Team 5

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH
Petitioner

-and-

TRANSNATIONAL GAS PIPELINES, LLC
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

Petition of review from the Federal Energy Regulatory Commission order denying rehearing in consolidated docket Nos. 23-01110 and 23-01109

Brief of Petitioner, HOLY ORDER OF MOTHER EARTH

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STATEMENT OF JURISDICTION

On May 19, 2023, the Federal Energy Regulatory Commission (FERC) denied Holy Order of Mother Earth ("HOME") and Transnational Gas Pipelines' ("TGP") request for rehearing regarding FERC's Certificate of Public Convenience and Necessity Order ("the CPCN") granted on April 1, 2023 in docket No. TG21-616-000. R. at 2. FERC has subject matter jurisdiction over all claims brought before it pursuant to 15 U.S.C. § 717r(b). *See also Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 194 (3d Cir. 2018). The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 15 U.S.C. § 717r(d)(1), which grants original and exclusive jurisdiction for Courts of Appeals to review FERC orders regarding proposed construction under the Natural Gas Act ("NGA"). The FERC order denying rehearing is a final order in the matter and hence reviewable. 15 U.S.C.A. § 717r(b).

STATEMENT OF ISSUES PRESENTED

I. Was FERC's finding of public convenience and necessity for the American Freedom Pipeline ("AFP") arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project need where 90% of the gas transported by that pipeline was for export?

II. Was FERC's finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?

III. Was FERC's decision to route the AFP over HOME property, despite HOME's religious objections, in violation of the Religious Freedom Restoration Act (RFRA)?

IV. Were the greenhouse gas ("GHG") conditions required by FERC in the CPCN 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

I. History of HOME and Their Practices

HOME is a religious group that was established in 1903 which recognizes Nature itself as a deity to be worshiped and respected. Seeing the harm that capitalism and industrialization have wrought upon Nature, HOME members' core tenet is that humans should do everything in their power to promote natural preservation over all other interests. R. at 11. HOME is organized as a not-for-profit religious organization under the laws of the State of New Union and directly owns and operates a 15,500-acre property that they utilize for one of their religious ceremonies, the Solstice Sojourn. R. at 5; R. at 11.

On every solstice since at least 1935, HOME members make a ceremonial journey across the property from a temple at the western border to a sacred hill on the eastern border. R. at 11. At the hill, all children in the Order who have reached the age of 15 in the prior six months undergo a sacred ceremony. R. at 11. After the ceremony, HOME members take a different path across the property to return to the temple, completing the Solstice Sojourn. R. at 11.

II. TGP's Application to FERC

TGP is a limited liability company organized and existing under the laws of the State of New Union. R. at 5. On June 13, 2022, TGP filed an application with FERC for authorization to construct and operate an interstate liquified natural gas ("LNG") pipeline pursuant to section 7(c) of 15 U.S.C. § 717f(c) of the NGA and Part 157 of FERC's regulations, 18 C.F.R. § 157. R. at 4. The proposed pipeline design is for a 99-mile-long, 30-inch diameter pipeline with a capacity of 500,000 dekatherms (Dth) per day of transportation service. R. at 5-6. The AFP will divert 35%

of the LNG produced at Hayes Fracking Field from TGP receipt point in Jordan County, Old Union to an existing TGP gas transmission facility in Burden County, New Union. R. at 6. At this existing TGP gas facility the LNG will enter into the Northway Pipeline, with 90% (450,000 Dth) eventually making it to the Port of New Union for export to Brazil by International Oil & Gas Corporation (International). R. at 6. The estimated cost of the project is $599 million. R. at 6.

TGP's proposed AFP cuts straight through HOME's property, splitting the path of the Solstice Sojourn at two separate points along its route. R. at 11. The route would also require the removal of 2,200 trees from HOME's property, the majority of which would not be replaced on the property due to safety reasons. R. at 10. Furthermore, TGP has not obtained an easement agreement with 40% of the landowners along the route, including HOME. R. at 10.

III. FERC's Issuance of the Certificate of Public Convenience and Necessity Order

On April 1, 2023, pursuant to section 7 of the NGA, FERC issued a Certificate of Public Convenience and Necessity Order (hereinafter "the CPCN") authorizing the construction and operation of the AFP, subject to the conditions within the CPCN. The CPCN found that the benefits the AFP would provide to the market would outweigh adverse effects to existing stakeholders, specifically that "the benefits [the AFP] will provide to the market outweigh any adverse effects on shippers, other pipelines and their captive customers, and on landowners and surrounding communities." R. at 6. FERC also states that as "TGP has presented evidence that the LNG demands in regions east of Old Union have been steadily declining" and due to increasing electrification of heating, "market needs are better served by routing the LNG through AFP" and that "TGP asserts that the reduction in transport on the Southway Pipeline would not lead to gas shortages." R. at 6.

Additionally, the CPCN found that, based on an Environmental Impact Statement ("EIS"), adverse environmental impacts could be mitigated to less-than-significant levels with conditions included in the order. R. at 4. The EIS found that the downstream CO2e impacts of the project could result in 9.7 million metric tons of CO2e per year, in addition to the 88,340 metric tons of CO2e produced per year over the four-year period of AFP construction (assuming the conditions below are adhered to). R. at 15. The CPCN declined to address upstream and downstream emissions that would result from the project. R. at 18.

Due to the findings in the EIS, the CPCN included the following conditions: the pipeline must be buried at a depth of two feet; TGP shall plant or cause to planted an equal number of trees as removed in construction of the AFP; TGP shall use electric equipment and vehicles, wherever practicable, in the construction of the AFP; TGP shall only use "green" steel pipeline segments produced by net-zero steel manufacturers; and that TGP shall purchase all electricity used in construction from renewable sources where such sources are available. R. at 14. While not included in the CPCN order, TGP has agreed to "expedite" construction "to the extent feasible" over HOME property to avoid interference with the Solstice Sojourn. R. at 10.

IV. HOME and TGP's Requests for Rehearing

Pursuant to 15 U.S.C. § 717r(a), HOME and TGP submitted timely requests for rehearing on April 20, 2023 and April 22, 2023, respectively. R. at 2.

HOME's request for rehearing challenged numerous issues: (1) that FERC erred in its determination that TGP has demonstrated a "public need" for the AFP despite the fact that approximately 90% of the gas carried by the pipeline will undisputedly be exported to Brazil; (2) that, even if a public need existed, the benefits of the project failed to outweigh the harms; (3) that routing the AFP over HOME property was in violation of RFRA; (4) FERC's erred in its

determination that the CPCN does not require mitigation of upstream and downstream greenhouse gas impacts of the AFP. R. at 4-5. Included in HOME's request was testimony from HOME members that walking over the pipeline would be "unimaginable" and that it is anathema to HOME's religious beliefs and practices to allow its land to be used for the transport of LNG given the harmful environmental effects of the fracking process to obtain the LNG, the environmental harm resulting from creating the route for the pipeline, and the detrimental climate effects of burning any fossil fuels, including LNG. R. at 11-12.

TGP's claims that the conditions in the CPCN Order addressing mitigation of greenhouse gas impacts (the "GHG Conditions") are beyond FERC's authority under the NGA, implicating the major questions doctrine. R. at 5. HOME contests this objection.

V. FERC's Rehearing Denial

FERC's rehearing denial incorporated the facts above and responded to HOME and TGP's objections. First, FERC affirmed their decision that TGP demonstrated a public need, despite 90% of the capacity being exported, as the AFP will still provide marginal benefits to domestic consumers, fill additional capacity at various transfer stations, and redirect gas from the Southway Pipeline. R. at 9. Furthermore, FERC contends that the alternative route proposed through the Misty Top Mountains would add over $51 million in construction costs and lead to more environmental harm than the current proposed route, thereby denying rehearing on the issue of whether the balance of harms outweigh the benefits. R. at 11-12.

Additionally, FERC found that the routing of the pipeline was not contrary to RFRA, claiming that as the pipeline would be underground and construction expedited there would be no substantial burden placed upon HOME due to the AFP construction. R. at 13. FERC, however, does not dispute the sincerity of HOME's religious beliefs, and declined to reach the alternative

issue on if the AFP was deemed to be a substantial burden then if there existed both a compelling government interest and if the current route was the least-restrictive means on furthering that interest. R. at 12-13.

Additionally, FERC found that as they were an independent agency, they are not required to follow Council on Environmental Quality (CEQ) Climate Guidance under the National Environmental Policy Act (NEPA), and therefore do not need to consider upstream GHG consequences as the gas is already coming from existing production and that the decision on whether or not to implement mitigation measures is discretionary. R. at 18-19.

Finally, FERC found that as the NGA empowers them to set the terms and conditions of CPCN orders, reiterating that this discretion is "partly due to the recognition that FERC has specialized expertise in the natural gas sector and is best positioned to assess what measures are necessary to protect the public interest." R17.

VI. HOME and TGP's Petition for Review

On June 1, 2023, pursuant to 15 U.S.C. § 717r(b), TGP and HOME both filed timely petitions for review with the Twelfth Circuit challenging both the CPCN and the rehearing denial. HOME petitions for review of the FERC Orders insofar as: (1) FERC was arbitrary and capricious in its determination that TGP has demonstrated a "public need" for the AFP as approximately 90% of the gas carried by the pipeline will undisputedly be exported to Brazil; (2) that, even if a public need existed, the benefits of the project failed to outweigh the harms; (3) that routing the AFP over HOME property is in violation of RFRA; (4) FERC was arbitrary and capricious in its determination that the CPCN does not require mitigation of upstream and downstream greenhouse gas impacts of the AFP. R. at 2.

TGP petitions for review of the FERC Orders insofar that the conditions in the CPCN Order addressing mitigation of greenhouse gas impacts (the "GHG Conditions") are beyond FERC's authority under the NGA. R. at 2.

SUMMARY OF THE ARGUMENT

FERC's grant of the CPCN was arbitrary and capricious because they failed to elucidate reasoning consistent with principled decision making in deciding the AFP would be required by present or future public convenience and necessity. Additionally, they misinterpreted existing case law and abused their discretion by finding existing precedent agreements to be controlling. They failed to engage with HOME's counter-arguments considering that 90% of the AFP's capacity is destined for Brazilian export. They then failed entirely to explain how they weighed the adverse environmental impacts, including the irreversible destruction of 2,200 trees, against the purported benefits of the pipeline.

Furthermore, FERC's decision to route the AFP over HOME property, despite that property being utilized for a religious exercise that is specific to that property, is in clear violation of RFRA. FERC's conclusion that no substantial burden exists on HOME's religious exercise as a result of government action is the result of misapplying tests developed by the Tenth and Ninth Circuit Courts of Appeal, under which HOME clearly has established that a substantial burden. As HOME satisfies the substantial burden test under both instances, FERC must demonstrate that the government has both a compelling interest in imposing the substantial burden, and that the substantial burden was the least-restrictive-means on the religious exercise needed to further that burden. As FERC chooses not to address these issues, a rehearing is required to make a determination if the action violates RFRA.

FERC correctly conditioned its grant of a CPCN on compliance with conditions for mitigating the GHG impacts of construction of the pipeline. FERC made this decision after a sound analysis of the direct emissions implications of the project, and with its unambiguous authority under the NGA to subject approval of a certificate upon reasonable terms and conditions.

However, after thoughtfully minimizing direct GHG effects of the pipeline construction, FERC arbitrarily and capriciously failed to adequately analyze or mitigate upstream and downstream GHG impacts. FERC failed to calculate or mitigate the reasonably foreseeable upstream impacts of installing a new pipeline. FERC did calculate the downstream impacts of the pipeline, but then after making that calculation arbitrarily ended their analysis and did not mitigate those GHG effects. FERC's failure to follow through with this analysis and mitigation, especially in light of CEQ's interim guidance, is arbitrary and capricious.

STANDARD OF REVIEW

The Administrative Procedure Act allows for agency decisions to be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 966 F.2d 1292, 1296 (9th Cir. 1992). Furthermore, an agency's decision can be upheld only based on reasoning in that decision. *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir.1997). Courts may reverse decisions under the arbitrary and capricious standard if the agency relied on factors that Congress did not intend it to consider, offered an explanation for its decision which is contrary to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003), *amended by* 352 F.3d 1186 (9th Cir. 2003). This standard should be applied to FERC's finding of a project need, their weighing of benefits and harms of the project, and their decisions surrounding GHG conditions.

Under the National Gas Act, "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C.A. § 717r(b). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bear Lake Watch, Inc. v. FERC,* 324 F.3d 1071, 1076 (9th Cir. 2003) (quoting *Eichler v. SEC*, 757 F.2d 1066, 1069 (9th Cir. 1985)). If the evidence is susceptible to more than one rational interpretation, courts may not substitute their judgment for that of the agency. *See id.*

Furthermore, an agency's interpretation or application of a statute is a question of law reviewed *de novo*. *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006). When a statute is silent or ambiguous on a particular point, courts may defer to the agency's interpretation if based on a permissible construction of the statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The *de novo* standard is appropriate to apply to FERC's RFRA analysis.

ARGUMENT

I. FERC'S FAILURE TO FULLY ARTICULATE THEIR REASONING IN GRANTING THE CPCN, AND THEIR COMPLETE RELIANCE ON *IPSE DIXIT*, RENDERS THEIR DECISION ARBITRARY AND CAPRICIOUS.

A Certificate of Public Convenience and Necessity shall only be granted on the finding that an applicant is "able and willing… to do the acts and to perform the service proposed and… will be required by the present or future public convenience and necessity; otherwise such application shall be denied." 15 U.S.C. § 717f(e). Under 5 U.S.C. § 706(a)(2), agency action may be set aside when found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Nat. Res. Def. Council, Inc.,* 966 F.2d at 1297. There must be a rational connection between the facts found in the agency action and the choice made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The court must also decide whether the agency considered the relevant factors and whether there has been a clear error of

judgment. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). FERC fails to explain their reasoning, erroneously made decisions which were not in accordance with law, and made errors of judgment in multiple instances in its grant of the CPCN.

FERC finds in the CPCN order that "the benefits [the AFP] will provide to the market outweigh any adverse effects on shippers, other pipelines and their captive customers, and on landowners and surrounding communities," and deny requests for rehearing on these same grounds. R. at []. However, they fail to elucidate reasoning consistent with principled decision making and fail to sufficiently address HOME's counterarguments, thus rendering their balancing of the benefits versus the adverse impacts arbitrary and capricious. *See Env't Def. Fund v. FERC*, 2 F.4th 953, 974-5 (D.C. Cir. 2021) (holding that FERC must provide evidence of reasoned and principled decision making in granting a CPCN).

First, FERC states that because "TGP has presented evidence that the LNG demands in regions east of Old Union have been steadily declining… and increasing electrification of heating… market needs are better served by routing the LNG through AFP" and takes TGP's word on this matter because "no commenter disputed these assertions as a general matter." R. at 6. FERC's failure to engage in additional research on this matter, such as conducting their own market survey, and solely taking TGP's word for market conditions, is a clear error in judgment because they do not consider all relevant factors. In fact, their only consideration on record of gas shortages is that "TGP asserts that the reduction in transport on the Southway Pipeline would not lead to gas shortages." R. at 13. FERC's blind acceptance of TGP's assertion, when TGP is biased towards the building of AFP, is a clear failure to consider relevant factors without a rational connection between the facts and decision.

The consequence of building AFP is a 35% diversion in the production of the HFF pipeline, which provides natural gas to states east of Old Union, impacting both the existing pipeline, their customers, and the well-being of a significant number of people who could be subject to gas shortages. R. at 12. An independent analysis by FERC is necessary to (1) verify the impact and (2) and to confirm that a 35% reduction in HFF production would not lead to drastic consequences such as leaving millions of homes in eastern states without power or otherwise with gas shortages and significant cost increases. Even if LNG demand was indeed declining, FERC did not determine exactly how much it was declining and if the 35% reduction would indeed be negligible through independent figures. Not doing so is a clear failure to consider relevant factors.

FERC also errs in its failure to weigh the fact that approximately 90% of AFP's LNG capacity will be diverted for Brazilian export by International. HOME's submission of records evidence that all or nearly all of International's LNG will be exported to Brazil, and TNG does not dispute this fact. This means FERC is required to weigh it as a factor bearing upon the public interest. The AFP, given these facts, is tailored to serve a 'Brazilian need' as opposed to the needs of the American public.

Despite these indisputable facts, FERC finds a "strong showing" in the public interest because "TGP had executed binding precedent agreements for firm use using 100% of the design capacity" and that "HOME's various claims that these contracts are insufficient to establish market need… are without merit" as FERC's Certificate Policy Statement explains "that precedent agreements will always be important, significant evidence of demand for a project." R. at 26. FERC entirely fails to engage with HOME's arguments in this instance, and provides no reasoning beyond a shallow dismissal for why these arguments were "without merit." HOME asked FERC to consider the distinction between precedent agreements bound for domestic use versus those

which are to be entirely exported to foreign nations and this distinction continues to go unaddressed. R. at 24.

A. FERC is wrong as a matter of law because they grossly misinterpret the weight afforded to precedent agreements for public need and public benefit within the case law.

FERC erroneously finds a "strong showing of public benefit based on the fact that TGP had executed binding precedent agreements" which "will always be important, significant evidence of demand for a project," and cites to the holdings in *Myersville* and *Minisink*. *See* R. at 26. FERC also cites *Oberlin* and claims that the holding affirms their conclusion that "precedent agreements for gas that is to be exported are a valid consideration in determining the need for a project. R. at 31. However, the D.C. Court of Appeals explicitly clarifies that "there is a difference between saying that precedent agreements are always important versus saying that they are always sufficient to show that the construction of a new pipeline [is required]." *See Env't Def. Fund*, 2 F.4th at 972 (holding that FERC's grant of a CPCN for pipeline construction was arbitrary and capricious). While FERC may be free to consider precedent agreements as one factor in determining whether a public benefit exists, the mere fact of precedent agreements does not in and of itself present a sufficient showing of public interest. *See id.* Thus, FERC's acknowledgement of their existence without further justification is insufficient grounds to issue the CPCN, particularly in light of HOME's arguments on exports which were left unaddressed.

The precedent agreements in *Oberlin* are also highly distinguishable. *See City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 726-8 (D.C. Cir. 2022) (holding that FERC's finding of public need for a pipeline was proper where precedent agreements accounted for 59% of total pipeline capacity, and only 17% were marked for export to Canada). In the present matter, 90% of the pipeline's capacity is earmarked for export to Brazil. R. at 28. As opposed to foreign exports merely being incidental, like in *Oberlin*, they are instead the primary purpose of AFP. AFP must therefore be

evaluated in this light by FERC. Additionally, Brazil does not have a free trade agreement for LNG with the United States unlike the Canadian government, as was the case in *Oberlin*. *See* R at 33. FERC only claims that they "do not find this distinction to be meaningful" in referring to the lack of a free trade agreement, but they do not explain further. *Id.* Thus, AFP's exports should be viewed with even greater skepticism under a public necessity analysis, when the "exportation of natural gas to a nation which there is in effect a free trade agreement… in natural gas, shall be deemed to be consistent with the public interest." *See* 15 U.S.C. § 717b(c).

B. FERC did not make a reasoned and principled finding that the AFP serves the public interest, because Brazilian exports are not within the NGA's meaning of public interest and FERC fails to provide reasoning to overcome this.

A Certificate of Public Convenience and Necessity shall only be granted on the finding that an applicant is "able and willing… to do the acts and to perform the service proposed." 15 U.S.C. § 717f(e). Since 90% of AFP's capacity is dedicated to Brazilian exports, it is impossible as a matter of law for FERC to reasonably find a *public* need for the pipeline. LNG exports to Brazil cannot be construed in any light to serve the public interest, especially when the Natural Gas Act specifies that exports of natural gas to nations where there is a free trade agreement requiring national treatment for trade in natural gas "shall be deemed to be consistent with the public interest." 15 U.S.C. § 717b(c). However, the NGA notably does *not* direct the commission to consider other exports (like those destined through the AFP) as part of the public interest.

C. FERC fails to consider that Brazilian exports will require approval from the Secretary of Energy, leaving a substantial risk that 90% of the pipeline's capacity will be left unused and its profitability in serious jeopardy.

A CPCN shall only be granted on the finding that an applicant is "able and willing… to do the acts and to perform the service proposed." 15 U.S.C. § 717f(e). However, a person may only export natural gas to a foreign country by securing an order from the Department of Energy ("DOE") authorizing them to do so, which shall be granted unless the DOE "finds that the proposed

exportation… will not be consistent with the public interest." 15 U.S.C. § 717b(a). Exports of natural gas to nations where there is a free trade agreement requiring national treatment for trade in natural gas "shall be deemed to be consistent with the public interest." 15 U.S.C. § 717b(c). However, as Brazil does not have such an agreement with the United States, the exports themselves would have to be independently determined as in the 'public interest' by the DOE. There was no showing within the record that such an order from the FPC had been granted. Since a disallowance of the proposed exportation would serve to eliminate 90% of the precedent agreements which TNG and FERC rely upon, this issue jeopardizes the viability of AFP in its entirety. By failing to consider this issue, FERC arbitrarily affords significantly more weight to AFP's precedent agreements than is justified.

II. FERC'S FINDING THAT THE BENEFITS OF AFP OUTWEIGHED THE ADVERSE ENVIRONMENTAL IMPACTS IS ARBITRARY AND CAPRICIOUS, BECAUSE FERC FAILED TO GIVE SUFFICIENT WEIGHT TO HOME'S ARGUMENTS.

FERC is required to weigh the public benefits against the adverse impacts of the project, and only approve the project where the public benefits outweigh the adverse impacts. 15 U.S.C. § 717f(c)(1)(A), (e). "The amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests." *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,747, No. PL99-3-000 (1999). In their balancing of these relevant factors, FERC must "provide a cogent explanation for how it reached its conclusions" in both Certificate Orders and Rehearing Orders. *Env't Def. Fund*, 2 F.4th at 975. In the EIS, FERC concludes that "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 6. However, beyond this, FERC fails to provide any cogent explanation that demonstrates a reasoned and principled decision as to how the

benefits of AFP would outweigh the adverse environmental impacts and fails to seriously engage with HOME's arguments. *See Env't Def. Fund*, 975-6.

FERC rightly acknowledges that the majority of 2,200 trees and vegetation along AFP's route cannot be replaced. R. at 38. However, in addressing this FERC merely states they found that "TGP has taken sufficient steps to minimize adverse economic impacts on landowners and surrounding communities" and that "we do not find that HOME has demonstrated significant impacts." Further, FERC's only arguments regarding the alternate route through the Misty Top Mountains is that it would cost TNG more money and that they accept TGP's assertion that it would cause more environmental damage. R. at 44. FERC does not, however, present an independent analysis on this matter which meaningfully weighs the alternative against the current route.

FERC also neglects to consider the alternative of simply not building the pipeline at all. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) (holding that an agency's failure to consider an energy conservation alternative, when granting a certificate to build a nuclear power plant, was arbitrary and capricious). FERC additionally fails to explain why the purported benefits (fulfillment of a Brazilian need for LNG) are substantial enough to justify the destruction of thousands of trees that will not be replaced and fails to address HOME's arguments that the pipeline's serving foreign interests prevents the AFP from serving a public benefit. While TNG may be required to replant other trees as part of GHG mitigation conditions, this still does not resolve the irreparable damage to the specific trees and ecosystem along the AFP's route which FERC fails to specifically address.

Thus, because FERC does not explicitly weigh the damage to the environment along the route against the benefits of the pipeline within the rehearing order, its decision is arbitrary and capricious.

III. FERC'S CPCN ORDER VIOLATES RFRA, AS THE APPROVED PATH OF THE AFP POSES A SUBSTANTIAL BURDEN ON HOME MEMBERS' SINCERELY HELD RELIGIOUS BELIEFS THAT DO NOT FALL INTO A RFRA EXCEPTION.

RFRA prohibits the federal government from imposing a substantial burden on "a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." 42 U.S.C.A. § 2000bb-1(a). The substantial burden must be demonstrated by the plaintiff. However, the prohibition does not apply if the government can show that the application of the burden on the person's exercise of religion is both "in furtherance of a compelling government interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.A. § 2000bb-1(b).

Congress passed RFRA in 1993 as a legislative response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 484 U.S. 872 (1990), in which the Supreme Court held that the government could burden free exercise if it was through a "valid and neutral law of general applicability." *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (quoting *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 484 U.S. at 879 (1990)). *Smith* did away with the compelling interest test developed in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), two cases in which religious individuals were denied a benefit or penalized as a result of their exercise of religious beliefs.

The express purpose of RFRA was to both restore the pre-*Smith* compelling interest test used in *Sherbert* and *Yoder* and "to provide a claim or defense to persons whose religious exercise

is substantially burdened by government." 42 U.S.C.A. § 2000bb. Nowhere in the statute did Congress express what test or precedent was to be used in order to determine what actions constituted a "substantial burden." *See id.*

In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which expands RFRA's applicability in the contexts of prisoners and zoning decisions, and the Supreme Court states that it is appropriate to "apply the same standards [in analyzing RLUIPA] as set forth in RFRA," making the analysis used in RLUIPA cases relevant to RFRA analysis. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

A. An unclear definition of "substantial burden" splits courts, with the Tenth Circuit's *Werner* test being more faithful to the legislative intent than the Ninth Circuit's restrictive test from *Navajo Nation.*

As Congress does not define what government actions fall under the "substantial burden" threshold, federal courts have since independently crafted tests to determine what acts fall under RFRA's scope. A spectrum of jurisprudence has evolved to make such a determination, with the Tenth Circuit developing a relatively comprehensive definition - that to exceed the threshold to be a "substantial burden," the government action:

> must significantly inhibit or constrain conduct or expression that manifests some central tenet of ... [an individual's] beliefs; must meaningfully curtail [an individual's] ability to express adherence to his or her faith; or must deny [an individual] reasonable opportunities to engage in those activities that are fundamental to [an individual's] religion.

Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996) (quoting *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir.)). The Eighth Circuit frequently adopts the language in *Werner* and *Thiry* in their RFRA analysis, applying the standard to a wide array of government action. *See In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996), *cert. granted*, *judgment vacated sub nom. Christians v. Crystal*

Evangelical Free Church, 521 U.S. 1114 (1997) (judgment vacated on other grounds). The Seventh Circuit agrees that the "the more generous" *Werner* language "is more faithful both to the statutory language and to the approach that the courts took before *Smith*." *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996), *cert. granted, judgment vacated*, 522 U.S. 801 (1997), *and vacated*, 151 F.3d 1033 (7th Cir. 1998) (judgment vacated on other grounds). The Sixth Circuit, while not directly endorsing the *Werner* definition, cites the decision in previous RFRA analysis with the additional requirement that the practice be "fundamental" to the individual's religion. *See Abdur-Rahman v. Michigan Dep't of Corr.*, 65 F.3d 489, 492 (6th Cir. 1995).

Furthermore, the Tenth Circuit appears to expand its definition of "substantial burden" to include *all* religious exercise, not just expression which manifests a central tenet of a religious belief. *See Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1313 n. 5 (10th Cir. 2010) (in which the court utilized an RFRA analysis in determining what constitutes a "substantial burden" after passage of RLUIPA). Furthermore, this broad language is in line with the Congressional intent behind RFRA and RLUIPA, in that "[b]oth statutes aim to ensure 'greater protection for religious exercise than is available under the First Amendment.'" *Ramirez v. Collier*, 595 U.S. 411, 424 (2022) (quoting *Holt v. Hobbs*, 574 U.S. 357 (2015)).

FERC will likely point to courts such as the Ninth Circuit's narrow test of a "substantial burden" as one that "coerce[s] [individuals] to act contrary to their religious beliefs under the threat of sanctions" or "condition[s] a governmental benefit upon conduct that would violate their religious beliefs." *Navajo Nation*, 535 F.3d at 1067. While this language is used by some courts, such as the D.C. Circuit's reiteration of the standard in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77, 94 (D.D.C. 2017), the test faces a fair share of criticism as well. For instance, the dissent in *Navajo Nation* aptly points out that the majority misreads the

statute as both restoring the *Sherbert* and *Yoder* compelling interest test as well as applying the substantial burden analysis used in those cases to all RFRA claims - despite the fact that "[t]he Court in *Sherbert* and *Yoder* used the word 'burden,' but nowhere defined, or even used, the phrase 'substantial burden.'" *Navajo Nation*, 535 F.3d at 1089 (9th Cir. 2008) (Fletcher, W., dissenting). The dissent furthers notes that while *Sherbert* and *Yoder* highlight "certain interferences with religious exercise trigger the compelling interest test . . . neither case suggested that religious exercise can be 'burdened,' or 'substantially burdened,' *only* by the two types of interference considered in those cases." *Id.* (Fletcher, W., dissenting, emphasis in original).

Additionally, there is a significant likelihood that the substantial burden test in *Navajo Nation* will no longer be good law in the near future - the *Navajo Nation* language is at risk of being overturned by the Ninth Circuit as a result of their recent decision in *Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022), which was decided on essentially the same grounds as *Navajo Nation*, but has since been vacated. *See Apache Stronghold v. United States*, 38 F.4th 742, *reh'g en banc granted, opinion vacated,* 56 F.4th 636 (9th Cir. 2022). Finally, the Ninth Circuit's test is directly contrary to recent Supreme Court precedent, as a recent Supreme Court decision found that a death row inmate who was challenging Texas prison officials blanket ban on religious touch during executions under RFRA was "likely to succeed in showing that Texas's policy substantially burdens his exercise of religion." *Ramirez v. Collier,* 595 U.S. 411, 426 (the prisoner filed suit under RLUIPA). This was despite the Texan ban on religious touch being neither a coercive action nor a conditional benefit, rather it was simply a prohibition of free religious exercise and hence subject to the compelling interest and least restrictive means tests under RFRA. *See id.* This type of action, therefore, falls outside the scope of the Ninth Circuit's narrow definition

for substantial burden. For these reasons, the court should adopt the Tenth Circuit's definition from *Werner* and *Thiry*.

B. FERC errs in its application of the substantial burden test in *Thiry* in determining the AFP does not place a substantial burden on HOME's religious exercise.

FERC erroneously determines in their rehearing denial that HOME members would not be substantially burdened pursuant to *Thiry*. R. at 13 n. 14. The present case is clearly distinguishable from *Thiry* on the facts. The Tenth Circuit states in *Thiry* that the government action, the construction of a highway by the Kansas Department of Transportation requiring both the condemnation of the Thiry's private land and the relocation of a gravesite of the Thiry's stillborn baby, which had been used as a site of prayer to God, does not substantially burden the Thirys under RFRA. *See Thiry,* 78 F.3d at 1496. In making this determination, the Court remarks how the Thiry's themselves testified that "they will still continue their religious beliefs and practices even if the condemnation proceeds as planned" and that "they concede that they have worshiped, prayed, and drawn near to God in places other than the gravesite area." *Id.* at 1495-1496. Furthermore, the Thiry's even testified to the fact that "they would agree to move [their child]'s grave if . . . it was necessary to ensure a safe highway." *Id.* at 1496. The Thiry's clearly failed to demonstrate how the government action would at all constrain their ability to engage in religious exercise, that being prayer, as they testified that they would still be able to engage in that type of religious activity regardless of whether or not the condemnation went forward. *See id.*

That is not the case for the members of HOME. HOME members explicitly testify that the continuance of their religious activity on their property, the Solstice Sojourn, would be "unimaginable" in the event of FERC's proposed condemnation of HOME land for the AFP. R. at 12. Unlike in *Thiry*, where the government condemnation impacts a less tangible expression of faith via prayer, which can occur anywhere, FERC's condemnation threatens a physical

manifestation of a fundamental belief that can only occur at a certain location, that being a pilgrimage from the HOME temple across HOME's unadulterated property to HOME's sacred hill. FERC's actions could prevent the Solstice Sojourn from occurring at all, meaningfully curtailing HOME members' ability to express adherence to their faith. This thereby constitutes a substantial burden. *See Werner*, 49 F.3d at 1480.

C. Even when applying the more stringent substantial burden test in *Navajo Nation*, a test which FERC misstates, FERC errs in the application of the test to determine the AFP does not place a substantial burden on HOME's religious exercise.

In their rehearing denial, FERC misstates the substantial burden test developed in *Navajo Nation*, claiming that a substantial burden exists when the government action places "substantial pressure on an adherent to modify his behavior and to violate his beliefs" - the actual test developed in *Navajo Nation* is whether government action "coerce[s] [individuals] to act contrary to their religious beliefs under the threat of sanctions" or "condition[s] a governmental benefit upon conduct that would violate their religious beliefs." *Navajo Nation*, 535 F.3d at 1067. Furthermore, *Navajo Nation* implies that coercive threats or a conditional benefit are a floor to the types of actions that are considered, as "[a]ny burden imposed on the exercise of religion *short of* that described by *Sherbert* and *Yoder* is not a "substantial burden" within the meaning of RFRA." *Id.* at 1070 (emphasis added). As the circumstances of the burden on HOME is distinguishable from the alleged burden in *Navajo Nation*, HOME is able to satisfy the requirements under both of these tests.

In *Navajo Nation*, the Navajo Nation, as well as other Native American tribes, sought to prevent the U.S. Forest Service from utilizing snow machines which used recycled wastewater to blow snow unto the San Francisco Peaks, mountains which they consider sacred. *Id.* at 1063. The San Francisco Peaks are entirely located on Forest Service land. *Id.* at 1064. As the desecration of the peaks was on federal land, the court decided that the government action in question did not

substantially burden the plaintiffs, as while the recycled wastewater might have harmed the tribes' religious sensibilities, "*whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land." Id.* at 1072 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 451–53 (1988) (emphasis in original)); *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d at 93 (in which a government action in the form of an easement grant for Dakota Access to build and operate a pipeline under a lake on federal land did not substantially burden a tribe that used the lake for religious purposes).

Therefore, while it is clear that using *federal* land in a way contrary to certain individuals' religious sensibilities does not impose a substantial burden on them, the Ninth Circuit has not yet ruled on whether or not government *condemnation* of *private* religious land for a purpose contrary to those landholders sensibilities imposes a substantial burden. This is the situation HOME is faced with, and this change of facts is what elevates the government action to the level of substantial burden.

HOME clearly faces a substantial burden under FERC's misstated test, as the government action goes far beyond placing substantial pressure on the defendants to modify their behavior and to violate their religious beliefs - it essentially requires them, as a result of the use of the police power of condemnation, to violate their religious beliefs by continuing to practice the Solstice Sojourn over the AFP (a structure which they see as antithetical to their faith) or to modify their beliefs by ceasing the practice altogether, as violating their precepts would, again, be "unimaginable." R. at 12.

Even under the narrowly tailored Ninth Circuit test, HOME still meets the substantial burden threshold. In *Navajo Nation*, the Ninth Circuit quotes a choice faced by the petitioner in

Sherbert, where the government created "a condition" which "unconstitutionally forced Sherbert 'to choose 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 hand.'" *Navajo Nation*, 535 F.3d at 1069. The government action here again goes beyond that of the action in *Sherbert*, as the petitioner there at least faced a choice. Here, the government first denies HOME of any choice in the matter—the land is condemned as a result of the police power of the state that has been delegated to a LNG company—and HOME must accept just compensation for said land. Next, HOME would at least be faced with an unconstitutional choice: accepting the just compensation for HOME use, in violation of their religious convictions, or a refusal to accept the payments which be made out for just compensation, denying themselves a government benefit to adhere to the faith. Both the initial condemnation of HOME land and the payment of just compensation for HOME land thereby constitute a substantial burden under the Ninth Circuit's definition through both the imposition of condemnation as well as requiring HOME to make a choice that would violate their faith in regards to just compensation.

D. As a substantial burden exists, FERC must show that the substantial burden is both in furtherance of a compelling government interest and is the least-restrictive-means of furthering that compelling governmental interest; FERC does neither.

It is the burden of the government to show that they both have a compelling government interest as well as show that the government action which imposes a substantial burden on religious exercise is the least-restrictive-means of furthering that compelling interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). However, FERC directly states in their denial of a rehearing that they fail to reach a final determination on those issues, thereby failing to meet the burden required under RFRA. However, as it is clear that HOME meets the substantial burden threshold, their failure to reach those issues directly violates RFRA, and hence a rehearing is required for FERC to make those showings.

While HOME recognizes that the Court also need not reach those issues today, HOME would be remiss to let the comments alluding to these factors, made by TGP and FERC in the rehearing denial, go unaddressed. TGP errs in their conclusion that the proposed pipeline would satisfy the least-restrictive-means test, stating that "maintaining a coherent natural gas pipeline permitting system, not one that would bend unreasonably to the desired exceptions of any religion, is the least restrictive means of furthering the government interest." R. at 13. This is a misunderstanding of how the least-restrictive-means test works. The "least-restrictive-means standard is exceptionally demanding" and requires the government to demonstrate that "it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." *Burwell*, 573 U.S. at 728. TGP fails to comprehend that "the least-restrictive-means" requires the government to demonstrate that the proposed action would be the least-restrictive on the individuals whose religious exercise is being burdened, instead understanding the test as the least-expensive option for all parties. TGP and FERC cannot demonstrate that the proposed route is the least-restrive-means, as there is a feasible alternative route that would not prevent HOME from engaging in the Solstice Sojourn.

However, FERC incorrectly suggests that "the Alternate Route would result in even more environmental harm, which would also be a 'burden' to HOME's religious beliefs." R. at 13. HOME does not dispute that the other route will cause more environmental harm, but it clearly would not burden any religious exercise, as the Solstice Sojourn does not take place over the Alternative Route, and therefore this "burden" is irrelevant to the least-restrictive means analysis. Therefore, it is appropriate for this court to require a rehearing so FERC can properly make a showing that the AFP serves a compelling government interest and that the AFP is the least-restrictive means of furthering that interest.

IV. THE NGA GRANTS FERC AUTHORITY TO CONDITION PIPELINE CONSTRUCTION WITH MEASURES TO MITIGATE ENVIRONMENTAL IMPACTS, WHICH HAS LONG INCLUDED GHG IMPACTS.

The NGA unambiguously gives FERC the power to condition a grant of a certificate to a pipeline project on an applicant's adherence to reasonable terms and conditions as required by public convenience and necessity. 15 U.S.C. §717f(e). Federal agencies, including FERC, must publish an EIS when undertaking any major federal action that significantly affects the quality of the human environment. 42 U.S.C. §4332(2)(C). Pipeline construction is explicitly categorized as a major federal action necessitating a NEPA analysis and requiring an EIS. 18 C.F.R. §380.6(a)(3). FERC has considered environmental impacts in its decisions to grant CPCNs since at least 1999. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,747, No. PL99-3-000 (1999). The 1999 Certificate Policy Statement indicated that FERC would decide to issue a CPCN after an economic analysis, and then a balancing against environmental impacts. *Id*. at 3.

The 2022 Updated Certificate Policy Statement further clarifies FERC's commitment to mitigating environmental impacts. *Certification Of New Interstate Natural Gas Pipeline Facilities, Updated Policy Statement On Certification Of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107, No. PL18-1-000 (2022). The Updated Policy affirms FERC's requirement to consider environmental impacts under both NEPA and the NGA. Concurrently released, FERC's GHG Policy Statement sets out that "the Commission will quantify a project's GHG emissions that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action." *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, No. PL21-3-000, at 20 (2022). GHG emissions generated from construction of a project are as close and causally related to the action as any effect could get - they are known, certain to occur, and stem directly from the pipeline installation. FERC's consideration of GHG emissions is not new. *See, e.g.*, *Environmental Assessment for the Philadelphia Lateral Expansion*

Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (construction emissions); *Environmental Assessment for the Minisink Compressor Project*, Docket No. CP11-515- 000, at 29 (Feb. 29, 2012) (operation emissions). The Commission has long held that direct GHG emissions from project construction and operational activities are effects of the proposed project. *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, No. PL21-3-000, at 24 (2022). FERC therefore has authority to mitigate environmental impacts, and this includes an analysis of direct GHG emissions from construction.

A. The NGA gives FERC the power to impose specific conditions when granting authorization for a project, which FERC appropriately employed here.

FERC has the authority to condition its grant of a CPCN on compliance with further reasonable mitigation conditions. *See* 15 U.S.C. §717f(e). The Updated Policy Statement notes the Commission's "broad authority" to attach terms to CPCNs. *Certification Of New Interstate Natural Gas Pipeline Facilities, Updated Policy Statement On Certification Of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107, at 11558 No. PL18-1-000 (2022). If proposed mitigation measures are deemed inadequate, FERC may "condition the certificate to require additional mitigation." *Id.* In the AFP's case, FERC concludes after extensive analysis that construction of the pipeline would result in an average of 104,100 metric tons of CO2e per year. R. at 15. FERC decides to impose reasonable conditions such as replanting trees, using electric construction equipment, using net-zero steel, and purchasing all electricity from renewable sources when possible. R. at 13-14. These conditions reduce construction GHG emissions to 88,340 metric tons CO2e per year. R. at 15. For the predicted four-year duration of construction, this is a net 63,040 metric tons CO2e saved. This decision is a result of a reasoned environmental analysis by FERC, and a determination that these GHG conditions are necessary to ensure the project aligns with public convenience and necessity.

B. The Commission's GHG conditions narrowly address this pipeline project, and avoids nationwide implications.

The GHG conditions required here are focused on this project, and the implications do not extend to nationwide issues or trigger major-questions doctrine. The NGA grants FERC the power to set conditions issuing a CPCN, which FERC lawfully exercises in this case. 15 U.S.C. §717f(e). Here, FERC engaged in an analysis specific to the facts and circumstances of this particular pipeline construction, and using its specialized expertise decided on reasonable conditions to satisfy public convenience and necessity. The construction mitigation requirements apply solely to this project, and are far from a broad mandate or industry-wide plan. FERC's construction requirements are supported by statute, narrowly tailored, and soundly within FERC's jurisdiction. Therefore, this Court should affirm FERC's mitigation of construction GHG impacts of the AFP.

V. FERC FAILS TO ADEQUATELY CONSIDER AND MITIGATE UPSTREAM AND DOWNSTREAM GHG IMPACTS FROM THE AFP.

Upstream and downstream GHG impacts are reasonably foreseeable components to pipeline construction, and FERC arbitrarily and capriciously fails to consider and mitigate these effects. Federal agencies are required to consider both direct and indirect impacts of a federal action under NEPA. *Gulf Restoration Network v. Jewell,* 161 F. Supp. 3d 1119, 1124-25 (S.D. Ala. 2016). Indirect effects are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. §1508.1(g)(2). Whether emissions qualify as an indirect effect is a determination made in NEPA on a case-by-case basis. *See Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1122 (D.C. Cir. 1971). Here, FERC fails to adequately consider the facts of the AFP's construction, and thus arbitrarily and capriciously neglected to address upstream and downstream GHG emissions in their analysis.

A. Upstream impacts are a reasonably foreseeable indirect effect successfully raised by HOME that FERC arbitrarily and capriciously fails to include in their analysis.

The upstream impacts of constructing the AFP are reasonably foreseeable, and FERC fails to include them in its analysis despite HOME properly raising them. Similar to the present case, in *Freeport*, a pipeline was constructed to carry gas for export. *See Sierra Club v. FERC (Freeport)*, 827 F.3d 36 (D.C. Cir. 2016). Building a pipeline for the purpose of increasing exports has the very foreseeable effect of increasing domestic natural gas production, but in *Freeport* FERC declined to consider this "because no specific shale-play had been identified as a source of natural gas for the projects." *See id.* at 47. In our case, TGP has clearly identified that the LNG for the AFP will be produced in the Hayes Fracking Field in Old Union. R. at 6. Therefore, FERC's primary reason for failing to consider upstream effects in *Freeport* is inapplicable to the AFP.

Furthermore, in previous instances where courts decided not to review a FERC decision that ignores upstream GHG emissions, the petitioners had failed to adequately raise the issue before FERC. *See Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019); *Food & Water Watch v. FERC*, 28 F.4th 277 (D.C. Cir. 2022). Here, HOME consistently and continuously raised the issue of both upstream and downstream emissions from the first petition for rehearing to this appeal, so this claim is not jurisdictionally barred.

In *Birckhead*, the court took issue with petitioners' inability to point to specific numbers and locations of additional wells that would be drilled as a result of increased demand from the pipeline. *See Birckhead,* 925 F.3d 510 at 517. *Food & Water Watch* continues this conversation, noting that this demanding specificity requirement could validly be challenged by petitioners. *See Food & Water Watch*, 28 F.4th 277 at 287. However, the court was unable to review because the petitioner there failed to exhaust this argument with FERC. *See id.* Here, HOME exhausts this

issue, therefore the Court must review the case on the merits. NEPA requires that agencies engage in "reasonable forecasting and speculation," and prevents agencies from shirking that requirement by passing off all forecasting as "crystal ball inquiry." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014). Agencies must satisfy their duty to provide a fully informed and well-considered decision to the "fullest extent possible." *Id.* The impetus is in fact on FERC to reasonably forecast or use its best efforts to discern the extent of potential upstream impacts of the pipeline. *See* 40 C.F.R. §1502.21 (when "information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because ... the means to obtain it are not known," and "the agency shall include within the environmental impact statement ... [t]he agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community"). FERC cannot, therefore, point to petitioners' inability to show individual locations of new wells as a valid reason to avoid making a reasonable evaluation. *See id.* Then with FERC's own reasoned analysis in hand, FERC could have made a fact-based determination as part of its indirect-effects analysis. FERC's failure to adequately inquire after or reasonably forecast the increase in drilling or extraction as a result of this pipeline was arbitrary and capricious.

B. Downstream impacts are a reasonably foreseeable indirect impact of the AFP that FERC considers, but then arbitrarily and capriciously fails to mitigate.

FERC's requirement under NEPA to analyze indirect impacts of a pipeline includes consideration of downstream GHG impacts. The burning of gas at the destination of a pipeline is not just reasonably foreseeable, but is in fact a pipeline project's entire purpose. *See Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1372 (D.C. Cir. 2017).

Furthermore, FERC has been required to consider downstream GHG emissions in situations similar to the AFP's. In the context of a pipeline where the destination for the gas is not clearly known, FERC's lack of specific knowledge does not excuse them from conducting a thorough analysis of downstream effects. *See Birckhead*, 925 F.3d 510 at 519-20. In *Birckhead*, a pipeline expansion project was proposed to supply natural gas to the southeastern U.S., and when the sufficiency of FERC's NEPA analysis was challenged, FERC pointed to a lack of knowledge on the destination of the gas. *See id.* The court was troubled by FERC's "attempt to justify its decision to discount downstream impacts based on its lack of information about the destination and end use of the gas in question." *Id.* The court notes that in instances where the destination of the gas is not known, NEPA "requires the Commission to at least *attempt* to obtain the information necessary" to fulfill its statutory responsibility to do an educated environmental analysis of all direct and indirect effects. *Id.* at 520 (italics in original). Here, FERC correctly considers and calculates downstream impacts.

In *Food & Water Watch*, FERC was presented with concrete evidence of how much gas would flow through a new pipeline, and where that gas was going. The court found that the end use of the transported gas is reasonably foreseeable, and the Commission had therefore failed to account for downstream emissions. *See Food & Water Watch,* 28 F.4th 277 at 289. The court remanded the case to FERC, requiring them to provide a supplemental environmental assessment to "either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so." *Id.* In regards to the AFP, FERC knows that the pipeline will transport 500,000 Dth per day, and the EIS reveals that the downstream impacts of burning that fuel will result in 9.7 million metric tons of CO2e per year. R. at 14.

After including the reasonably foreseeable downstream emissions of the AFP in their analysis, FERC arbitrarily and capriciously failed to mitigate the impact of those emissions on climate change. FERC claims a variety of ways in which the pipeline could actually decrease emissions, such as displacing other fuels and displacing gas transported by other means. R. at 15. FERC made the same claim in *Sabal Trail*, where its EIS made the assumption that the benefits of retiring dirtier coal-fired power plants would counteract the potential downstream emission impacts of the pipeline. *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1375 (D.C. Cir. 2017). The court disagreed, stating that the EIS is not "absolved" from considering emissions merely because "the emissions in question might be offset by reductions elsewhere." *Id.* at 1374-75. *Sabal Trail* clearly indicates that FERC is required to do an actual weighing in their EIS analysis of downstream impacts. *See id.* Therefore, FERC arbitrarily and capriciously ended their analysis at a calculation of emissions, and failed to perform the balancing that courts have required.

The majority of the gas in the AFP is destined for export. R. at 2. The D.C. Circuit recently held that the Department of Energy has exclusive jurisdiction over whether to approve natural gas exports, meaning that FERC cannot rely on the effects of exports to deny permission for a project, and that therefore no NEPA obligations of the effects of export-bound gas can be considered. *Ctr. for Biol. Diversity v. FERC*, 67 F.4th 1176, 1185 (D.C. Cir. 2023). However, FERC should not be able to have it both ways. If FERC is able to consider a pipeline with 90% of its contents destined for export to a country the US has no free trade agreement with to be in the interest of public convenience and necessity, it should also be able to adequately analyze and act upon the downstream GHG impacts of that action, as these are clearly connected effects. *See* 40 C.F.R. 1508.25(a)(1). If FERC has the jurisdiction to decide that this pipeline meets public interests and act on that decision, it cannot be hamstrung from fully considering all the connected environmental

implications. If this court were to decide based on *Ctr. for Biol. Diversity* that FERC cannot consider the downstream impacts of exported fuel because it is under DOE's jurisdiction, then this court should conclude that FERC does not have jurisdiction to allow this pipeline at all.

C. FERC need not wait for final guidance in order to mitigate upstream/downstream impacts.

The Council on Environmental Quality issued interim guidance in order to assist agencies in analyzing the GHG effects of proposed actions that require NEPA analysis. *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 FR 1196 (Jan. 9 2023). The guidance indicates that agencies "should quantify the reasonably foreseeable direct and indirect GHG emissions of their proposed actions and reasonable alternatives (as well as the no-action alternative) and provide additional context to describe the effects associated with those projected emissions in NEPA analysis." *Id.* at 1201. The interim guidance concludes with the statement: "Agencies should use this guidance to inform the NEPA review for all new proposed actions." *Id.* at 1212.

While FERC is an independent agency, it has voluntarily committed to implementing the regulations and guidance of the CEQ since 1987. *Regulations Implementing National Environmental Policy Act of 1969*, 52 FR 47897-01 (Dec. 17, 1987). It has not addressed the issue of whether CEQ regulations are binding as a matter of law, because FERC's voluntary compliance meant that question need not be reached. *Id.* Given FERC's history of following CEQ guidance and regulations, and as CEQ's interim guidance is directed at precisely the subject of the issue raised by HOME here, a decision to not follow the interim guidance appears extremely arbitrary. Interim guidance has been found to require deference in other scenarios, and the CEQ interim guidance deserves that deference here. *See e.g. Buffalo Transportation, Inc. v. U.S.*, 844 F.3d 381

(2nd Cir. 2016). Furthermore, the Administrative Procedure Act defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency…". 5 U.S.C. §551(4). Interim guidance meets this definition. *See e.g*. U.S. Gen. Accounting Office, GAO-B-281575, *Comments on Whether EPA Interim Guidance Is a Rule Under the Congressional Review Act* (1999).

The interim guidance published by the CEQ will become final guidance after its comment period, at which point FERC, in keeping with decades of consistent voluntary compliance with CEQ guidance and regulations, will adopt and follow these recommendations. *See Regulations Implementing National Environmental Policy Act of 1969*, 52 FR 47897-01 (Dec. 17, 1987). Choosing to suspend that tradition for this case alone, during the brief interim before this guidance becomes final, would be arbitrary and capricious. The court should find that FERC's long history of complying with CEQ guidance requires that the Commission must look at and mitigate the upstream/downstream GHG emissions in this case. Therefore, this Court should find that FERC arbitrarily and capriciously failed to adequately consider or mitigate GHG upstream/downstream impacts of the AFP.

CONCLUSION

In light of the above, HOME respectfully requests this Court order FERC to conduct a rehearing in accordance with the following findings: (1) FERC cannot consider international precedent agreements with a country the United States does not have a free trade agreement in determining whether or not a public need exists; (2) FERC must adequately address HOME's claims of irreversible harms in analyzing the balance of the benefits versus the harms; (3) the AFP presents a substantial burden on HOME, and FERC must proffer evidence that the AFP is a

compelling government interest and is the least-restrictive-means of furthering that interest; (4) FERC must include conditions mitigating both upstream and downstream impacts of the AFP.

However, we respectfully request that this Court affirm the propriety of the current greenhouse gas conditions for construction required by FERC under the current CPCN.