express authority to do so by the NGA. However, even if FERC did have such authority, neither the NGA nor NEPA mandate that FERC impose greenhouse gas conditions. It was not arbitrary and capricious for FERC to exercise its discretion to decline to impose conditions on the possible upstream and downstream greenhouse gas emissions.

CONCLUSION

For the foregoing reasons, this Court should affirm FERC's issuance of a Certificate of Public Convenience and Necessity for the American Freedom Pipeline, but reverse FERC's imposition of the GHG Conditions.