C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH,
Plaintiff-Appellant-Cross Appellant

-and-

TRANSNATIONAL GAS PIPELINES, LLC,
Plaintiff-Appellant-Cross Appellant

v.

UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION,
Defendant-Appellee-Cross Appellee

On Consolidated Petitions for Review of an Order Granting a Certificate of Public Convenience and Necessity

Brief of Appellee, UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF JURISDICTION

On April 1, 2023, the Federal Energy Regulatory Commission, (the "Commission"), issued an Order granting a Certificate of Public Convenience and Necessity (the "CPCN) to Transnational Pipelines, LLC ("TGP") for the construction of the American Freedom Pipeline ("AFP"). The Holy Order of Mother Earth ("HOME") and TGP timely sought rehearing on certain issues and conditions in the CPCN. On May 19, 2023 the Commission issued an Order denying the petitions for rehearing and affirming the CPCN as originally issued (the "Rehearing Order"). Both HOME and TGP timely filed Petitions for Review of the CPCN Order and Rehearing Order (the "FERC Orders") with this Court and the petitions were consolidated under Docket 23-01109. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 15 U.S.C. § 717r(b) which states that "any party to a proceeding under [the Natural Gas Act] aggrieved by an order issued by the Commission in such proceeding may obtain review of such order in the court of appeals of the United States."

STATEMENT OF ISSUES PRESENTED

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

II. Was FERC's finding that 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?

IV. Were the greenhouse gas conditions (GHG) imposed by the Commission beyond the Commission's authority under the NGA?

V. Was the Commission's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

STATEMENT OF THE CASE

1. TGP's Proposed Project

TGP, an LLC established under the laws of the State of New Union, filed an application for authorization to construct and operate the AFP on June 13, 2022. Transnat'l Gas Pipelines LLC., Docket No. TG21-616-000, 199 F.E.R.C. ¶ 72,201, Record at ¶ 1,(FERC 2023) (Order denying Rehearing), [hereinafter, 'Record']. The proposed pipeline is approximately 99-miles-long, 30-inches in diameter and is designed to provide up to 500,000 dekatherms (Dth) per day of firm transportation service. *Id.* With the construction of the pipeline and its supporting facilities, the proposed project will cost about $599 million. *Id.* at ¶ 10.

TGP has secured binding precedent agreements to utilize its full capacity of 500,000 Dth, with International Oil & Gas Corporation ("International") using 450,000 Dth, and New Union Gas and Energy Services Company ("NUG") utilizing 50,000 Dth. *Id.* at ¶ 11. The AFP will transport natural gas from the Hayes Fracking Field ("HFF") in Old Union, rerouting approximately 35% of the current production at HFF through the AFP rather than the Southway Pipeline that currently transports the full production of natural gas from HFF. *Id.* at ¶ 12. Since the demands for liquified natural gas ("LNG") are declining in east Old Union due to a population shift and improvements to energy efficiency, TGP has asserted that market needs would be better served by the rerouting through the AFP. *Id*. at ¶ 13. It is undisputed that because of the decline in LNG demand, the reduction in transport through the Southway Pipeline will not lead to a gas shortage. *Id.* The LNG purchased by International will be diverted at the Burden Road M&R Station to the existing NorthWay Pipeline which is set to carry the LNG into the

New Union City M&R Station operated by International. *Id.* at ¶ 14. From the Lake Williams Port, the LNG will be loaded onto LNG tankers for export to Brazil. *Id.*

2. The Commission's Decision

On April 1, 2023, the Commission issued the CPCN order authorizing TGP's proposed AFP under section 7 of the Natural Gas Act to construct and operate the AFP, subject to conditions set forth in the CPCP Order. *Id.* at ¶ 2. The Natural Gas Act "vests the Commission with authority to regulate the transportation and sale of natural gas in interstate commerce." 15 USC § 717f(c); *Myersville Citizens For A Rural Cmty.*, *Inc. v. FERC*, 783 F.3d 1301, 1307. Specifically, Section 7 of the Natural Gas Act "governs the construction and operation of facilities used to transport or sell gas interstate." *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 722 (D.C.Cir.2022) ; 15 USC § 717f. If the Commission approves of the Section 7 facility, the Commission issues a CPCN where they may attach "such reasonable terms and conditions as the public convenience and necessity may require."*See* 15 U.S.C. § 717f (e). In issuing the certificate, the Commission is required "to evaluate all factors bearing on the public interest." *Atl. Refining Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 397 (1959). And a certificate is only issued if "the proposed facility is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e).

Our review of applications is guided by the Certificate Policy Statement which establishes the criteria for determining whether there is sufficient need for a proposed project and whether such project will serve the public interest. Record at ¶ 17. In 1999, FERC issued a certificate policy statement outlining the criteria used to determine whether a proposed pipeline is within the public convenience or necessity. *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further certified*, 92

FERC ¶ 61,094 (2000) (Certificate Policy Statement). On March 24, 2022, the Commission issued an order converting the policy statements issued in February 2022 to draft policy statements. *See Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197 (2022) (Order on Draft Policy Statements). First, the project must meet a "threshold requirement." This requires TGP to show that the pipeline is "prepared to financially support the project without relying on subsidization from its existing customers." Certificate Policy Statement at 61,746. That threshold has been met here and is undisputed. Once the threshold is met, the Commission then balances the "public benefits against the potential adverse consequences" of the project. Id. There, the Commission considers if the applicant has made any efforts to eliminate or minimize any adverse effects.

As outlined in the CPCN Order, the Commission determined that the advantages offered by the TGP Project to the market outweigh any negative impacts on existing shippers, other pipelines, current customers, as well as on impacted landowners and nearby communities. Additionally, we assessed that the adverse environmental impacts assessed in the Environmental Impact Statement (EIS) can be minimized to levels below significance by implementing the recommendations listed as conditions in the CPCN Order. Record at ¶ 3. Thus, the Commission has granted the requested authorizations. *Id.*

In response to the Commission's decision, TGP and HOME each filed a request for rehearing of different aspects of the CPCN order. *Id.* at ¶ 4. There is no dispute among parties that TGP is capable of financially supporting the project without adverse impact on its current customers, so the issues in dispute are whether there is sufficient need for the project, the impacts it has on landowners affected by the route, and environmental concerns. *Id*. at ¶ 21.

3. **Holy Order of Mother Earth.**

HOME is a not-for-profit religious organization that owns a 15,500-acre property in Burden County, New Union where it has its headquarters. *Id.* at ¶ 9. The proposed AFP will cross over the HOME property east of the headquarters. *Id*.

HOME's religious beliefs are centered around its founding principle that the natural world is sacred and that nature itself is a deity that deserves worship and respect. *Id.* at ¶ 46. HOME contends that its fundamental principle is that individuals should exert every effort to prioritize the preservation of nature above all other concerns, particularly economic interests. *Id.* at ¶ 47. HOME's founding in 1903 was largely due to the detrimental effects of the industrial revolution and capitalism on the environment. *Id.* at ¶ 46. Because of these core beliefs, HOME asserts that the construction of the AFP through HOME's property goes against its religious beliefs and practices due to the adverse environmental impacts of the fracking process involved in the LNG extraction, the environmental damage caused by establishing the pipeline route, and the detrimental climate effects associated with burning fossil fuels. *Id.* at ¶ 49.

HOME further presents testimony that that the AFP will interfere with its religious practices – notably its Solstice Sojourn that the organization has observed since at least 1935. *Id.* at ¶ 48. During each summer and winter solstice, HOME members partake in a ceremonial pilgrimage from a temple situated at the property's western boundary to a revered hill located at the property's eastern border in the foothills of the Misty Top Mountains. *Id.* Subsequently, they return along an alternative route. *Id.* At the hill, every child within the Order who has turned 15 in the preceding six months undergoes a sacred religious rite. *Id.* The designated Sojourn path intersects with the proposed pipeline route in both directions. *Id.*

HOME has filed for review of the CPCN Order, asserting that the Order compels HOME to support the production, transportation, and burning of fossil fuels which outweighs any benefit of the AFP. *Id.* at ¶ 50. Further, HOME argues that the CPCN violates their rights under the Religious Freedom Restoration Act of 1993. *Id.* at ¶ 54.

Congress established RFRA to protect religious exercise from burdens imposed by government action, even if the government action is neutral toward religion. 42 U.S.C.A. § 2000bb-1(a). A claimant whose religious practice is burdened in violation of RFRA may assert the violation as a claim or defense to receive relief from the government. 42 U.S.C. § 2000bb-1. A plaintiff must establish one of two elements to establish a prima facie claim that the government violated RFRA. 42 U.S.C. § 2000bb-1. The plaintiff must establish "that the activities allegedly burdened by the government action constitute an 'exercise of religion.'" *Id.* Alternatively, the plaintiff must demonstrate that the government action 'substantially burdens' the plaintiff's exercise of religion." *Id.* If the claimant proves a substantial burden exists, the government may receive an exception if it demonstrates two elements under strict scrutiny. 42 U.S.C. § 2000bb-1. First, the government must prove that the burden imposed is in "furtherance of a compelling governmental interest." *Id.* Second, the government must prove that the burden imposed "is the least restrictive means of furthering that compelling government interest." *Id.*

4. **The Disputed GHG Conditions.**

In addition to HOME's arguments against the CPCN Order, TGP takes issue with the requirements of the GHG Conditions set forth in the Order. Record at ¶ 75. The GHG Conditions imposed by the CPCN require TGP to take certain steps to mitigate the GHG impacts in the construction of the AFP. *Id*. at ¶ 6, 67. The conditions include the following: "(1) TGP shall plant or cause to be planted an equal number of trees as those removed in the construction of the

TGP Project; (2) TGP shall utilize, wherever practical, electric-powered equipment in the construction of the TGP Project, including, without limitation: (a) Electric chainsaws and other removal equipment, where available, and (b) Electric powered vehicles, where available; (3) TGP shall purchase only "green" steel pipeline segments produced by net-zero steel manufacturers; and (4) TGP shall purchase all electricity used in construction from renewable sources where such sources are available." *Id.* at ¶ 67.

The GHG Conditions were crafted upon review of TGP's comprehensive EIS analysis, which extensively evaluated the TGP Project's greenhouse gas impacts. *Id.* at ¶ 72. The downstream analysis indicated a potential annual CO2e emission of about 9.7 million metric tons if all 500,000 Dth per day were combusted, with this figure representing an upper limit. *Id.* However, actual emissions are likely lower due to factors such as peak day use design, potential displacement of other fuels, and variations in gas transportation methods. *Id.* Additionally, the construction of the AFP is estimated to result in an average of 88,340 metric tons per year of CO2e over a four-year period, contingent on adherence to GHG Conditions. *Id.* at ¶ 73. Without these conditions, the construction estimate would rise to 104,100 metric tons per year. *Id.* Upstream emissions from gas production are deemed irrelevant in this case, as the HFF gas is already in production, and approval of the TGP Project is not anticipated to have a significant upstream consequence. *Id.* at ¶ 74.

Although HOME and TGP argue otherwise, the Commission has the authority to impose conditions on direct project impacts and to decline to impose conditions on upstream and downstream emissions in the CPCN Order. *See* 15 USC § 717f. The Department of Energy assigned FERC the authority to "approve or deny any application for the construction, expansion, or operation of an LNG terminal." 15 U.S.C. § 717b(e)(1); U.S. Department of

Energy, Delegation Order No. 00-004.00A, § 1.21.A (May 16, 2006). The Natural Gas Act specifically grants FERC the power to approve such actions through a CPCN Order and the "power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 USC § 717e. Here, these "reasonable terms and conditions" are referred to as the GHG Conditions or mitigation measures in the order. *See id.*; Record at ¶ 14.

FERC also has an obligation to gather or consider environmental information when making its certification determination under the National Environmental Policy Act of 1969 (NEPA). 42 U.S.C. § 4332(2)(C). *See* Sierra Club v. FERC, 867 F.3d 1357, 1371 (2017) (citing *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767-68 (2004)). Under NEPA, the Commission is required to consider environmental impacts including (1) *direct* environmental effects that are "caused by the action and occur at the same time and place," (2) *indirect* environmental effects that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," and the *cumulative effects* "from the incremental impact of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency… or person undertakes such other actions." 40 C.F.R. 1502.16; 40 C.F.R. § 1508.1.

SUMMARY OF THE ARGUMENT

The Federal Energy Regulatory Commission was correct in finding that the projected benefits of the pipeline outweigh any adverse impacts. Here, it is appropriate to certify the pipeline under Section 7 of the Natural Gas Act because TGP's interstate domestic gas is undeniably "commingled" with export gas in pipelines that cross state lines as they travel from Old Union to New Union. Under the Natural Gas Act and the support of subsequent persuasive

judicial interpretations, the Commission's finding of project need is supported by substantial evidence of public interest. Export precedent agreements may be used to demonstrate substantial evidence of the public's interest especially when, as in this case, the project will provide a host of domestic needs such as providing gas to underserviced areas in New Union, expanding access to gas sources in the United States, creating a more competitive market, and more. Additionally, the Commission properly balanced adverse environmental and social impacts by recognizing TGP's steps to minimize the harm to affected landowners and community members, and by properly denying an alternate route that would have resulted in greater environmental harm.

The Commission was correct in finding that allowing the pipeline route to pass over HOME's property does not violate RFRA because there will be no substantial burden on the religious practices of HOME's members. According to binding and persuasive case precedent and statutory authority, there is no substantial burden because the government will not coerce HOME to act contrary to their beliefs under the threat of sanctions and there is no tangible barrier to HOME's religious practices. Thus, the Court should find that the impacts on HOME's religious practices do not rise to the level of substantial burden under RFRA, and thus do not need to be analyzed under the strict scrutiny standard.

The Commission was correct in finding that adverse environmental impacts will be reduced to less-than-significant levels when TGP implements the conditions adopted in the CPCN Order. We have satisfied our obligations to address GHG emissions under both NEPA and the NGA. FERC has the statutory authority to impose GHG conditions and our decision to do so here is consistent with historical agency practice, CEQ guidance, appellate court guidance, and TGP's own science. This is not a major-questions case because it deals narrowly with a single, specific agency adjudication. Even if it were, FERC has been given clear congressional

authorization to consider applications and to authorize projects with specific constraints (here, GHG Conditions) when the Commission determines it is in the public interest. FERC is not legally obligated to impose specific GHG conditions on upstream and downstream GHG emissions. In this case, the indirect emissions do not satisfy the causation requirement, so FERC is not required to consider them, much less to mitigate them.

In light of the foregoing, this Court should find that the CPCN was properly issued, the Commission's decision does not violate RFRA, and the Commission acted within our authority to impose GHG emissions.

STANDARD OF REVIEW

The court reviews Commission decisions under the Administrative Procedure Act's (APA) narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under that standard, the question is not, "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 292 (2016). Rather, the court must uphold the Commission's determination "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.*

Because section 7 of the Natural Gas Act grants the Commission broad discretion to grant or deny a certificate, the court does not substitute its judgment for that of the Commission. *See Myersville Citizens For A Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). Rather, the court only evaluates whether the Commission considered relevant factors and whether there was a clear error of judgment. *Id.*

ARGUMENT

I. THE COMMISSION'S FINDING OF PROJECT NEED IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

This Court should find that the Commission relied on substantial evidence in finding a project need because export precedent agreements are a valid consideration in determining public need and the project will serve multiple domestic benefits.

The Natural Gas Act vests the Commission with exclusive authority to determine whether the construction of a natural gas facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). In doing so, this statutory provision entrusts the Commission "with a wide range of discretionary authority." *See FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961).

HOME erroneously claims that the Commission failed to rely on substantial evidence in making their determination of public need. Record at ¶ 22. A clear look at the record and relevant statutory authority shows, however, that the Commission properly exercised their broad authority under the Natural Gas Act in its reliance on substantial evidence. *See City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 726-7 (D.C. Cir. 2022). In determining public need, the Commission considers "all relevant factors reflecting on the need for the project" including "precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." Certificate Policy Statement at 61,747.

The Commission's finding of project need must be supported by "substantial evidence," or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Myersville Citizens For A Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) (citing *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010); *see*

also 15 USC § 717r(b). This standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *Minisink*, 762 F.3d at 108 (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 60 (D.C. Cir. 2002)).

Here, substantial evidence of public need includes the fact that TGP secured "binding precedent agreements for firm service using 100% of the design capacity of the pipeline project," and the project is expected to serve "multiple domestic needs." Record at ¶ 7. Based on Commission practice and under the Natural Gas Act, these factors may be used as substantial evidence to demonstrate public need. *See, e.g.*, *Oberlin*, 39 F.4th at 726-7.

A. Persuasive precedent shows, and the Natural Gas Act supports, that export precedent agreements may be used to demonstrate public need.

The use of export precedent agreements is a valid consideration in determining if there is "substantial evidence" of a public need.

"Precedent agreements are long-term contracts in which gas shippers agree to buy the proposed pipeline's transportation services." *Allegheny Def. Project v. FERC*, 964 F.3d 1, 19 (D.C. Cir. 2020) (citing *Myersville*, 783 F.3d at 1310). It is a "common method for applicants" to use precedent agreements to show demand for the project, which in turn demonstrates a public benefit. *See Oberlin*, 39 F.4th at 722 (citing *Env't Def. Fund v. FERC*, 2 F.4th 953, 962 (D.C. Cir. 2021). Notably, "precedent agreements are important, and sometimes sufficient, evidence of market need for a pipeline project." *Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 114 (citing *Minisink*, 762 F.3d at 111).

Here, TGP executed binding precedent agreements with International for 450,000 Dth per day of firm transportation service and NUG for 50,000 Dth per day of firm transportation service. Record at ¶ 11. Combined, the precedent agreements are equal to the full design capacity of the TGP project. *Id.* The Commission reasonably relied on these precedent agreements as

"evidence of the market need and proof that the Project [would] be self-supporting." *See Twp. of Bordentown v. FERC*, 903 F.3d 234, 262-3 (finding that precedent agreements fulfilling 100% of the capacity were sufficient evidence of need for the project). As countless courts have reiterated, "FERC need not 'look [] beyond the market need reflected by the applicant's existing contracts with shippers." *See id.* at 263 (citing *Myersville*, 783 F.3d at 1311).

i. *The AFP is correctly governed by Section 7 of the Natural Gas Act.*

HOME incorrectly claims that TGP's use of an *export* precedent agreement to show market need was improper because 90% of the gas is to be exported to Brazil. Record at ¶ 26. But "nothing in Section 7 prohibits the consideration of export precedent agreements in the public convenience and necessity analysis." *Oberlin*, 39 F.4th at 726. Section 7(e) also "directs FERC to grant a certificate to construct a new pipeline whenever the pipeline 'is or will be required by the present or future public convenience and necessity.'" *Id.* (citing 15 U.S.C. § 717f(e)). This "broad language" "requires the Commission to evaluate *all* factors bearing on the public interest." *Id.* at 726; *Atl. Refining Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 91 (1959) (emphasis added). Finally, "gas commingled with other gas indisputably flowing in interstate commerce becomes itself interstate gas." *Okla. Nat. Gas Co. v. FERC*, 28 F.3d 1281, 85 (D.C. Cir. 1994).

For example, in *Oberlin*, the court determined that the "Nexus Project met the interstate commerce criteria" under Section 7 of the Natural Gas Act rather than Section 3. *See* 39 F.4th at 736. There, the Nexus Project secured "six precedent agreements to transport gas from Pennsylvania and Ohio for sale across state lines" as well as "two . . . precedent agreements . . . with Canadian companies that serve[d] customers in Canada" and accounted for "17% of the pipeline's total capacity." *Id.* at 723, 26. The City of Oberlin called into question the

Commission's use of the two export precedent agreements in determining public need claiming that the use of the export precedent agreements meant that the Nexus Project had to be analyzed under Section 3 rather than Section 7 of the Natural Gas Act. *Id.* at 725. The D.C. Circuit disagreed. *Id.* at 726. The court reasoned that the project was properly analyzed under Section 7 of the Natural Gas Act because the "Nexus Pipeline [was] indisputably in interstate commerce" and "an assessment of the public convenience and necessity requires a consideration of *all* the factors that might bear on the public interest." *Id.* (emphasis added).

That same reasoning can be applied here. Like the Nexus Project in *Oberlin*, the Commission used both export and domestic precedent agreements to show public need under the Certificate of Public Necessity and Convenience. *See id.;* Record at ¶ 11. And similar to the Nexus pipeline, the AFP transports gas across state lines, making it an interstate pipeline. *See Oberlin*, 39 F.4th at 726; Record at ¶ 5. Therefore, the gas bound for export is "commingled" with the gas bound for interstate consumption, and therefore is still considered an interstate pipeline under Section 7. *See Oberlin*, 39 F.4th at 726.

ii. *Congress's direction and intent under Section 3 of the Natural Gas Act directs the Commission to give equal weight to export precedent agreements.*

HOME attempts to distinguish *Oberlin* because the export precedent agreements in question there only accounted for 13% of the project's capacity, while here, the export precedent agreement accounts for 90% of the project's capacity. Record at ¶ 31. But Congress's directive under the Natural Gas Act suggests that export precedent agreements should not be weighed differently than domestic precedent agreements. *See* 15 U.S.C. § 717b(c); *Oberlin*, 39 F.4th at 719, 25-6; Columbia Gulf Transmission, LLC, 178 FERC ¶ 61,198, 62,326 (2022).

"Under Section 3(c) of the Natural Gas Act, exports to nations with which the United States has a free trade agreement for natural gas 'shall be deemed consistent with the public

interest.'" *See Oberlin*, 39 F.4th at 726; 15 U.S.C. § 717b(c). Further, "no person can export gas from the United States without the commodity export having been first approved by the Secretary of Energy under Section 3 of the NGA." Columbia Gulf Transmission, LLC, 178 FERC ¶ 61,198, 62,326 (2022). Thus, the language of Section 3 "sets out a general presumption favoring such authorization." *EarthReports, Inc. v. FERC*, 828 F.3d 949, 53 (D.C. Cir. 2016) (citing *W. Va. Pub. Servs. Comm'n v. Dep't of Energy*, 681 F.2d 847, 56 (D.C. Cir. 1982). To be clear, the United States does not have a free trade agreement with Brazil. Record at ¶ 33.. Still, the Commission does not put any significant weight on the end use of the gas. *Id.* And Congress's "directive and intent" would be "thwarted" "if the Commission were precluded from considering the benefits represented by precedent agreements with shippers transporting gas for export in determining whether the interstate facilities are required by the public convenience and necessity." Columbia Gulf Transmission, LLC, 178 FERC ¶ 61,198, 62,326 (2022); *NEXUS*, 172 FERC ¶ 61,199 at P 15 (Finding that export precedent agreements still produce benefits including "contributing to the development of the gas market, in particular the supply of reasonably-priced gas; adding new transportation options for producers, shippers, and consumers; strengthening the domestic economy and the international trade balance; and supporting domestic jobs in gas production, transportation, and distribution, and jobs in industrial sectors that rely on gas.").

Moreover, the Commission previously issued a section 7 certificate where *100%* of the capacity was for export. Columbia Gulf Transmission, LLC, 178 FERC ¶ 61,198, 62,326 (2022). Unlike the export precedent agreement relied on in *Columbia Gulf*, the export precedent agreement at issue here only accounts for *90%* of the project capacity. Thus, there should be no reason why the Commission should treat the export agreement at issue here differently.

Lastly, the Commission acknowledges that some courts have held export precedent agreements to not be in the public interest. But those cases involved export precedent agreements where the agreements were with affiliates. *See Env't Def. Fund v. FERC*, 2 F.4th 953, 73 (D.C. Cir. 2021) (finding agreements among affiliates to be less probative because they are not the result of an arms-length negotiation); 173 FERC ¶ 61,074 at 2 Order Issuing Certificates and Addressing Arguments Raised on Rehearing, Docket No. CP19-495-000 and CP19-495-001 (finding use of export precedent agreement invalid where . . .). Here, TGP held an open season and secured precedent agreements with two shippers with whom they had no affiliation. Record at ¶ 11. Therefore, we can sufficiently rely on the export precedent agreement with International as substantial evidence for public need.

B. The AFP fulfills domestic needs.

HOME further argues that the minimal domestic benefits suggested by TGP are insufficient, standing alone, to justify the AFP where the gas otherwise serves virtually no domestic needs. Record ¶ 29. But HOME is mistaken in this regard. TGP contended in its application that the AFP will serve multiple domestic needs including:

> "(1) delivering up to 500,000 Dth per day of natural gas to the interconnection with the NUG terminal and the NorthWay Pipeline; (2) providing natural gas service to areas currently without access to natural gas within New Union; (3) expanding access to sources of natural gas supply in the United States; (4) optimizing the existing systems for the benefits of both current and new customers by creating a more competitive market; (5) fulfilling capacity in the undersubscribed NorthWay Pipeline; and (6) providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels." Record at ¶ 27.

The need is not, as HOME claims, to provide capacity for the gas to reach Brazil. Rather, "this is the means of fulfilling the need, not the need itself." *See Bordentown*, 903 F.3d at 263. Here, the "need" is to provide the host of domestic needs that TGP identified in its application. The domestic needs are the purpose of the AFP's construction, and "why it is seeking additional

capacity from [International]." *See id.* (finding that the project need was not for the gas to reach the proposed pipeline, but rather the domestic needs identified in the gas company's application). Thus, the Commission correctly found, based on substantial evidence, an existing need for the AFP's construction.

II. THE COMMISSION PROPERLY FOUND THAT THE BENEFITS OF THE AFP OUTWEIGHED THE SOCIAL AND ENVIRONMENTAL HARMS.

This Court should find that the Commission properly balanced the adverse environmental and social harms because the AFP took sufficient steps to minimize the adverse impacts to landowners and communities affected by the route and because the alternate route would have resulted in more adverse environmental effects.

The Commission "enjoys broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines." *Minisink*, 762 F.3d at 111 (citing *Am. Gas Ass'n v. FERC* 593 F.3d 14, 19 (D.C. Cir. 2010)). "As an expert agency, the Commission is vested with wide discretion to balance competing equities against the backdrop of the public interest." *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C.Cir. 1984).

HOME mistakenly claims that the Commission improperly balanced the benefits and adverse effects of the AFP. Record at ¶ 40. However, under the APA's narrow standard of review, the record clearly reflects that the Commission showed "a rational connection between the facts found and the choice made." *See, e.g.*, *Electric Power Supply Ass'n*, 577 U.S. at 292.

Provided a project will not be subsidized by existing customers, as is the case here, the Commission then balances the "public benefits against the potential adverse consequences" of the proposal. Certificate Policy Statement at 61,745. This analysis is "essentially an economic test." *Id.* Public benefits may include things like "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 61,748. On the other hand, adverse effects include "increased rates for pre-existing customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property." *Myersville*, 783 F.3d at 1309 (citing Certificate Policy Statement at 61,747-48). The "Commission will approve an application for a certificate if the public benefits from the project outweigh any adverse effects." Certificate Policy Statement at 61,749.

Here, HOME claims that the adverse effects on the landowners and communities, as well as the adverse environmental effects, outweigh the benefits of the project. Record at ¶ 39. Nonetheless, the record clearly shows, and countless prior project approvals have found, that the Commission properly found that the benefits of the project outweighed any residual effects.

A. TGP took sufficient steps to minimize the adverse impacts to landowners and communities affected by the route.

The Commission considers "whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on . . . landowners and communities affected by the route of the new pipeline." Certificate Policy Statement at 61, 745. We properly found that TGP made sufficient efforts.

As proof of minimizing adverse impacts, we relied on evidence that TGP (1) participated in the Commission's pre-filing process and has been working to address landowners' concerns and questions; (2) made changes to over 30% of the proposed pipeline route in order to address concerns from landowners and to negotiate mutually acceptable easement agreements; (3) has agreed to bury the AFP through the entirety of its passage through HOME property and expedite construction "to the extent feasible" across HOME's property to minimize disruption; and (4)

will complete the two-mile stretch over HOME's property within a four-month period. Record at ¶ 41.

HOME mistakenly relies on the fact that TGP has not signed easement agreements with over 40% of landowners along the route. *Id.* at 42 - 43. But the use of eminent domain is common practice in the construction of pipelines. *Id.* at ¶ 43. The Commission's guidance under the Certificate Policy Statement provides this as well. Certificate Policy Statement at 61,749.

The Commission uses a "sliding scale approach" to determine whether the project's benefits outweigh the harm. *Id.* The policy states that "if an applicant had precedent agreements with *multiple* parties for *most* of the new capacity, that would be strong evidence of market demand and potential public benefits that could outweigh the inability to negotiate right-of-way agreements with some landowners." *Id.* (emphasis added). Here, TGP has certainly surpassed the necessary showing that they secure precedent agreements for most of the new capacity. Record at ¶ 11. In fact, TGP secured precedent agreements for 100% of the capacity with two different shippers during the open season. *Id.* And to reiterate our previous argument, the existence of an export precedent agreement for 90% of the capacity should not be an issue. This assertion is grounded in both case law and the Natural Gas Act, which affirm that the Commission does not weigh such agreements differently than domestic precedent agreements, making them a valid consideration of public need.

B. The Commission cannot ascribe extra weight to environmental harms or uses on HOME's property.

HOME contends that the Commission should ascribe "extra" weight to the environmental harms or uses on HOME's property, as seen through the religious beliefs of HOME's members. Record at ¶ 52. But guidance under the Certificate Policy Statement has never allowed for such preferential treatment. Certificate Policy Statement at 61,749. The Policy Statement provides

that "a few holdout landowners cannot veto a project . . . if the applicant provides support for the benefits of its proposal that justifies the issuance of a certificate and the exercise of the corresponding eminent domain rights." *Id.*

HOME specifically argues that the Commission's issuing of the CPCN compels HOME to support the production, transportation, and burning of fossil fuels and that this invaluably outweighs any benefits of the AFP. Record at ¶ 50. In making this argument, HOME relies on the fact that the gas is to be exported, and so the Commission must subscribe less weight to the precedent agreement. *Id.* Based on countless court rulings and Commission orders, this argument cannot stand.

C. The alternate route would have resulted in more adverse environmental effects.

As further proof that TGP took sufficient steps to minimize harm to HOME, TGP considered an alternate route that would avoid HOME property. Record at ¶ 44. In its findings, TGP found, and HOME *agreed*, that the rerouting would result in more environmental harm by traveling an additional three miles and running through more environmentally sensitive ecosystems in the mountains. *Id.* Moreover, the alternate route would add over $51 million in construction costs. *Id.* The no-action alternative is not relevant here because there was "substantial evidence" of public need for the pipeline's construction. *See id. at* ¶ 26-27. Because the existing route results in less environmental harm, TGP has made sufficient efforts to minimize impacts to landowners and communities, and export precedent agreements are given the same weight as other precedent agreements, the Commission properly found that the projected benefits outweigh the minimized adverse effects resulting from the project.

III. THE COMMISSION'S DECISION ALLOWING AFP TO CROSS OVER HOME'S PROPERTY DOES NOT VIOLATE RFRA.

This Court should find that the Commission's decision to route the AFP over HOME's property despite HOME's religious objections was not in violation of RFRA because it does not impose a substantial burden on HOME's religious practice. *See* 42 U.S.C. § 2000bb-1; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 685 (2014). RFRA provides relief to persons whose religious practices are substantially burdened by the Federal Government, unless the Government can prove that the application of the burden is in furtherance of a compelling government interest and that it is the least restrictive means of doing so. 42 U.S.C. §§ 2000bb-1(a), (b); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 419 (2006).

Here, HOME fails to establish that its religious practice is substantially burdened by the Commission's decision to allow the AFP to cross over its property. *See* Record at ¶ 54, 57-61;42 U.S.C. §§ 2000bb-1(a), (b); *Hobby Lobby,* 573 U.S. at 685.

A. The Commission's decision does not impose a substantial burden on HOME's religious practice.

HOME claims that routing the AFP through the path of their Solstice Sojourn on their property would substantially burden their religious exercise. Record at ¶ 57. While the AFP will cross the path of the Sojourn, leaving a clear-cut path over the pipeline, it does not coerce HOME to act contrary to their beliefs or prevent them from practicing their religion. Under RFRA, a substantial burden exists when the federal government coerces a person to act contrary to his/her sincere religious beliefs under the threat of sanctions. 42 U.S.C. § 2000bb-1; *Hobby Lobby*, 573 U.S. at 685; *Navajo Nation v. U.S. Forest Serv.,* 535 F.3d 1058, 1069 n.11 (9th Cr. 2008); *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996). The courts have a high bar for finding a substantial burden under RFRA.

In finding a substantial burden, the court must find that the government action caused the plaintiffs to act in opposition to their sincere religious beliefs. *Hobby Lobby*, 573 U.S. at 685. For example, in *Hobby Lobby*, the U.S. Supreme Court found that a federal contraceptive mandate substantially burdened business owners because it forced them to act in a way that seriously violated their religious beliefs against contraception under the threat of serious economic consequences. *Id*. The contraceptive mandate required the business owners to provide health insurance coverage to their employees which includes forms of FDA-approved contraceptives. *Id.* at 702. The court reasoned that because the mandate "implicated a difficult and important question of religion and moral philosophy" for the business owners by requiring them to go against their religious convictions and provide contraceptives to their employees, it substantially burdened their ability to "conduct business in accordance with their religious beliefs." *Id.* at 686. This was in violation of RFRA. *Id.*

A substantial burden also requires that a tangible barrier exists to the exercise of one's religious practice. *See Navajo Nation,* 535 F.3d at 1089. In *Navajo Nation*, the court found that the government's use of recycled wastewater for artificial snow on a mountain held sacred by various tribes did not constitute a substantial burden on their religious exercise because it did not coerce the tribes to act contrary to their beliefs under the threat of sanctions, nor did it create any tangible barrier to the exercise of their religion. *Id.* at 1063, 1089. The presence of the wastewater did not prevent the plaintiffs from accessing the mountain to exercise their religious and cultural practices including praying, conducting ceremonies, and collecting plants for religious purposes. *Id*. And while the existence of wastewater on the mountain may have offended the plaintiffs' beliefs and impact their sense of spiritual fulfillment, the court found that the only real result of the artificial snow is on the plaintiffs' "subjective spiritual experience." *Id*.

at 1063. The court acknowledged that the government action would cause a decrease in fulfillment and satisfaction from religious participation but clarified that this does not rise to the level of substantial burden that Congress intended in RFRA. *Id.*

Here, the Commission does not coerce HOME to act contrary to their religious beliefs. Unlike in *Hobby Lobby* where the plaintiffs faced economic consequences if they did not comply with the governmental mandate, HOME is not threatened with fines or sanctions if they were to continue to practice their religious beliefs. *See* 573 U.S. at 685. Despite the presence of the pipeline on their property, HOME is still able to perform the Solstice Sojourn without economic consequences while *Hobby Lobby* plaintiffs would be. *See id.* While the government action in both cases imposes a difficult question of religious philosophy, the *Hobby Lobby* plaintiffs are prevented from running their business according to their religious beliefs while HOME would be able to perform the Solstice Sojourn in the same manner with or without the pipeline. *See id*. at 686; Record at ¶ 57. The only difference would be their subjective spiritual experience, which the court in *Navajo Nation* found insufficient to amount to a substantial burden. *See* 535 F.3d at 1063. Further, if the Commission were to decide the AFP should be re-routed to avoid HOME property, the resulting undisputed environmental harm caused by the Alternate Route would also "burden" HOME's religious beliefs. Record at ¶ 62.

Similarly, in *Thiry v. Carlson*, a court found that the Thirys did not prove a substantial burden to their religious practice when the Kansas Department of Transportation (KDOT) condemned a portion of their property because their religious beliefs and practices would proceed despite governmental interference. 78 F.3d at 1495. The Thirys brought suit claiming their religious practice of worship and prayer at the gravesite of their stillborn child would be substantially burdened by KDOT because they would be devastated to have to relocate the

gravesite and lose access to that part of their property. *Id.* at 1493. While the condemnation would result in emotional distress and inconvenience for the Thirys, they conceded that their religion allowed them to relocate the gravesite and that they would continue to practice their religion afterward. *Id.* at 1495. Thus, the court found that the burden, while it caused difficulty for the Thirys, did not amount to a substantial burden because it did not coerce them to act contrary to their beliefs. *Id.*

Because the pipeline will be underground and the expedited construction will take place entirely between Solstice Sojourns, the impacts on HOME's practice would be minimal. Record at ¶ 56 (2023). Like in *Navajo Nation* and *Thiry*, HOME's religious practices, including the journey itself and the sacred religious ceremony at the hill, will proceed unimpeded by the presence of the pipeline. *See* 535 F.3d at 1063; 78 F.3d at 1495. While its presence may result in a perceived reduction in spiritual fulfillment when completing the Sojourn, these beliefs are insufficient under RFRA which exists to protect a person's religious practices. *See* 42 U.S.C. § 2000bb-1; *Hobby Lobby,* 573 U.S. at 685. Because HOME's practices will proceed despite its religious objections to the AFP, it fails to establish a substantial burden under RFRA. *Id.*

B. Strict scrutiny standard.

If a claimant demonstrates a substantial burden to their religious practices, the court will apply strict scrutiny and the burden shifts to the government to demonstrate that the compelling interest test is satisfied and that the burden imposed "is the least restrictive means of furthering that compelling government interest." *See* 42 U.S.C. § 2000bb-1(b); *O Centro*, 546 U.S. at 419. If proven, the governmental action is upheld despite any substantial burden it imposes. *Id.* We do not argue the issue related to the strict scrutiny test until such time as the court determines the appropriate legal standard for its consideration.

IV. UNDER NEPA AND THE NGA, THE COMMISSION SATISFIED OUR OBLIGATIONS TO ADDRESS GREENHOUSE GAS EMISSIONS.

This Court should find that the Commission properly included GHG Conditions for TGP's construction of the AFP into its CPCN Order according to its authority under the National Gas Act. *See* 15 USC § 717f; Record at ¶ 14. Before issuing the GHG Conditions, the Commission followed NEPA requirements to consider the direct, indirect, and cumulative impacts of the proposed project. *See* Record at ¶ 10; 40 C.F.R. § 1502.16.

Although HOME and TGP argue otherwise, the Commission undoubtedly has the statutory authority and the discretion to impose greenhouse gas (GHG) conditions on direct project impacts and to decline to impose conditions on upstream and downstream emissions in the CPCN Order. *See* 15 USC § 717f.

A. FERC has the authority to impose GHG Conditions.

This Court should find that the Commission acted within its authority when it imposed the GHG Conditions. On rehearing, TGP asks the court to review the conditions in the CPCN order, claiming that we acted beyond the scope of our authority in doing so . Record at ¶ 14.The GHG Conditions should not be surprising to TGP as they are consistent with CEQ guidance, consistent with appellate court guidance, consistent with established agency practice, and consistent with scientific assessments provided by the applicant.

i. Our decision to impose GHG Conditions is nothing surprising or new.

It is undisputed that the GHG Conditions are limited to environmental impacts from the construction of the AFP. *Id.* The conditions are mitigation measures that FERC included in its CPCN Order to address the *direct* environmental effects that will be "caused by the action" of constructing the pipeline and "occur at the same time and place" as the construction, which we are authorized to impose. *See id.; See also* 40 C.F.R. § 1508.1.

The Commission's decision to include these GHG Conditions in the CPCN Order is consistent with the Council for Environmental Quality's (CEQ) Climate Guidance. National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023). In the CEQ's guidance, agencies are encouraged to mitigate GHG emissions associated with proposed actions "to the greatest extent possible, consistent with national, science-based GHG reduction policies established to avoid the worst impacts of climate change." *Id* at 1197. This guidance clearly asserts that the "United States faces a profound climate crisis and there is little time left to avoid a dangerous—potentially catastrophic—climate trajectory." *See id.* Although FERC is not legally required to strictly adhere to CEQ guidance, we generally do so. *See* Record at ¶ 10.The Commission is in the process of promulgating agency-specific rules to guide how we address GHG emissions in the future. Certification of New Interstate Nat. Gas Facilities, 178 FERC ¶ 61,197 (2022) (Order on Draft Policy Statements). However, because these rules are not finalized we will just add here that the language of the draft policy statements strongly supports and reiterates CEQ guidance. *See id.; See also* 88 Fed. Reg. 1196.

Additionally, the GHG Conditions in our CPCN Order are consistent with appellate court guidance. *See Freeport*, 867 F.3d at 1374 (noting FERC has the legal authority to mitigate GHG emissions because they are a reasonably foreseeable indirect effect); See also *Twp. of Bordentown v. FERC*, 903 F.3d 234, 261 n.15 (3d Cir. 2018) (noting FERC's authority to enforce mitigation measures). The court in *Freeport* asserts that "greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate." 867 F.3d at 1374. It is difficult to see how TGP can

argue that the GHG Conditions here are "beyond our authority" and "unstated change in agency practice" when they so clearly rest on judicial precedent. *See id.*; *See also* Record at ¶¶ 14, 16.

The GHG Conditions are also consistent with our established method of conducting environmental analysis. *See*, e.g., Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (emissions from project construction); Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515000, at 29 (Feb. 29, 2012) (emissions from operation of the compressor). Here, we have found these GHG Conditions to be reasonable conditions that are in the public interest. Record at ¶¶ 14, 16.In fact, the GHG Conditions that TGP takes issue with are consistent with TGP's own science (ie the extensive information that TGP itself provided in its EIS about greenhouse gas emissions expected from their proposed pipeline project). *See id.* at ¶ 15.

ii. *GHG Conditions do not address "major questions."*

Since the doctrine's inception, the court has established that the MQD is only implicated when there is an issue of political significance or controversy, a novel issue, a significant financial burden on industry, or a rarely used statutory provision. *See generally W. Virginia v. Env't Prot. Agency,* 142 S. Ct. 2587, 2595 (2022). In *W. Virginia v. EPA*, the court found that the agency moved for a "transformative expansion" of authority in vague language designed as a "gap filler" that had rarely been used. *Id.* at 2604. The court did not allow the agency to take broad action by creating the vast Clean Power Plan, which seeks to fundamentally alter an industry practice. *Id.* at 2587.

Here, rather than implicating a "major question" of political significance, the GHG conditions deal narrowly with a single agency adjudication that goes to the "core of our authority—the construction of LNG pipelines." Record at ¶ 18; *Compare with W. Virginia,* 142

S. Ct. at 2587. The GHG Conditions in the instant case are specific, individual, and focused on the direct environmental impacts of TGP's single project application. *See* Record at ¶ 14. FERC routinely uses its specific authority under Section 7 of the Natural Gas Act because it is the very thing the agency was created to do, ensure efficient energy for consumers by issuing CPCN orders for deserving applicants. *See* Federal Energy Regulatory Commission, Overview and Mission (2023), https://www.ferc.gov.

In *N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, the court found that the MQD prevented the petitioner from broadly defining "biological materials" and "discharge" to include bycatch. 76 F.4th 291, 296 (4th Cir. 2023). The court also found that the MQD did not allow a definition of "dredging" that included trawl nets that disturb sediment where no pollutant was discharged and the disturbed sediment was already present. *See id. 303.* In *N. Carolina Coastal Fisherie*s, the petitioner would have needed clear congressional authorization to regulate bycatch and disturbed sediment under the Clean Water Act. *See id.*

Here, under a "practical understanding of legislative intent", the Commission does not venture beyond its authority to broadly define statutory terms. *See id.* at 304 (quoting *West Virginia*, 142 S. Ct. at 2609 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. at 324 (2014)). Instead, the Commission is explicitly given authorization to implement mitigation measures under the NGA and has been specifically instructed by the CEQ to mitigate GHG emissions "to the greatest extent possible" under NEPA. 15 USC § 717f; 88 Fed. Reg. 1196; *Compare with N. Carolina Coastal Fisherie*s, 76 F.4th at 291.

iii. *FERC has the statutory authority to impose GHG Conditions.*

Even if the court were to find that our GHG Conditions address "major questions," we have specific statutory authority to create and enforce GHG Conditions. 15 USC § 717f. FERC

does not go beyond the plain meaning of the Natural Gas Act (NGA) which bars natural gas companies from transporting or selling natural gas and from extending, constructing, acquiring, or operating facilities unless it is authorized to do so by the Commission. *See id.* Congress clearly stated that FERC "shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717(e). Clearly, FERC may "grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate." Id. § 717b(a). NEPA further requires FERC to consider environmental information when making its determination. 42 U.S.C. § 4332(2)(C); *See Freeport, 867 F.3d at 1372.*

Even TGP has conceded our authority to enforce mitigation measures. *See* Record at ¶ 16. In the Order Denying Rehearing, TGP conceded that the Commission has historically had discretion to mitigate "traditional" environmental harms such as felling trees. *See id.* However, it then took issue with our GHG Conditions, one of which provides that "TGP shall plant or cause to be planted an equal number of trees as those removed in the construction of the TGP Project." *See id* at 14. TGP goes on to use a faulty slippery slope argument to claim that because we have imposed GHG Conditions in subsequent section 7 CPCN orders, applicants will now feel they need to include mitigation measures in EIS submissions. *See id.* at 16. However, the Commission has made no such assertion, nor has it strayed from well-established agency practice. *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. CP11-515000, at 29 (Feb. 29, 2012) (operation emissions). See also *Freeport*, 867 F.3d at 1374; *Bordentown*, 903 F.3d at 261 n.15. In fact, no

mitigation proposals were included in TGP's EIS nor was such a proposal required. *See* Record at ¶ 16. Instead, we used the factual and scientific information about GHG emissions provided by TGP in the EIS. *See id.* at 15. TGP agrees we have long had the authority to mitigate harm from felled trees, and we are exercising this authority now to mitigate TGP's harm as they fell trees in New Union. *Id.* at 16.

B. FERC's decision to not impose conditions on upstream and downstream greenhouse gas emissions was not arbitrary or capricious.

On appeal, HOME asks the court to review our decision to not impose mitigation conditions on upstream and downstream GHG emissions. *Id.* at 18. TGP argues that it would be outside FERC's authority to include the conditions urged by HOME. *Id.* We are not obligated to consider, much less to mitigate, indirect emissions when they are sufficiently separated in time and distance as to break the requisite causal connection under NEPA.

i. *FERC is not legally obligated to include mitigation measures for upstream and downstream emissions.*

Here, it is undisputed that the GHG Conditions that TGP challenges on rehearing address environmental impacts from the construction of the AFP. Record at ¶ 14. These are mitigation measures that FERC included in its CPCN Order to address the *direct* environmental effects that will be "caused by the action" of constructing the pipeline and "occur at the same time and place" as the construction. *See* 40 C.F.R. § 1508.1. Just because FERC determined some mitigation measures were appropriate (cue GHG Conditions), does not mean that NEPA or the NGA mandates FERC to prescribe a certain kind of mitigation measure that is specific to every possible environmental impact. *See* 42 U.S.C. § 4332(2)(C); 15 USC § 717f. Under NEPA, HOME will likely assert that upstream and downstream emissions are *indirect* environmental effects that "are caused by the action and are later in time or farther removed in distance" than

the *direct* effects from the construction of the pipeline "but still reasonably foreseeable." *See* 40 C.F.R. § 1508.1.

ii. *Upstream and downstream emissions do not satisfy the causation requirement.*

As the analysis in Sierra Club and EarthReports shows, the Commission was not required to consider, much less mitigate impacts from upstream and downstream GHG emissions. *See Freeport,* 827 F.3d at 36 (2016); *See also EarthReports*, 828 F.3d at 953. HOME mischaracterizes NEPA requirements because the *indirect* effects requirement does not blindly extend to everything under the sun which could "conceivably" connect to the proposed project through "but-for" causation. *See Freeport*, 827 F.3d at 46 (*citing see e.g. Public Citizen*, 541 U.S. at 767; *Village of Bensenville v. FAA*, 457 F.3d 52, 65 (D.C. Cir. 2006).)

The court in *Freeport* clarifies that because FERC has no authority to authorize the export of natural gas out of the country, it cannot be the "legally relevant cause" of downstream greenhouse gas emissions and thus the agency does not have to consider *indirect* emissions impacts. *See Freeport*, 827 F.3d at 46. The court clarifies that the effect must be "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."*See id. and City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)). In *Freeport,* the Department of Energy's (DOE) independent authority to authorize export out of the country "breaks the NEPA causal chain and absolves the Commission of responsibility to include [these considerations] in its NEPA analysis." *See Freeport*, 827 F.3d at 48. This rationale can be expanded to include indirect greenhouse gas emissions from upstream production. *See id.* The court asserts that because it is DOE, not FERC, that has the sole authority to license natural gas LNG liquefaction through LNG facilities for export out of country, FERC is relieved of any legal

obligation to consider indirect impacts (such as upstream and downstream GHG emissions). *See id. at* 47.

Here, upstream impacts from gas production are not relevant in part because the gas is already in production and thus is not a "reasonably foreseeable" "cause" of the project. *See id.* HOME may argue that capacity will be increased. However, the facilities are already in operation, and it is difficult to predict whether transported gas will come from new or existing production. Record at ¶ 15. Following Commission tradition and appellate court guidance, we have no legal duty to consider greenhouse gas emissions from upstream production or downstream use in our CPCN determination because the causation requirement is not satisfied. *See Freeport* 827 F.3d 59 at 68-69; *See also EarthReports* 828 F.3d at 949.

iii. *No significant cumulative impacts are expected.*

Under NEPA, FERC must consider the *cumulative impact* on the environment "from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency… or person undertakes such other actions." 40 C.F.R. 1502.16; 40 C.F.R. § 1508.1. In *Minisink Residents for Envtl. Pres. & Safety v. FERC,* no significant cumulative impacts were expected because the development of a compressor station upstream was sufficiently separate in distance and construction timing. 762 F.3d 97, 108 (2014). The court in *Minisink* found (1) that a "typical distance" between compressor statements of 70 miles showed sufficient separation in distance and (2) the absence of an application as of yet showed sufficient separation in construction timing. *Id.* at 112-13.

Here, as in *Minisink,* no significant cumulative impacts from upstream emissions are expected in part because there is no evidence of a new compressor station and gas will be produced and go through LNG liquefaction at existing facilities. *See id.* Additionally, as in

Minisink, downstream uses are sufficiently separated by the distance. *Id.* No significant cumulative impacts from downstream emissions are expected because the downstream use is separated by 99 miles of pipeline and many more nautical miles between the United States and Brazil. Record at ¶ 4, 6.

Although the Commission was under no obligation to consider upstream and downstream GHG impacts, we exercised our discretion and do not characterize upstream or downstream impacts as significant. *Id.* at ¶ 16.

iv. *FERC is not mandated to attach specific mitigation measures to CPCN Orders.*

Even if we had found that the causation requirement was satisfied and that upstream and downstream GHG emissions were "significant" and reasonably foreseeable as *indirect* impacts or in the *cumulative impact* analysis, we are not required to act. 15 USC § 717f; 42 U.S.C. § 4332(2)(C). Just because we find that there is an *indirect* or *cumulative* impact in our consideration of the project proposal does not necessitate that we attach conditions specifically mitigating every single environmental impact. 15 USC § 717f; 42 U.S.C. § 4332(2)(C). NEPA does not require a specific outcome. 42 U.S.C. § 4332(2)(C). Instead, NEPA requires we take a "hard look" at environmental impacts, as we have done here, and endows us with discretion to determine appropriate conditions. *See id,; Freeport*, 867 F.3d at 1376. We have determined that it is not currently appropriate to attach upstream and downstream GHG conditions to TGP's CPCN Order, and we are in the process of completing guidance on how the Commission will handle this moving forward. *See* Certification of New Interstate Nat. Gas Facilities, 178 FERC ¶ 61,197 (2022).

CONCLUSION

After a thorough examination of the issues presented, the Court should find that the Commission's decision denying rehearing is founded on sound legal reasoning and is consistent with established precedent. We respectfully request that this Court deny the appellants' petition for review and affirm (1) the Commission's decision to issue a CPCN order to TGP with attached GHG Conditions, and (2) the Commission's determination that this certification does not violate RFRA.